Re DiCostanzo

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Neil DiCostanzo

2022 IIROC 24

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario, District)

Heard in writing: September 19, 2022 in Toronto, Ontario
Decision: September 27, 2022

Hearing Panel:
Karen Weiler, Chair, Steve Garmaise and Stuart Livingston
Appearances:
Kathryn Andrews, Senior Enforcement Counsel
April Engelberg, Enforcement Counsel
Kevin Richard, for Neil DiCostanzo

DECISION ON SANCTIONS

I. OVERVIEW

¶ 1 In its Merits Decision issued on May 18, 2022, the Panel held that the Respondent, Neil DiCostanzo, a Registered Representative of Foster and Associates Financial Services (Fosters), contravened IIROC Dealer Member Rule 18.14 by engaging in outside business activities without the approval of his Dealer Member.

¶ 2 The parties agreed to make written submissions with respect to sanctions. For the reasons that follow, we order the following sanctions:

a) disgorgement of $17,500,

b) a fine of $17,500, and

c) costs of $15,000,

all payable within 30 days of this decision taking effect.

¶ 3 In addition to payment of the monetary sanctions imposed, if the Respondent wishes to return to work in the industry, he is required to:

a) successfully rewrite the Conduct and Practices Handbook (CPH) examination within 6 months of being re-registered with IIROC and

b) undergo a 12-month period of strict supervision upon any re-approval with IIROC.

¶ 4 Our reasons for this order, set out below, begin by summarizing the Merits Decision, relevant Sanctions

Principles, the submissions of IIROC as to penalty, the Respondent's proposal as to penalty, discuss their submissions and state our conclusion on them.

II. THE HEARING DECISION

¶ 5 The Respondent arranged for subscription receipts and the issuance of subscription certificates relating to QNext, a private company, between December 2016 and March 2018. The Respondent did not deny this. The Respondent's overall position was that, following a brokered private placement by Fosters in QNext in which he was modestly involved, he told Chris Foster, the principal of Fosters, that he would be "working with" private companies like Qnext and Sustainable Growth Strategic Capital Corp (SGSCC) with a view to bringing about an Initial Public Offering for the firm. Chris Foster knew what he was doing and therefore he did not contravene the Rule. Although the Respondent denied receiving money in relation to QNext for his efforts, he eventually acknowledged accepting a $5000 e-transfer stating he needed to help his father-in-law.

¶ 6 The Respondent was shown the Foster's Annual Enforcement Staff Questionnaire requiring him to disclose all "outside business" even if previously disclosed to Fosters. It was pointed out to him that he answered "No" to the question "Are you involved in any outside business or employment other than your position with Fosters".

¶ 7 The Respondent's explanation that he thought "outside business activity" meant business outside the brokerage industry was rejected in light of the Notice on the Questionnaire stating any non-brokered private placement for which he received any remuneration had to be approved according to the Firm's procedures. The Panel held, at para. 59 of its reasons that, "The wording of this statement would put a reasonable person on notice that facilitating a subscription agreement for shares in QNext and receiving remuneration or money required approval of the firm." There was some evidence that the Respondent wished to conceal his activity in relation to QNext. An email from the Respondent's assistant dated September 28, 2017 states in part, "…you said you want to keep QNext email separate from Foster".

¶ 8 In relation to SGSCC, the Respondent arranged for his wife to have a referral agreement with Meadowbank Asset Management, an Exempt Market Dealer, in which she would receive a 5% referral fee for referring investments. A corporate client of Fosters made a $250,000 investment in SGSCC through Meadowbank Asset Management. The Respondent wrote to Meadowbank stating in reference to the subscription form: "[P]lease scan me a copy of the completed subscription form for my client." On February 26, 2018, the CEO of Meadowbank received an invoice from the Respondent with the subject line "Invoice for Referral Form". The Respondent stated that he sent the invoice from the office as he did not have a printer at home. [We add that the invoice the Respondent sent was not printed. A digital invoice was sent from the Respondent's email and his email makes no reference to the invoice being on behalf of his wife.] The Respondent's wife received a commission of $12,500 from Meadowbank for facilitating this investment.

