File No. 202326

# Re Au

**IN THE MATTER OF:**

**The Mutual Fund Dealer Rules**

**and**

**Carren Kwok Wah Au**

2024 CIRO 58

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: May 15, 2024, by electronic hearing in Toronto, Ontario
Decision: May 15, 2024
Reasons for Decision: June 28 ,2024

**Hearing Panel:**
Paul M. Moore, K.C., Chair
Brigitte Geisler, Industry Representative
Edward Jackson, Industry Representative
**Appearances:**
Alan Melamud, Senior Enforcement Counsel, CIRO

## REASONS FOR DECISION

**REASONS FOR DECISION**

**Legislative Background**

¶ 1 On January 1, 2023, the Investment Industry Regulatory Organization of Canada ("IIROC") and the Mutual Fund Dealers Association of Canada (the "MFDA") were consolidated into a single self-regulatory organization recognized under applicable securities legislation. It was initially called the New Self-Regulatory Organization of Canada and was renamed the Canadian Investment Regulatory Organization ("CIRO"). CIRO adopted rules that incorporate the pre-amalgamation regulatory requirements contained in the rules and policies of IIROC and the by-law, rules and policies of the MFDA and has authority to bring disciplinary proceedings for misconduct under the former rules.

**The Proceeding**

¶ 2 On September 18, 2023, CIRO issued a Notice of Hearing commencing a disciplinary proceeding in respect of Carren Kwok Wah Au (the "Respondent").

¶ 3 The Respondent failed to file a reply to the Notice of Hearing.

¶ 4 After due notice to the Respondent of the time, place and method of the hearing in this matter, the hearing was held on May 15, 2024. Neither the Respondent nor any representative of the Respondent attended the hearing.

¶ 5 Pursuant to Mutual Fund Dealer Rule 7.3.4 and Rules 8.4 and 13.5 of the Mutual Fund Dealer Rules of Procedure, where a respondent does not serve a reply or attend the hearing, the Hearing Panel may proceed with the hearing on the merits in the absence of the respondent and accept the facts alleged in the Notice of

Hearing as having been proven. The Hearing Panel may then impose the penalties set out in Mutual Fund Dealer Rule 7.4.1.

¶ 6 As the Respondent had not served a reply and did not attend the hearing on the merits, the Hearing Panel was prepared to accept as proven the facts alleged in the Notice of Hearing. Nonetheless, Staff filed in evidence two affidavits to substantiate the facts alleged in the Notice of Hearing on which the Hearing Panel also relied in coming to its decision.

**The Allegations**

¶ 7 In this disciplinary proceeding, Staff of the CIRO ("Staff") alleged that the Respondent contravened his regulatory obligations by engaging in the following conduct:

> **Allegation #1:** Between 2009 and 2021, the Respondent misappropriated or failed to account for monies that the Respondent obtained from clients and other individuals, contrary to Mutual Fund Dealer Rule 2.1.1 (formerly MFDA Rule 2.1.1).
>
> **Allegation #2:** Beginning November 2022, the Respondent failed to cooperate with an investigation into the Respondent's conduct by MFDA Staff, contrary to Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1).

**Decision**

¶ 8 The Hearing Panel decided that allegations #1 and #2 had been proven.

¶ 9 The Hearing Panel ordered the following sanctions against the Respondent:

I. A permanent prohibition against acting in any capacity for a Dealer Member of CIRO registered as a Mutual Fund Dealer.

II. A fine of $900,000 for contravention of the rules as alleged in Allegation #1.

III. A fine of $100,000 for contravention of the rules as alleged in Allegation #2.

IV. A costs award against the Respondent for $21,375.

**Facts**

**Registration History**

¶ 10 Between February 17, 1997, and June 11, 2021, the Respondent was registered as a dealing representative with HSBC Investment Funds (Canada) Inc. (the "**Dealer Member**",) a Dealer Member of CIRO (formerly a Member of the MFDA), and was an employee of the Dealer Member's bank affiliate, HSBC Bank Canada (the "**Bank**").

