Re Shields

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Yonathan Chanoch Shields

2021 IIROC 31

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

Heard: October 20, 2021 in Toronto, Ontario
Decision: December 21, 2021

Hearing Panel:
Philip Anisman, Chair, Deborah Leckman and Edward Jackson
Appearances:
Natalija Popovic, Senior Enforcement Counsel
April Engelberg, Enforcement Counsel
Eric Brousseau, for Yonathan Chanoch Shields
Yonathan Chanoch Shields (present)

REASONS FOR SANCTION DECISION

Table of Contents

I. INTRODUCTION: THE MERITS DECISION

¶ 1 In its decision of July 20, 2021 (the "Merits Decision"), the Panel found that the respondent, Yonathan Chanoch Shields ("Shields" or the "Respondent"), contravened IIROC Dealer Member Rules 1300.1(a) and 1300.1(q) ("IIROC Rules") by failing to exercise the due diligence required to know nine of his clients and to ensure the suitability of recommendations he made to them to execute a trading strategy involving the sale of naked options on commodities futures (the "Strategy").[1]

¶ 2 All of these clients were referred to Shields, directly or indirectly, by another client, Sean Dubin ("Dubin"), a registered representative at Scotia Capital, who informed Shields that they were sophisticated and wished to trade the same Strategy as he and provided information about them to Shields.[2] As a result, Shields assumed they understood the risks involved in this trading Strategy, without making the inquiries suggested in his employer's policy and procedures manual and without informing them of the nature and scope of the risks of trading options on futures, thus failing to determine their risk tolerance contrary to his obligation to know his clients.[3] As Shields then proceeded to recommend trades to these clients without discussion or explanation, he necessarily also failed to exercise due diligence to ensure the suitability of these trades.[4]

¶ 3 While these failures were common to the nine clients, the manner in which they occurred differed. Shields spoke with five clients, JM, SF, MW, BT and AM,[5] usually briefly. He did not meet or talk to two of the clients, VP and ED, but spoke only with their husbands, who had trading authority over their accounts; in both cases he included information on their new client application forms ("NCAF") that reflected the husband's, not the client's, trading experience.[6] He also failed to meet or talk to two other clients, SS and RF, who had joint accounts with their husbands. In these four instances, he treated the client's husband as the client. Similarly, although he spoke to MW, Shields treated his wife as the client, and failed to engage in more than a cursory conversation with MW.

II. SANCTION HEARING

A. Additional Evidence

¶ 4 Each of the parties provided affidavit evidence for the sanction hearing. IIROC enforcement staff ("IIROC Staff") filed two affidavits, one sworn by Alexandre Oustinov ("Oustinov"), the IIROC investigator who testified previously, and the other by Ricki Ann Newmarch ("Newmarch"), Enforcement Litigation National

[1] *Re Shields,* 2021 IIROC 15 ("Merits Decision"). IIROC did not prove that Shields failed to fulfil his know your client obligation ("KYC obligation") with respect to a tenth client, PA; *ibid*., para. 64.

[2] Four of the clients, VP, ED, RF and MW, were referred indirectly; the direct referrals were their husbands, DP, DD and SF, and MW's wife, SC; *ibid*., paras. 45, 54, 82 and 90.

[3] *Ibid*., paras. 37-42.

[4] *Ibid*., para. 132.

[5] *Ibid*., paras. 71-72, 87, 93-94, 104 and 111, respectively.

[6] *Ibid*., paras. 48 and 56.

Coordinator in IIROC's Enforcement Department.[7] Shields filed his own affidavit.[8]

¶ 5 Oustinov's affidavit provided additional calculations of the commissions received by Shields for trading in the accounts of his nine clients ($64,054.80) and the $1,222,004.23 in losses they incurred on February 5, 2018; it also described the withholding of $269,000 of commissions by Shields' employer, R.J. O'Brien & Associates Canada Inc. ("RJO"), when Shields resigned in October 2019. Shields' affidavit contained information relating to his resignation, the commissions withheld by RJO and his current financial circumstances. The Newmarch Affidavit contained information relating to IIROC's investigation and hearing costs. As these affidavits related to sanctions and costs, they are addressed below in the discussion of these issues.