¶ 9 Fosters' Policy and Procedures Manual makes clear that immediate family members are prohibited from receiving any fees, commissions or similar form of consideration from any person with whom Fosters does business. The Annual Enforcement Staff Questionnaire signed by the respondent stated that he had access to the Manual on his computer and was familiar with those sections of it that applied to his duties at Fosters. When cross-examined about his statement, the Respondent said he did not have access to the Manual on his computer and his statement was false. The Panel held that the Respondent's false declaration did not excuse him from his obligation to familiarize himself with the Manual.

¶ 10 The core of the Panel's reasons rejecting the Respondent's overall position in relation to QNext and SGSCC can be found in paragraphs 11, 52 and 68 of its decision reproduced below.

> [11] As to whether Mr. DiCostanzo had the approval of Fosters for his activities, the Respondent's evidence is that Chris Foster knew the Respondent was "working with" private companies with a view to bringing in an initial public offering for the firm.

> This vague and broad statement cannot be taken to meet the first requirement of the Rule, namely, that he informed Fosters of his outside business activities. It was not a statement of substance. The Respondent's statement is not the same thing as telling Chris Foster that he would be facilitating subscription agreements for shares in QNext and SGSCC for clients and that he and his wife received money for their efforts. Thus, IIROC has proven that the first requirement, that the Respondent inform Fosters, his Dealer Member, of his outside business activities was not met. Inasmuch as the Respondent did not inform Fosters of the substance of his activities, Fosters did not approve them. […]
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> [52] At no time did the Respondent testify that he specifically told Fosters of his continued and ongoing activity in obtaining share subscriptions in QNext for clients, that he facilitated the transfer of shares in QNext to the clients and that Fosters expressly approved of this activity. The Respondent denies receiving money for his efforts. The documentary evidence indicates that he did. He did not disclose these amounts to Fosters, and thus Fosters could not have approved of the Respondent receiving money. Quite apart from all the other evidence, the Respondent's receipt of this money is a transgression of the rule.
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> [68] To summarize, the fact that Chris Foster may have known in a general sense that the Respondent hoped to "work with" the two companies with a view to bringing in an IPO to Fosters does not reasonably lead to the conclusion that their conversation was the functional equivalent of the required knowledge much less the approval under the Rule. See *Tassone (Re)*, 2018 IIROC 46 at paras. 22-29 in which the panel held that while Tassone's manager may have known something in a general sense of the Respondent's involvement in an investment, there was no persuasive evidence that they knew anything of substance about it and he had not obtained the firm's approval. Accordingly, he was found to be in breach of the rule.

¶ 11 When the Respondent's transgressions were discovered by Chris Foster, his employment was terminated forthwith.

III. SANCTION PRINCIPLES

¶ 12 The determination of the appropriate sanction in any given case is discretionary and depends on the facts of a particular case and the circumstances of the conduct.[1] The IIROC Sanction Guidelines are divided into two parts: Sanction Principles and Key Factors. The Sanction Principles provide a framework to be considered in connection with the imposition of sanctions in all cases. The Key Factors are to be considered to the extent they are applicable to the specific case. They are intended to be illustrative, not exhaustive.

¶ 13 The first Sanction Principle is that "Disciplinary sanctions are preventative in nature and should be designed to protect the investing public strengthen market integrity, and improve overall business standards and practices." Similarly, the jurisprudence states that general deterrence is an appropriate factor to consider in formulating sanctions in the public interest. It has both a prospective and preventive function and is important to maintain investor confidence in capital markets. The weight to be given to general deterrence will vary from case to case and requires a different remedial emphasis according to the circumstances.[2]

¶ 14 General deterrence is not the only factor to consider. Specific deterrence to prevent and discourage future misconduct is also a factor. To achieve both general and specific deterrence, the penalties imposed "must be appropriately unpleasant to the respondent taking into account the respondent's specific

[1] IIROC Sanction Guidelines at p. 2

[2] *Re Cartaway Resources Corp.,* 2004 SCC 672 at 674

misconduct and must also be in line with industry expectations.[3] Remedial sanctions tailored to the specific misconduct may be a useful tool in effectively addressing regulatory misconduct where prohibition of approval for employment in any capacity for a period of 12 months is sought: Sanction Principle 9.