¶ 11 On June 11, 2021, the Dealer Member terminated the Respondent as a result of the conduct that is the subject of this proceeding, and the Respondent is not currently registered in the securities industry in any capacity.

**The Respondent's Misappropriation**

¶ 12 The evidence established that between 2009 and 2021, the Respondent misappropriated at least $2,897,097.18CAD and $813,178.34USD from five clients (the "Clients") and six other individuals (the "Other Individuals"). The Respondent used a variety of means to misappropriate the money including: unauthorized redemptions of mutual funds; unauthorized redemptions of term deposits; unauthorized cheques and bank drafts; fake bank accounts; and unauthorized cash withdrawals.

¶ 13 The Respondent further used a variety of means to conceal his misconduct. The Respondent wrote the cheques or obtained bank drafts to different accounts he controlled and also used cash withdrawals. The Respondent drafted false client notes, transferred money between the Clients and Other Individuals' accounts before withdrawing the money for himself, and changed some of the Clients and Other Individuals' home addresses on the Bank's back-office system to a P.O. Box he controlled, so the Clients and Other Individuals

would not receive mail from the Bank. The Respondent temporarily booked GICs and term deposits in the Clients and Other Individuals' accounts to either obscure the money trail and/or facilitate generating false account statements to mislead the Clients and Other Individuals. Finally, when the Respondent knew that the Clients and Other Individuals or their family members intended to withdraw money from their bank accounts, he restored money to those accounts to conceal the misconduct.

¶ 14 The evidence showed that the Respondent further misappropriated at least $158,537.70CAD from the Bank by engaging in kiting using the Clients and Other Individuals' accounts.

¶ 15 The Bank discovered the Respondent's misappropriation after it identified kiting activity among 12 bank accounts, which were all domiciled in the same branch and managed by the Respondent. This discovery prompted an investigation by the Bank, which led to the discovery of the Respondent's misappropriation from the Clients and Other Individuals.

¶ 16 In an interview with the Bank, the Respondent admitted that, as described above, he misappropriated approximately $3-4 million from Clients and Other Individuals' accounts which he accomplished by using cheques, bank drafts, and cash withdrawals. The Respondent generally misappropriated money from Clients and Other Individuals that were not living in Canada and barely used their accounts. In addition, two of the Clients and three Other Individuals were elderly. Finally, the reason for the misappropriation was to pay gambling debts, although the Respondent also used the monies he misappropriated to purchase property and make mortgage payments.

¶ 17 The Respondent took many steps to conceal the misconduct from the Clients and Other Individuals, the Dealer Member, and the Bank.

**Compensation by the Bank and the Bank's Lawsuit**

¶ 18 Following the discovery of the Respondent's misconduct, the Bank met with the Clients and Other Individuals and/or their powers of attorney to determine the extent of unauthorized transactions. The Bank compensated the Clients and Other Individuals in full and, in some instances, paid additional amounts on account of foregone gains or as goodwill gestures.

¶ 19 On September 10, 2021, the Bank commenced a civil action against the Respondent and others.

¶ 20 In August 2022, the Respondent paid the Bank $433,159CAD, representing the proceeds from the sale of his home. At the same time, the Bank also obtained a judgment against the Respondent for $3,152,764.67CAD and $1,626,877.55USD.

¶ 21 Staff is unaware of whether the Respondent has made any payments to the Bank pursuant to the judgment, and is unaware of any other compensation paid by the Respondent to the Clients and Other Individuals.

**The Respondent's Failure to Cooperate**

¶ 22 On June 18, 2021, MFDA Staff (hereinafter referred to as "Staff") commenced an investigation into the Respondent's conduct after the Dealer Member reported to Staff that it had discovered that the Respondent had misappropriated monies from the Clients.

¶ 23 Between December 8, 2021 and November 23, 2022, Staff wrote to the Respondent or his counsel at least 10 times, seeking information and various documents, including the Respondent's bank statements, in connection with Staff's investigation. Staff also sought to arrange an interview. On multiple occasions, Staff advised the Respondent and his counsel that failure to comply with Staff's requests could result in Staff bringing a proceeding for failure to cooperate.