B. Requested Sanctions

¶ 6 Submitting that the findings in the Merits Decision warrant significant sanctions, IIROC Staff requested (1) a fine of $50,000, (2) disgorgement of $15,900, (3) a prohibition from approval in any capacity for two years, (4) a requirement to rewrite the Conduct and Practices Handbook Course ("CPH") examination upon any re-registration, and (5) costs of $65,000.

¶ 7 Acknowledging that the Merits Decision provided a basis for significant sanctions, Shields requested (1) a fine of $20,000, (2) no disgorgement, (3) a two-year suspension retroactive (a) to October 7, 2019, when he resigned from RJO, (b) to January 2020, when he ceased to be employed in the investment business, or (c) for the eight months that the hearing was delayed because of the COVID-19 pandemic, (4) rewriting the CPH examination, (5) a one to two year period of strict or close supervision, and (6) costs of $30,000.

¶ 8 In sum, IIROC Staff requested total payments of $130,900 as against Shields' $50,000 and a prospective prohibition as against a retroactive suspension with a period of supervision; they agreed on rewriting the CPH exam.

C. Sanction Principles

¶ 9 The ultimate purpose of IIROC disciplinary proceedings is "to maintain high standards of conduct in the securities industry and to protect market integrity".[9] To this end, IIROC's Consolidated Enforcement, Examination and Approval Rules ("Consolidated Rules") give hearing panels a wide discretion to impose any sanction or combination of sanctions that they consider appropriate, based on the respondent's conduct and the nature and consequences of the contravention. Consolidated Rule 8210 provides that a hearing panel may impose any sanctions it considers appropriate, including (a) disgorgement of any amount obtained as a result of a contravention, (b) a fine of $5,000,000 or if greater, three times the profit made, directly or indirectly, as a result of a contravention, (c) a suspension or prohibition of approval as a registrant, (d) a permanent bar to approval, and (e) terms and conditions on a continuing approval or otherwise.

¶ 10 An appropriate sanction will reflect consideration of both specific and general deterrence; it will be designed to prevent future improper conduct by the respondent and to deter others from engaging in similar misconduct.[10] While the primary focus must remain the respondent's conduct and the facts relating to the contravention, the weight given to general deterrence may vary so long as the overall set of sanctions

[7] Affidavit of Alexandre Oustinov, sworn September 29, 2021 ("Oustinov Affidavit"); Affidavit of Ricki Ann Newmarch, sworn September 29, 2021 ("Newmarch Affidavit"). Newmarch subsequently swore a supplementary affidavit, which was filed after the hearing; Supplementary Affidavit of Ricki Ann Newmarch, sworn October 21, 2021 ("Newmarch Supplementary Affidavit"); see para. 53, below.

[8] Affidavit of Yonathan Chanoch Shields, sworn October 1, 2021 ("Shields Affidavit").

[9] IIROC Sanction Guidelines, February 2, 2015, p. 2 ("Sanction Guidelines").

[10] See Sanction Guidelines, p. 4 (principle 1).

imposed is proportionate "to the conduct at issue".[11] Proportionality is determined by sanctions that are consistent with industry expectations, as reflected in IIROC's Sanction Guidelines and prior decisions, recognizing that prior decisions are not binding and are of assistance only to the extent that they are based on similar facts.[12]

¶ 11 As IIROC Staff informed the Panel, there are no cases that are directly applicable; the facts in this proceeding are unique. No prior decision addresses a failure to meet or talk to a client when opening an account and recommending trades, and to the Panel's knowledge, no decision deals with a know your client deficiency like Mr. Shields' failure to learn his clients' risk tolerance and his resulting failure to exercise due diligence to ensure the suitability of his recommendations to them. This decision must therefore be based primarily on Shields' conduct in light of the applicable principles and factors in IIROC's Sanction Guidelines; as a case of first instance, it will necessarily effect general deterrence.