¶ 15 Principle 4 which states that "Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct" is a fundamental tenet. Thus, where possible, the sanction should include a disgorgement of the amount of the financial benefit received by the respondent directly or indirectly as a result of the misconduct.

¶ 16 Where, as here, there have been one or more serious contraventions or there has been a pattern of misconduct, a suspension may be sought: Sanction Principle 5. As well, the principle includes consideration of the respondent's prior disciplinary history, whether the contraventions involved fraudulent, willful and/or reckless misconduct; or whether the conduct in question caused some measure of harm to investors, the integrity of the marketplace or the securities industry as a whole. In addition, pursuant to Principle 3, "[T]he total or cumulative sanction should appropriately reflect the totality of the misconduct". As well, the order made must be considered globally to determine whether it is reasonable.[4]

¶ 17 When a fine is sought as a sanction for a regulated person, Rule 8210(1)(iii) provides that a hearing panel may impose a fine not exceeding (a) the greater of $5,000,000 for each contravention and (b) an amount equal to three times the profit made directly or indirectly, as a result of the contravention. Inability to pay is a factor to consider in deciding an appropriate monetary sanction or costs only when raised by the respondent: Sanction Principle 7.

¶ 18 The sanction principles also require that disciplinary sanctions be more severe for respondents with prior disciplinary records, and that, in determining the appropriate sanction, a respondent's proactive and exceptional assistance to IIROC in the investigation be considered: Sanction Principles 2 and 8.

¶ 19 With these principles in mind, we now turn to a discussion of the sanctions requested by IIROC and proposed by the Respondent.

IV. SANCTIONS REQUESTED BY IIROC

¶ 20 IIROC Staff request the following:

a) a fine of $75,000, payable within 30 days

b) disgorgement of $17,500, payable within 30 days

c) a 12-month prohibition of approval in any capacity

d) that the Respondent be required to successfully rewrite the Conduct and Practices Handbook (CPH) examination within 6 months of being re-registered with IIROC

e) a 12-month period of strict supervision upon any re-approval with IIROC and

f) costs of $15,000, payable within 30 days.

V. SANCTIONS PROPOSED BY THE RESPONDENT

¶ 21 The Respondent submits that an appropriate sanction in this matter is:

a) a total fine not exceeding $15,000, inclusive of disgorgement and costs and

b) a prohibition on registration for a maximum of 6 months from the date of his dismissal from Fosters.

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[3] *Wong (Re),* 2010 IIROC 50 at para. 29

[4] *Re Cartaway Resources Corp.*, supra

VI. DISCUSSION

1) Disgorgement

¶ 22 We agree with IIROC Staff's submission that the Respondent be ordered to disgorge the $17,500 by which he benefited directly and indirectly from his transgression of the Rule. The Respondent's proposal that the entire amount to be paid by the Respondent be limited to $15,000, is $2,500 less than the direct and indirect benefit to him and does not amount to complete disgorgement. Thus, it does not accord with the sanction principle that "Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct." Allowing the respondent to benefit, even in small measure, would not serve as either specific or general deterrence. See e.g., *Northern Securities Inc.et al.,* 2014 ONSEC 27 at paras. 210-211; *Rojas Diaz (Re)*, 2021 ONSEC 24. Considered as a whole, the Respondent's proposed sanction submission does not reflect the totality of the misconduct or accord with industry standards. It is not reasonable because it ignores the sanction principles and the jurisprudence.

2) Suspension and Return to Work

¶ 23 IIROC Staff further seek a 12-month prohibition of approval of the Respondent in any capacity.