¶ 24 The Respondent refused to provide the information and documents requested by Staff and refused to attend an interview. The Respondent's counsel advised Staff that the Respondent would not provide answers to Staff's questions or attend an interview. Staff advised the Respondent's counsel that the Respondent was required to cooperate with Staff's investigation. The Respondent nonetheless refused to comply with Staff's requests.

¶ 25 As a result of the Respondent's failure to cooperate, Staff has been unable to determine the full nature and extent of the Respondent's conduct, including whether the Respondent engaged in the same or similar conduct described above with other clients or other individuals.

**The Law**

**Allegation #1-– Mutual Fund Dealer Rule 2.1.1**

¶ 26 The standard of conduct codified by Mutual Fund Dealer Rule 2.1.1 (formerly MFDA Rule 2.1.1) requires that Dealer Members and Approved Persons deal fairly, honestly, and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest. The Rule is central to CIRO's mandate of enhancing investor protection and strengthening public confidence in the Canadian mutual fund industry.

¶ 27 The misappropriation of client funds is antithetical to the standard of conduct under Mutual Fund Dealer Rule 2.1.1. It is an egregious form of misconduct, which involves a significant breach of trust, causes serious harm to the clients and individuals affected, and shakes public confidence in the Canadian mutual fund industry. As stated by the Hearing Panel in *Palumbo (Re)*:

> Misappropriation of client funds is a very serious contravention of MFDA rules. Trust is the foundation of a healthy relationship between clients and Approved Persons. Misappropriation is an irreparable breach of trust.
>
> Misappropriation is among the most serious types of misconduct encountered by securities regulators.
>
> Clients not only suffer a financial loss, they also lose their faith in the Approved Person who misappropriated their money. Misappropriation of funds has a negative ripple effect on all those who work in the securities industry. The misconduct of one Approved Person tarnishes the reputation of every other Approved Person and taints the integrity of the securities industry.
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> *Palumbo (Re)*, 2020 LNCMFDA 16 at paras. 38-39.

¶ 28 Accordingly, by misappropriating money from the Clients and Other Individuals, the Respondent contravened Mutual Fund Dealer Rule 2.1.1.

**Allegation #2–Mutual Fund Dealer Rule 6.2.1**

¶ 29 Pursuant to Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1), all Approved Persons and former Approved Persons have an obligation to provide information and documents sought by Staff and to attend an interview. Mutual Fund Dealer Rule 6.2.1 states:

> 6.2.1 For the purpose of any examination or investigation pursuant to this Rule, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation to:
>
> (a) submit a report with respect to any matter involved in any such examination or investigation;
>
> (b) produce for inspection any records in the possession or control of the Member, an Approved Person of the Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules that the Corporation believes may be relevant to the examination or investigation;
>
> (c) provide copies of any such records in the manner and form, including electronically, that the Corporation requests;
>
> (d) answer questions with respect to any such matters;
>
> (e) in an investigation, attend and answer questions under oath or otherwise, and any such attendance may be transcribed, recorded electronically, audio-recorded or video-

recorded as the Corporation determines;

(f) make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

and the Member or person shall be obliged to cooperate in the examination or investigation.

¶ 30 The obligation to cooperate with CIRO (and formerly the MFDA) is a necessary corollary to CIRO's duty to conduct such examinations and investigations as CIRO deems necessary relating to matters of compliance with CIRO's by-law or rules. Mutual Fund Dealer Rule 6.1.1 (formerly, section 21 of MFDA By-law No. 1) states:

> 6.1 The Corporation shall make such examinations of and investigations into the conduct, business or affairs of any Member, Approved Person of a Member or any other person under the jurisdiction of the Corporation pursuant to the By-laws and/or the Rules as it considers necessary or desirable in connection with any matter relating to compliance by such person with:
>
> 6.1.1 the By-laws and Rules of the Corporation;...