D. Sanction Guidelines: Relevant Principles and Factors

1. *General*

¶ 12 The Sanction Guidelines are intended to provide a framework for consideration of the sanctions that may be appropriate in specific proceedings. They contain general principles and a list of factors that inform the application of the principles and the determination of sanctions. As the principles and factors are inextricably interrelated, they are best considered with respect to the facts, the Respondent's conduct, the parties' submissions and the appropriateness of the sanctions authorized by Consolidated Rule 8210, individually and as a whole.

2. *Shields' Conduct*

¶ 13 Knowing one's client is a registrant's basic obligation. Without knowledge of a client's financial and other circumstances, particularly his or her risk tolerance, a registrant cannot ensure that a client's investment objectives and strategy and the trades recommended to achieve them are suitable for the client. Shields opened accounts for clients who wished to pursue Dubin's Strategy, without fulfilling this obligation. This failure resulted in large part from an undue reliance on Dubin with respect to their knowledge of trading in futures options, as a result of which he did not take the steps necessary to discover their actual understanding and their risk tolerance. Between January 2016 and February 5, 2018, Shields opened accounts for the nine clients and recommended and executed trades without determining whether the accounts, the Strategy or the trades were suitable for these clients. Although Shields had not been the subject of a regulatory investigation or disciplinary proceeding in more than twenty years of futures trading, his conduct relating to Dubin's referrals and the Strategy cannot be viewed as an isolated incident. It reflected consistent patterns of dealing with these clients over a two-year period. Even though he did not so intend, expect or foresee it, the volatility spike on February 5, 2018 resulted in aggregate losses of approximately $1,222,000 for these clients.[13]

¶ 14 Although the individuals referred by Dubin had financial or business experience, most of the clients were required to sign RJO's additional risk disclosure form ("ARDF") because they had no experience with futures, and three of them, VP, ED, and RF, had no financial or business experience. These facts should have flagged the need to discuss market risks and ensure they understood and accepted the potential to lose more than their risk capital. Shields' failure to do this was at least grossly negligent and arguably reckless despite the fact that the volatility spike was not foreseen,[14] and the opening of the accounts and pursuit of the Strategy in

[11] *Ibid*.; and see, e.g., *Re Cartaway Resources Corp.*, 2004 SCC 26, paras. 60-64; *Walton v. Alberta Securities Commission*, 2014 ABCA 273, paras. 154, 156, 164-166, leave to appeal denied 2015 CanLII 14759 (SCC); see also *Re Mills*, 2001 IDACD No. 7, (2001) 24 OSCB 4146, p. 4147.

[12] See *Re Mills*, OSCB, p. 4147, cited in Sanction Guidelines, p. 4.

[13] See Sanction Guidelines, p. 8 (factors 1-3 and 5).

[14] Sanction Guidelines, p. 8 (factors 4 and 7).

these circumstances resulted in the losses incurred by the clients.[15]

¶ 15 An assessment of Shields' conduct must take into account the manner in which he dealt with each of the clients. For this purpose, the clients fall into two groups, those he spoke to (JM, SF, MW, BT and AM) and those he did not (VP, ED, SS and RF).

¶ 16 The latter group is comprised of two subsets. VP and ED were the sole clients, both of whom granted trading authority to their husbands (DP and DD). Shields looked only to their trading-authority husbands (each a "TA") for information and direction, treating the TAs as his clients, a practice he followed when a TA husband so requested for tax purposes.[16] As he recognized that this was not the case with respect to a withdrawal of funds from an account, for which the true client's authorization was required, his treatment of the TAs as the clients and his failure to talk to his clients, VP and ED, can only be described as a reckless, bordering on wilful, disregard of his KYC responsibilities.[17]

¶ 17 The seriousness of this contravention is compounded by Shields' handling of the NCAFs for VP and ED, both of which reflected their husbands' trading experience to Shields' knowledge; indeed, Shields' assistant initially sent DP an ARDF for VP to sign.[18] Shields was aware of these inaccuracies when he submitted the NCAFs to LM for approval. This conduct was intentional and exacerbates the level of his culpability with respect to the contraventions relating to VP and ED.