¶ 24 The cumulative effect of the Respondent's conduct in failing to make substantive accurate disclosure of his outside business activities, the number of clients involved and the period of time over which the outside activity took place is serious enough to warrant a period of 6 to 12 months suspension. Significant sanctions including market bans have been imposed for participation in the distribution of unregistered securities not involving fraud: See *Lucy Marie Pariak-Lukic (Re)*, 2015 ONSEC 18 at paras. 100 and 101.

¶ 25 As IIROC Staff note, IIROC hearing panels have a discretion to make the time for suspensions or prohibitions to start running from the date of receipt of the penalty decision: *Ricci (Re)*, 2015 ONSEC 7 at para 54. However, in a number of cases, the period of suspension has been ordered to start running at the time of the respondent's departure from the industry, rather than at the time of the panel's decision: See *Re Smith* 2014 IIROC 16 at para. 21. Given the Respondent's absence from the industry due to his misconduct since March, 2018, he has for all practical purposes served a period of suspension of over three years. Accordingly, we are of the opinion that an additional period of suspension or prohibition to commence when this penalty decision is effective would not serve any useful purpose except, perhaps, to impair the Respondent's earning capacity and we decline to order one.

¶ 26 If the Respondent wishes to return to the industry, he must beforehand make disgorgement, pay the fine and the costs we impose for the reasons given below, successfully rewrite the CPH examination within 6 months of being re-registered with IIROC and be subject to a 12-month period of close supervision upon any re-approval with IIROC.

3) A Fine

¶ 27 The next question is whether, in addition to disgorgement of $17,500, a fine is appropriate. That question is largely answered by *Re Shields* 2021 IIROC 31 at para. 35 as follows:

> The deterrent effect of disgorgement is necessarily limited, as depriving a respondent of the benefits obtained as a result of a contravention leaves the respondent in a "break-even" position. Disgorgement alone, therefore, may provide weak deterrence specifically and weaker deterrence generally because detection of a contravention is less than certain. For this reason, prevention of similar future conduct, especially by persons other than the respondent, usually requires a fine in addition to disgorgement.

¶ 28 Prior decisions respecting fines are "goal posts" in the sense that they reflect the range of sanctions imposed in circumstances that are arguably roughly comparable to the current situation: See *Re Malic* 2021

IIROC 10 at para. 23.

¶ 29 During the Merit Hearing, in which he represented himself, the Respondent asserted that he was unable to afford a lawyer to act for him. In his written submissions as to penalties, the Respondent does not raise financial hardship, a factor that could result in the reduction of a fine or in the imposition of an installment payment plan. He has provided no evidence of financial hardship in the form of a sworn affidavit or declaration or any externally verifiable documentation. Accordingly, the Panel is not entitled to consider inability to pay.

¶ 30 Both IIROC Staff and the Respondent have provided the Panel with several prior decisions that show a range of possible fines. In response to IIROC Staff's submission that a fine of $75,000 be imposed, the Respondent points out that the conduct involved in the cases on which Staff relies, such as *Re Sole* 2018 IIROC 19, was much more serious in that it involved other misconduct while under suspension or, as in *Re Tassone* 2019 IIROC 3, conduct that took place over a much longer period of time, namely, 11 years. The Respondent relies on decisions where fines for failing to disclose outside business activity were $15,000 (*Re Lilly* 2020 IIROC 21), $25,000 (*Re Trueman* 2016 IIROC 29), $30,000 (*Re Blackmore* 2014 IIROC43), and $30,000 inclusive of disgorgement of $13,229 (*Re Tsao* 2022 IIROC 3). These decisions are also distinguishable because they are cases where the respondent admitted his guilt and entered into a settlement agreement which is not the situation here.

¶ 31 In *Thomson (Re)*, [2004] 1.D.A.C.D. No. 49, at para.76, the panel observed that then Guideline 2.10 entitled "Outside Business Activities" recommends a minimum fine of $10,000 as the suggested industry standard. Applying an inflation calculator to the 2004 figure of $10,000 would result in a significantly higher figure today.