¶ 31 As stated by the Ontario Divisional Court in *Artinian v. College of Physicians and Surgeons of Ontario*:

> Fundamentally, every professional has an obligation to co-operate with his self-governing body.
>
> *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct.), at para. 9.

¶ 32 Hearing panels have repeatedly held that an Approved Person's failure to cooperate with an investigation undermines CIRO's (previously MFDA) regulatory obligations under Mutual Fund Dealer Rule 6.1. CIRO requires cooperation from Dealer Members and Approved Persons to investigate the conduct of registrants in the mutual fund industry and fulfil its regulatory mandate of investor protection. As stated by the Hearing Panel in *Vitch (Re)*:

> There can be no exceptions to that obligation. The fulfilment of that obligation is particularly important to the MFDA because it has no statutory power to search and seize or to compel the production of documents. Without the cooperation of Members and Approved Persons, the MFDA's ability to investigate and discipline its Members and Approved Persons is gravely fettered.
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> *Vitch (Re)*, 2011 LNCMFDA 63 at paras. 55-56.

¶ 33 By failing to provide the information and documents sought by Staff and refusing to attend an interview, the Respondent contravened Mutual Fund Dealer Rule 6.2.1.

**Sanctions**

¶ 34 Pursuant to Mutual Fund Dealer Rule 7.4.1.1(i), if, in the opinion of a Hearing Panel, an Approved Person has failed to comply with the provisions of any of CIRO's By-laws or Rules, a Hearing Panel can impose any of the sanctions set out in Mutual Fund Dealer Rules 7.4.1.1(a)-(f). Such sanctions include a permanent prohibition of the authority of the Approved Person to conduct securities related business and a fine, not exceeding the greater of $5,000,000 or three times the profit obtained or loss avoided by engaging in the misconduct.

¶ 35 Pursuant to Mutual Fund Dealer Rule 7.4.2, the Hearing Panel has the discretion to require a Dealer Member or Approved Person to pay the whole or part of the costs of the proceeding before the Hearing Panel and any investigation relating to that proceeding.

¶ 36 Staff submitted that the appropriate sanction to impose in this case was:

(a) the Respondent be permanently prohibited from conducting securities related business in any

capacity while in the employ of or associated with any Dealer Member of CIRO, pursuant to Mutual Fund Dealer Rule 7.4.1.1(e);

(b) the Respondent pay a fine between $300,000 and $500,000 for Allegation #1, pursuant to Mutual Fund Dealer Rule 7.4.1.1(b);

(c) the Respondent pay a fine between $50,000 and $100,000 for Allegation #2, pursuant to Mutual Fund Dealer Rule 7.4.1.1(b);

(d) the Respondent pay costs in the amount of $15,000 which would constitute part of the costs to Staff of conducting the investigation and prosecution of the Respondent as set out in the Bill of Costs for $21,375 pursuant to Mutual Fund Dealer Rule 7.4.2.

**Factors Concerning the Appropriateness of the Proposed Sanction**

¶ 37 The primary goal of securities regulation is the protection of investors and fostering public confidence in the capital markets and the securities industry. Disciplinary sanctions imposed in a securities regulatory context are intended to restrain future misconduct in furtherance of these goals.

¶ 38 Sanctions imposed by a Hearing Panel should be protective and preventative to prevent likely future harm to the markets. To achieve deterrence, sanctions must inevitably impose a burden on those who contravene CIRO's regulations. An administrative sanction that is too low would not only fail to achieve deterrence but could erode public confidence in the disciplinary process. As stated by the Alberta Securities Commission in *Fauth (Re)*:

> However, we also agree with the reasoning of the panel in *Homerun*, which observed that ". . . a monetary sanction almost inevitably involves . . . a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all" (at para. 18). Balancing is involved so that general deterrence is not over-emphasized and individual circumstances are not overlooked, but the administrative penalty should still be sufficient to have a deterrent effect (*Guindon v. Canada*, 2015 SCC 41 at paras. 77, 80). We agree with Staff's submission that an administrative penalty that is too low - especially in cases like this one, involving the most serious sort of capital-market misconduct - could erode public confidence.
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> *Fauth (Re)*, 2019 LNABASC 90 at para. 100.