¶ 18 SS and RF had joint accounts with their husbands. SS's husband, PA, informed Shields that he and SS discussed all their investments, had discussed the Strategy with Dubin and wanted to open their account.[19] RF and SF's joint account was opened, at Shields' suggestion, after LM rejected RF's initial application because RF had no futures experience and was unemployed.[20] Shields himself admitted that his practice with joint accounts was "to speak to at least one of the clients".[21] Although his failure to speak to SS may have been understandable,[22] his contravention of his KYC obligation with respect to both her and RF in disregard of his obligations under IIROC Rules 1300.1(a) and 1300.1(q) was reckless, as both SS and RF were clients and were equally responsible with their husbands for their accounts.[23]

¶ 19 Although Shields talked to the remaining five clients, his reliance on Dubin's information led him to cursorily describe the handling of their accounts and little more, as is reflected in his transcribed conversation with JM and in MW's notes of their telephone call.[24] As they did not ask him any questions concerning the operation of futures markets or risk, he assumed they understood them.[25] He did not follow the suggestions in RJO's policy and procedures manual on how to discover their actual understanding, did not review their NCAFs with them or discuss the function of the risk capital they specified in it and did not explain the use of the risk capital figure; he did not disclose to them that LM had reduced their risk capital amount when approving their accounts, but allowed the greater amounts they deposited to be used for trading purposes, which resulted in greater exposure and greater losses; he also did not discuss their ARDFs with them; and he did not inform them of their inability to limit liability when selling naked options, of the risk of an unpredictable increase in volatility or even that they could lose more money than they invested. Instead, his description of his use of

[15] Sanction Guidelines, p. 8 (factor 5).
[16] Merits Decision, paras. 49 (VP) and 57 (ED). He also attempted to open an account for RF with her husband, SF, as the TA, but the account was rejected by LM, RJO's chief compliance officer; *ibid*., para. 84.
[17] *Ibid*., para. 58.
[18] *Ibid*., paras. 48 (VP) and 56 (ED).
[19] *Ibid*., para. 62.
[20] *Ibid*., paras. 84-86.
[21] *Ibid*., para. 65; Sanction Guidelines, p. 8 (factor 2).
[22] *Ibid*., para. 66.
[23] See *ibid*., para. 65.
[24] *Ibid*., paras. 71 (JM) and 93 (MW).
[25] *Ibid*., paras. 36 and 42.

rolls to avoid potential losses confirmed their beliefs that the Strategy was low risk, even though the Strategy they were seeking to pursue was high risk.[26]

¶ 20 These failures were common to all five clients even though Shields' dealings with each of them differed. MW, for example, was treated similarly to VP, ED, SS and RF; although Shields spoke to MW, he treated SC, MW's wife and TA, as his client. As Shields admitted, a "more fulsome discussion" was required for him to open an account for MW.[27] This conduct was if not reckless, close to it. On the other hand, his failure to probe when JM showed some knowledge of options terminology was closer to negligent in light of the information he received from Dubin, and his dealings with SF, BT and AM were somewhere in between. All of these clients were recommended by Dubin who had informed them of the Strategy's performance, and they wished to pursue the Strategy.[28] On a spectrum of culpability from mere negligence to intention, in all the circumstances, including Dubin's referrals and the information he provided to Shields, the clients' desire to open their accounts and Shields' position and lengthy experience in trading futures, Shields' conduct with respect to JM, SF, MW, BT and AM ranged from seriously negligent to reckless.[29]

¶ 21 This conduct is not mitigated by the fact that his account opening and trading were supervised by RJO, as his counsel argued.[30] Although the NCAFs for all nine clients were approved by LM, there is no evidence that she was aware of Shields' discussions, or non-discussions, with them. She was not aware of VP's true experience or of ED's lack of experience, as their NCAFs did not reflect them. Nor could she have been aware that Shields did not talk to them; indeed, when Shields sought her approval of VP's account, he characterized his acquaintance with her as a "new relationship", which suggested he had met or talked to her.[31] Nor would LM have been aware of the nature of the conversations with the clients who Shields spoke to or that Shields failed to address the risks of the Strategy with them. The fact that there was no evidence of Shields having taken notes of these conversations and a series of emails between LM and Shields after AM complained following the events on February 5, 2018 indicate she was not.[32] There was also no basis suggested for LM having been aware of Shields' suitability failures.