¶ 32 Recognizing the individual nature of sanctions, we also consider the Key Factors, which we have grouped together for convenience, to inform our decision as to the appropriate amount of the fine. They include the following:

> (1) *The number, size and character of the transactions in issue, whether there was a pattern of misconduct, the length of time over which the misconduct occurred and the Respondent's financial benefit from it.* The Respondent facilitated purchases of QNext shares totalling over $2 million to a significant number of clients and engaged in a pattern of conduct spanning approximately 1.5 years. He obtained a financial benefit of $17,500 and attempted to obtain more.
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> (2) *Whether the Respondent attempted to conceal his misconduct and whether his misconduct was intentional, wilfully blind, or reckless with respect to regulatory requirements.* There is some evidence the Respondent did attempt to conceal his activity by telling his assistant that he wanted to keep email pertaining to QNext separate from Fosters. Further, the Respondent failed to answer the Annual Questionnaire accurately despite the wording of the Notice on the Questionnaire stating any non-brokered private placement for which he received any remuneration had to be approved according to the Firm's procedures. He also made an admittedly false statement when he said he had access to and was familiar with the relevant sections of the firm's Policy and Procedures Manual in relation to SGSCC. His conduct was reckless.
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> (3) *The extent of harm to clients or other market participants and the level of vulnerability of the injured or affected clients.* The Respondent's failure to provide true and complete disclosure with respect to QNext and SGSCC prevented Fosters from addressing any existing or potential conflicts of interest and exposed it to potential damages. For a similar conclusion see *Re Malic*, supra, at para. 23. There is, however, no evidence of actual harm to clients.

(4) *Whether the Respondent accepted responsibility and acknowledged the misconduct to his employer or the regulator prior to detection and intervention.* The Respondent did not do this.

(5) *Whether there was voluntary disgorgement of profit.* When the results of IIROC's investigation were disclosed to the Respondent, there is no evidence he voluntarily disgorged any of the benefit he received.

(6) *Whether the Respondent provided proactive and exceptional assistance to IIROC in the investigation of the misconduct.* IIROC Rules require a respondent to cooperate fully with investigations and to respond to requests for information in a timely manner. The Respondent asserts that he cooperated with IIROC but this submission appears to be a bald statement. We note that the Respondent did not provide his banking records despite requests from IIROC that he do so: See *Re DiCostanzo* 2021 IIROC 26 at paras. 33-34. Thus, the Respondent did not cooperate fully with IIROC.

¶ 33 Although the Respondent previously worked in the industry for many years, he has no prior disciplinary record. This is his first disciplinary contravention. We also take into consideration the key factor that the Respondent was subjected to internal discipline by his Dealer Member, Fosters. Indeed, he was subjected to the ultimate internal disciplinary sanction because Fosters terminated his employment when, in March 2018, Chris Foster discovered emails indicating the Respondent had been involved in off the books activity in relation to the two companies. The Respondent has not worked in the industry since that time. There was evidence during the Merits Hearing that, when the Respondent tried to obtain work on one occasion, he was told that he would only be hired once the IIROC proceedings were over. Thus, the Respondent's misconduct has had a significant effect on him and, in determining the amount of the fine, it must be taken into consideration. We must also bear in mind that a global approach is required.

¶ 34 Bearing in mind the foregoing considerations, as well as the length of time for which the Respondent has had the use of the monetary benefit of $17,500 he received, we are of the opinion that the Respondent should pay a fine equal to 100% of the benefit he received of $17,500. As a result, in addition to the disgorgement already ordered, we order that the Respondent pay a fine of $17,500.