¶ 39 The Hearing Panel reviewed the CIRO's Sanction Guidelines (the "Sanction Guidelines"). The Sanction Guidelines are not mandatory or binding on the Hearing Panel but provide a summary of the key factors upon which discretion can be exercised consistently and fairly.

¶ 40 The misconduct engaged in by the Respondent was egregious. Misappropriation is among the most serious types of misconduct, which causes client harm and undermines confidence in the mutual fund industry. In addition, the Respondent's misconduct involved 11 Clients and Other Individuals, spanned over a decade, and involved other prohibited activity, such as multiple unauthorized redemptions.

¶ 41 The Respondent took a myriad of steps to conceal his misconduct from the Clients and Other Individuals, the Dealer Member, and the Bank. The Respondent's conduct was deliberate, calculated, and deceptive. As recognized in the Sanction Guidelines, seeking to mislead and lull into inactivity the clients and the Dealer Member is a significant aggravating factor.

¶ 42 It is further a significant aggravating factor that two of the Clients and three of the Other Individuals were vulnerable on account of their age and four of those five individuals did not reside in Canada.

¶ 43 Finally, by failing to cooperate with Staff's investigation, the Respondent demonstrated a total disregard for his regulatory obligations as an Approved Person. The comments of the Hearing Panel in *Dixon (Re)* apply equally here:

> The Panel considered that the failure of an Approved Person to cooperate with an MFDA

> investigation by among other things, not complying with a request by an MFDA investigator made pursuant to s. 22.1 of the By-law is serious misconduct. It subverts the ability of the MFDA to perform its regulatory function by fully investigating a matter and determining all of the facts. Further, the failure to provide information requested in an investigation undermines the integrity of the industry's self-regulatory system and the effectiveness of its operations, including the MFDA's mandate to protect the public.
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> *Dixon (Re)*, 2017 LNCMFDA 247 at para. 12.

¶ 44 The Respondent has not previously been the subject of a securities regulatory disciplinary proceeding. However, given the egregiousness of the misconduct we did not consider it a significant mitigating factor.

¶ 45 As held by the Alberta Court of Appeal, a respondent's failure to "admit guilt" or express remorse should not be treated as an aggravating factor. The Respondent is not required to admit guilt.

> *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273.

¶ 46 However, to the extent that expression of remorse and a commitment by a respondent to not reoffend could be considered a mitigating factor, such mitigation is absent in this case. There was no evidence that the Respondent recognized the seriousness of his misconduct.

¶ 47 As a result of the misconduct, the Respondent received the benefit of the use of at least $3,055,634.88CAD and $813,178.34USD. This is a significant aggravating factor.

¶ 48 The Bank has recovered $433,159CAD from the Respondent and received a judgment in excess of the amounts established in this proceeding as misappropriated by the Respondent. The restitution paid by the Respondent and that contemplated by the judgment, however, is not a mitigating factor. The Respondent did not voluntarily compensate the Bank, but rather was subject to a civil claim brought by the Bank. It is only a *voluntary* act of restitution that is recognized as a mitigating factor in the Sanction Guidelines.

¶ 49 A fine that disgorges the amounts received by the Respondent is not required in this matter. The purpose of disgorgement is to remove from a wrongdoer the amounts received by contravening the Mutual Fund Dealer Rules. However, the Bank, which compensated the Clients and Other Individuals, obtained a judgment against the Respondent for more than the full amount of the misappropriation asserted in this matter. Further, the Bank is a well-resourced entity that is capable of enforcing the judgment and obtaining whatever recovery may be available. Accordingly, to the extent possible, the Bank's judgment achieves the aim of disgorgement.