3. *Sanctions: Panel's Approach*

¶ 22 Shields' contraventions grew out of a single relationship; all nine clients were referred to him directly or indirectly by Dubin and wanted to follow Dubin's Strategy. Shields' failure to discuss risk with those he spoke to resulted in part from his undue reliance on Dubin's information concerning them. He failed in his KYC obligations to all of them, even though his failure followed two patterns.[33] In all cases, his continuing KYC failure resulted in his failure to exercise due diligence to ensure the suitability of the monthly trades he made for each of them.[34] Their losses resulted from the same event, the volatility spike of February 5, 2018.

¶ 23 Shields' KYC failures constituted nine contraventions of IIROC Rule 1300.1(a) and his suitability failures contravened IIROC Rule 1300.1(q) with respect to each trade in each account. It is appropriate, however, to address Shields' misconduct on a global basis with respect to the determination of sanctions and to treat the many specific contraventions as an aggravating factor because of the common Strategy and the commonalities among the clients' relationships and their losses, as well as the overlapping elements of Shields' KYC and

[26] *Ibid*., paras. 38-41 and 75.
[27] *Ibid*., paras. 92 and 95.
[28] *Ibid*., paras. 36, 67 (JM), 82 (SF), 90 (MW), 100 and 105 (BT) and 108, 110 and 118 (AM).
[29] Sanction Guidelines, p. 8 (factor 4).
[30] Sanction Guidelines, p. 9 (factor 17). There were also no mitigating factors based on internal discipline by RJO or voluntary compensation of his clients by Shields; *ibid*., p. 8 (factors 12 and 14); and see paras. 28, 30 and 33, below.
[31] Merits Decision, para. 48.
[32] Shields email to LM, February 21, 2018; Email of LM, March 5, 2018; and Shields email to LM, March 5, 2018, Exhibit 6, Tab A.7.
[33] See paras. 3 and 15, above.
[34] See Merits Decision, paras. 121 and 132.

suitability contraventions, which reflected the same basic failure.[35]

¶ 24 In the Panel's view, as advocated by IIROC Staff and Shields' counsel, the sanctions should also be viewed as a whole and addressed as a package. The sanctions authorized by Consolidated Rule 8210 are complementary and should be considered together with a view to determining a proportionate set of sanctions that may achieve both specific and general deterrence. To this end, the Panel first addressed each sanction individually and then considered and adjusted the results viewing these sanctions together as a package.

¶ 25 Shields violated a broker's most fundamental obligations to his clients, KYC and suitability. Although his contraventions are among the most serious, the Panel has taken into account the facts that Shields' conduct was not fraudulent, that he did not solicit the clients and did not intend or expect harm to befall them, that most of them, apart from futures and futures options trading, might have been considered financially sophisticated, and that he did not expect to obtain a benefit beyond commissions received for trading in the ordinary course of his business. Shields' lack of a prior disciplinary history, while not a mitigating factor, is also relevant to sanctions in so far as it is part of the overall context.[36]

¶ 26 Finally, the Panel recognizes that because this is the first case in which contraventions of this nature have come before an IIROC hearing panel, it is likely to receive greater attention from industry participants; the sanction package must therefore be carefully designed to achieve specific and general deterrence of similar conduct in the future.

E. Elements of a Sanction Package

1. Disgorgement

¶ 27 Under Consolidated Rule 8210(1)(ii), the Panel may order disgorgement "of any amount obtained … as a result of" Shields' contraventions. Although the Rule is not so limited, the Sanction Guidelines state that this discretion should be exercised to ensure that the Respondent does not benefit financially as a result of his misconduct.[37] Thus disgorgement orders usually deduct from the amount obtained as a result of a contravention amounts that were repaid by the respondent.[38] As is clear from Consolidated Rule 8210, both the imposition of disgorgement and such deductions are matters of the Panel's discretion,[39] which is to be exercised in accordance with the sanction's preventive purpose.