4) Costs

¶ 35 Pursuant to Dealer Member Rule 8214, a Panel may assess and order payment of IIROC's investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

¶ 36 IIROC panels have adopted a "conservative approach" to costs awards.[5] We note that costs imposed should not be so great as to inhibit a registered representative from exercising the right to an impartial hearing. In addition, we bear in mind that the power to award costs is one-sided in that a successful respondent cannot be awarded costs. We also bear in mind that costs must take into consideration the sanctions already ordered and must be assessed from a global overall perspective.

¶ 37 Costs are not an element of the sanction and serve a different purpose than a fine. It is not an error to consider the financial impact of a given costs order on a respondent, along with other appropriate factors.[6]

¶ 38 IIROC Enforcement Staff seek costs of $15,000. The affidavit filed in support of their request for costs sets out a Bill of Costs indicating costs of Enforcement Counsel in the amount of $113,792 and costs of the investigator of $61,494, which total $175,286.

¶ 39 At para. 41 of its submissions, the Respondent submits that in the event a fine is ordered, no costs award, or a small costs award should be made, with the total amount not exceeding $15,000. The Respondent

[5] *Creditfinance Securities Ltd. (Re)*, 2006 CarswellNAT 5800 at para. 18

[6] *Investment Dealers Assn. of Canada v. Kasman*, 2009 CarswellOnt 4083 at paras. 68-69 [*Kasman*]

also pointed out that the financial impact of the fine and cost award could be considered together with the Respondent's own legal costs.[7] In *Kasman*, the respondents cooperated fully with the investigation into market manipulation. They submitted that the only reason for a hearing on the merits was to enable a panel to assess all factors relevant for determining appropriate sanctions and no costs award was appropriate because they had incurred their own substantial legal costs. The panel took this submission into consideration in awarding a fine and costs of $40,000 on a joint and several basis, which was $20,000 less than the $60,000 requested by IIROC Staff.

¶ 40 *Kasman* is readily distinguishable from the case before us. Here, unlike the situation in *Kasman*, the Respondent did not cooperate with respect to an important aspect of IIROC's investigation because he did not disclose his banking records when requested to do so. We also have no basis on which to determine whether the Respondent's legal costs are "substantive". Even allowing for the fact that the Respondent was self-represented, his motion to have the proceedings stayed or dismissed for personal reasons was without legal foundation and contributed to the delay and costs of the hearing. We must also recognize that the Respondent contravened Dealer Member Rule 18.14 and was unsuccessful in this proceeding.

¶ 41 As noted in the Panel's Merits Decision, the method IIROC Staff chose to present its case, while not unfair, was not the most expeditious manner of proceeding. It chose to present its case by way of voluminous documentary evidence instead of calling Chris Foster to give *viva voce* evidence in chief under oath with some supporting documentary evidence. IIROC's method of proceeding contributed significantly to the length and cost of these proceedings. That said, the costs sought by IIROC are less than one tenth of its actual costs indicated and appear to implicitly acknowledge the Panel's comments as well as the fact that the overall costs incurred are disproportionate to the seriousness of the offence.

¶ 42 IIROC Staff's request for costs and the amount sought is reasonable. Accordingly costs of $15,000 are awarded.

VII. CUMULATIVE EFFECT OF FINANCIAL SANCTIONS, COSTS AND PAYMENT

¶ 43 The cumulative financial impact of the financial sanctions and costs imposed is disgorgement of $17,500 benefit plus a fine of $17,500 and costs of $15,000 for a total of $50,000. This is a reasonable global amount.

¶ 44 A fine, disgorgement and costs imposed by a decision are payable when the decision is effective, unless the decision provides or the parties agree otherwise: Rule 8200(4).

¶ 45 IIROC Staff seek to have the financial amounts paid within 30 days of the decision being effective. In the event that the Panel did not agree with the Respondent's submission that the total amount to be paid not exceed $15,000, no submissions respecting payment were made by the Respondent. Accordingly, we order that the amounts ordered be paid within 30 days of this decision being effective.

Dated at Toronto, Ontario this 27 day of September 2022.

Karen Weiler

Steve Garmaise

Stuart Livingston

[7] *Kasman*, ibid.