¶ 50 The Respondent's misappropriation resulted in a financial loss to the Clients and Other Individuals in the amounts misappropriated. The Clients and Other Individuals were ultimately compensated by the Bank. However, the compensation by the Bank is not a mitigating factor. As stated by the Ontario Securities Commission in *Mutual Fund Dealers Assn. (Re)*:

> Whether the loss was suffered by the client who was targeted or the Bank that compensated that client, the seriousness of the Respondent's dishonesty, the amount of financial harm suffered and the corresponding financial benefit obtained are all unaffected. The MFDA panel erred by considering the steps taken by a third party to redress the harm to investors as a mitigating factor.
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> *Mutual Fund Dealers Assn. (Re)*, 2021 LNONOSC 400 at paras. 39-40.

¶ 51 Further, in addition to the financial harm, misappropriation is the type of misconduct that "strikes at the heart of the advisor-client relationship" as it undermines trust in the Respondent, Approved Persons generally, and the Dealer Member.

¶ 52 The Respondent has caused significant damage to the integrity of the capital markets. The ability of mutual fund dealers to facilitate the participation of the public in the capital markets requires that investors trust mutual fund dealers with their money. The Respondent's misappropriation of the Clients' and Other Individuals' money undermines this trust, harming the mutual fund industry and the capital markets more broadly.

¶ 53 This harm is further aggravated in this case by the Respondent's failure to cooperate with CIRO, which undermines its mandate of investor protection.

¶ 54 Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors. As stated by the Supreme Court of Canada in *Cartaway Resources Corp. (Re):*

> The Oxford English Dictionary (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.
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> *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at para. 61. For a more general discussion, see paragraphs 52-62.

¶ 55 We considered comparative cases presented to us by Staff when determining appropriate sanctions in our case.

**Appropriate Sanction**

¶ 56 The Respondent's misconduct was antithetical to the standard of conduct expected of Approved Persons. It caused significant harm, was intentional and deceptive, and could undermine confidence in the mutual fund industry. In addition, the Respondent has demonstrated he is ungovernable by failing to cooperate with Staff's investigation. Accordingly, a permanent prohibition is necessary to ensure both specific and general deterrence. An individual such as the Respondent cannot be trusted to return to the mutual fund industry. A permanent prohibition is also consistent with all of the precedent cases we considered.

¶ 57 In addition to the permanent prohibition, a fine is also necessary to ensure general deterrence. Even treating the Bank's judgment as notionally achieving disgorgement, a significant fine is needed to ensure general deterrence and to send the appropriate message that the type of misconduct engaged in by the Respondent will not be tolerated.

¶ 58 The Respondent misappropriated more money and engaged in the misconduct for a greater length of time than almost all of the precedent cases considered by us. In addition, the Respondent engaged in an array of deceptive conduct to conceal his theft.

¶ 59 The Hearing Panel determined that in all the circumstances and considerations in this case, a fine of $900,000 for the misconduct in Allegation #1 was appropriate.

¶ 60 For failure to cooperate, Hearing Panels have ordered fines between $50,000 and $125,000. In general, in cases where the underlying conduct involved misappropriation, fines have been between $75,000 and $100,000. We determined that a fine of $100,000 for failing to cooperate with Staff's investigation was appropriate in this case.

¶ 61 A sanction of a permanent prohibition and a total fine of $1,000,000 reflects the seriousness of the misconduct and the absence of mitigating factors in this case. The sanction should deter the Respondent and send a message to other Approved Persons and the public that misappropriation and failing to cooperate with a regulatory investigation will not be tolerated in the mutual fund industry.

**Costs**

¶ 62 Staff submitted a bill of cost for $21,375 which appeared reasonable to us. Staff only asked for a costs award of $15,000 but we saw no reasons in the circumstances of this case to discount the costs reflected in the bill of costs.

DATED this 28th day of June, 2024.

"Paul M. Moore

Paul M. Moore, K.C., Chair

"Brigitte Geisler"

Brigitte Geisler, Industry Representative

"Edward Jackson

Edward Jackson, Industry Representative