¶ 28 Between January 2016 and February 5, 2018, Shields earned $64,054.80 for trades in the nine clients' accounts. Following the events on February 5, 2018, his business deteriorated and affected his relationship with RJO, leading to his resignation in October 2019. When he resigned from RJO, he and RJO agreed that RJO would withhold commissions then payable to him of $269,000, which he owed to RJO for unpaid debits in his clients' accounts in accordance with his employment agreement. The $269,000 represented 47 per cent of debits in the accounts of seven clients, five of whom were VP, ED, MW, BT and AM. The debits of these five clients reflected the amounts they owed to RJO after their accounts were closed, but the withheld funds were not allocated to any particular clients. RJO applied the $269,000 from this set-off arrangement to its bad debt account. [40]

¶ 29 IIROC Staff requested that Shields be required to disgorge only $15,900, which was the amount of the commissions attributable to the accounts of the other four clients, SS, JM, SF and RF. In response to a question

[35] See Sanction Guidelines, p. 5 (principle 3: multiple violations). See also, e.g., *Re Sadeghi,* 2018 IIROC 31, para. 18; *Re Tassone,* 2017 IIROC 63, para. 7.
[36] See Sanction Guidelines, p. 4 (principle 2: prior disciplinary record).
[37] Sanction Guidelines, p. 5 (principle 4).
[38] See, e.g., *Re Wong,* 2010 IIROC 50, para. 42.
[39] *Cf.*, e.g., *Re Quadrexx Hedge Capital Management Ltd*., 2018 ONSEC 3, para. 47 (CanLII) ("*Re Quadrexx*").
[40] Email from LM, November 20, 2019, Exhibit C to Oustinov Affidavit; Shields Affidavit, paras. 2-6.

from the Panel, Ms. Popovic said this request reflected proportionality and fairness. Shields' counsel argued that even $15,900 is too much and that Shields should not be required to disgorge any amount, as the $269,000 withholding significantly exceeded even his total commissions of $64,054.80 from the nine clients. Both submissions assume that the funds withheld by RJO as part of Shields' resignation agreement were attributable to these clients' losses.

¶ 30 This was not the reason for the withholding. As stated in LM's email, the withheld amounts were owed to RJO under the terms of Shields' employment agreement and were attributable to "any commissions" otherwise payable to him in October 2019.[41] They were more than likely not related to commissions earned by him between 2016 and the first five weeks of 2018, which period ended approximately 20 months earlier. More significantly, they were not intended to benefit RJO or the five clients for losses incurred as a result of his contraventions; at the time, October 2019, RJO and Shields were contesting civil actions by four of these five clients based on the conduct that constituted Shields' contraventions.

¶ 31 VP, ED, JM, SF, RF, MW and AM were among the parties to three actions against RJO and Shields. JM, SF and RF did not have account debits when their accounts were closed, and BT, who was among the five clients with debits, was not a party to the actions. Six of Shields other clients, including DP, were also parties to these actions. The three actions were settled after March 2020, prior to the hearing on the merits in this proceeding (the "Merits Hearing"), for an aggregate amount of $983,000 as counsel advised in this hearing. Shields did not contribute to the settlement, and there was no evidence presented of how the $983,000 were distributed among the parties to the actions. While admitting that there was no direct connection between the $269,000 withheld from Shields and the settlement, Shields' counsel submitted that there was an indirect contribution to it in that in some way, it facilitated the achievement of the settlement in which RJO paid the $983,000.

¶ 32 The purpose of disgorgement is specifically to deter a respondent and generally to deter others from engaging in similar contraventions by ensuring that such misconduct, once detected, cannot be profitable. Although its purpose is thus preventive, and not compensatory, if the respondent returns improperly obtained funds or compensates clients for losses caused by the contravention, the amounts so paid necessarily reduce the benefits obtained and may fairly be reflected in a lesser or no disgorgement order.[42] But when a person other than the respondent compensates the clients, a reduction is not appropriate, as the benefit obtained by the respondent has not been reduced.[43]

¶ 33 In the Panel's view, it is also not appropriate to impose disgorgement of less than the amount obtained where a respondent has used the funds for a purpose that is not related to the contravention or the affected clients, for example, to pay a debt owing to a third party. This is effectively what occurred between Shields and RJO when he resigned; Shields gave up commissions then owing to him to satisfy a debt he owed to RJO under his employment agreement. The $269,000 that RJO withheld were not responsive to his contraventions, were more than likely not commissions relating to the nine clients' accounts, which had been closed almost two years earlier, and were not used by RJO to compensate these clients. Nor can they realistically be treated as contributions to the subsequent settlement of the actions involving some of these clients and other clients of Shields.

¶ 34 For these reasons, the Panel asked IIROC Staff and Shields' counsel to explain why Shields should not be required to disgorge the full amount of the commissions he earned from these nine clients. As no justification for a lesser amount was provided, the sanction package should include disgorgement of $64,054.80, the full amount of these commissions.

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[41] LM email, November 20, 2019, note 40 above.

[42] See, e.g., *Re Wong*, note 38 above; *Re Quadrexx*, note 39 above.

[43] See, e.g., *Re Diaz*, 2021 ONSEC 24 (CanLII), para. 40; *Re Dennis*, 2012 ONSEC 24 (CanLII), para. 41.

2. Fine

¶ 35 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.[44] Disgorgement alone, therefore, may provide weak deterrence specifically and weaker deterrence generally because detection of a contravention is less than certain.[45] For this reason, prevention of similar future conduct, especially by persons other than the respondent, usually requires a fine in addition to disgorgement.[46]

¶ 36 IIROC Staff referred to several concededly distinguishable prior decisions to show a range of possible fines and, acknowledging that the facts of this proceeding are unique, requested a fine of $50,000.[47] Shields did not disagree that a $50,000 fine would be appropriate, if he were able to pay it, but requested a lesser fine of $20,000 in view of his inability to do so.

¶ 37 In his affidavit, Shields swore that he had not earned any income as a futures and futures options broker since his resignation in October 2019. In 2020, the total income shown on his income tax return was $1,876.59, only $875.59 of which was employment income.[48] In 2021, his gross revenue from a consulting business he set up in 2019 was $70,000. As disclosed in his affidavit, apart from his matrimonial home, Shields' assets total approximately $62,466.51, of which only $7,731.66 are liquid,[49] and his liabilities total approximately $483,099.70. The mortgage on his matrimonial home exceeded the appraised value of Shields' half interest.[50] The Panel accepts these facts, which were not challenged, as Shields was not cross-examined on this affidavit.

¶ 38 The Sanction Guidelines state that a respondent's inability to pay should be considered as a factor, but not a predominant or determinative factor, with respect to "an appropriate monetary sanction".[51] Although some decisions suggest that little weight should be given to such financial inability and that it is not relevant to a fine, but only to the time allowed for payment,[52] the Panel's discretion is not so confined by the Sanction Guidelines, which expressly contemplate a waiver as well as reduction of a fine and an instalment payment

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[44] See, e.g., *Re Quadrexx*, note 39 above, para. 56.

[45] Consolidated Rule 8210(1)(iii)(b) addresses this limitation by authorizing a fine of three times the profit made as a result of a contravention. It is derived from the insider trading sanction in the Ontario *Securities Act,* which also addresses deterrence; see R.S.O. 1990, c. S.5, s. 122(4) ("OSA"). In 2004, this provision was included in the Investment Dealers Association of Canada's rule authorizing fines, which became the IIROC predecessor to Consolidated Rule 8210(1)(iii). Until 2016, this was the only mechanism for addressing disgorgement in IIROC disciplinary proceedings, that is, as a principle informing the determination of a fine; see, e.g., *Re Mills*, note 11 above, OSCB, p. 4153; Re *Dennis*, note 43 above, paras. 28-32 and 43-45; see also *Re Diaz*, note 43 above, paras. 28-32 (applying MFDA rule authorizing fines). Express authorization to order disgorgement as a separate sanction was introduced as Consolidated Rule 8210(1)(ii) in September 2016, when IIROC's Consolidated Rules came into force.

[46] See, e.g., *Re Sadeghi*, note 35 above, paras. 83-84; but see *Re Jenkins,* 2021 IIROC 5, para. 23 (no fine).

[47] The cited decisions imposed fines ranging from $65,000 to $200,000; see, e.g., *Re Groome,* 2013 IIROC 28 (settlement: KYC, suitability and gatekeeping failures in facilitating investment promotion using RRSP funds); *Re Moldovan,* 2014 IIROC 17 (respondents advertised similar options strategy to clients who were retired or near retirement; respondents did not understand the strategy, traded without hedging that was required by their employment agreement and continued to trade despite substantial losses in a volatile market).
Although Dubin agreed to a fine of $60,000 in his settlement, his contravention was based on his failure to inform and obtain approval from his former employer for his involvement with Shields in recommending and facilitating trading for the clients; Merits Decision, para. 26. He also agreed to rewrite the CPH examination within three months and to pay costs of $10,000; see 2019 IIROC 17 (Exhibit 22).

[48] His other income was RRSP income.

[49] The remaining $54,734.85 are held in a locked in retirement account opened on May 15, 2020.

[50] The house was appraised in September 2018.

[51] Sanction Guidelines, p. 6 (principle 7), and p. 4 (principle 1). Some decisions treat inability to pay as a mitigating factor; see, e.g., *Re Brum,* 2020 IIROC 39, para. 13; *Re Nott,* 2011 IIROC 26, para. 110.

[52] *Re Wong*, note 38 above, paras. 39-40; *Re Tassone*, note 35 above, paras. 31-32 and 42-44.

plan.[53] On the other hand, giving too much weight to a respondent's inability to pay a fine would undermine both specific and general deterrence.[54]

¶ 39 In the Panel's view, the amount of a fine and the weight, if any, to be given to Shields' inability to pay should not be considered in isolation, but as part of an overall sanction package. In response to a question from the Panel, Shields' counsel addressed the difference between the monetary package requested by IIROC Staff and the total proposed by Shields, including disgorgement and costs. His concern was that the total amount would have to be paid before Shields can be re-registered and employed in the securities industry and that his re-registration would be significantly delayed, if not precluded, if the total were approximately $130,000 ($15,900 + $50,000 + $65,000), as IIROC Staff requested, rather than the $50,000 ($20,000 + $30,000) requested by Shields.

¶ 40 The Panel agrees that Shields' current financial position is relevant to his potential to return to his chosen profession as a futures and futures option broker and that his inability to pay is therefore relevant to the imposition of a fine in this proceeding. In its deliberations, the Panel was initially of the view that a $50,000 fine would be appropriate for Shields' contraventions, in light of the facts outlined above.[55] On consideration of the full sanctions package, including the disgorgement of the $64,054.80 in commissions, the other sanctions addressed below,[56] specific and general deterrence, costs and Shields' inability to pay, the Panel has concluded that a fine of $40,000 is appropriate.

¶ 41 As is discussed in the summary below, the Panel does not intend this fine or the other monetary payments that form part of the sanction package to terminate Shields' career in the securities industry.[57]

3. Suspension

¶ 42 A suspension should be considered when a respondent is found to have committed one or more serious contraventions which reflect a pattern of reckless misconduct that results in harm to investors.[58] A suspension is appropriate in this case in view of Shields' contraventions with respect to the clients' accounts and the Strategy, as a result of which the nine clients lost over $1,200,000 in aggregate.[59] The parties agreed that Shields should be suspended or prohibited from approval for two years, but differed on whether the suspension should begin with the Panel's decision or at an earlier date.[60]

¶ 43 Shields' relationship with RJO changed after the events of February 5, 2018. From then until his resignation on October 7, 2019, he conducted only a fraction of his prior futures and options trading. Following his resignation, Shields was employed by another firm for three months, but earned no income. He has not obtained employment since January 2020, as all the firms he spoke to "were awaiting the outcome of this proceeding before deciding whether to hire" him.[61] On the basis of these facts, Shields submitted that the

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[53] Sanction Guidelines, p. 6 (principle 7); see also *Re Jenkins*, note 46 above; but see *Re Diaz*, note 43 above.
Inability to pay should receive no weight with respect to disgorgement, as allowing an impecunious respondent a reduction would be equivalent to endorsing the misconduct by treating the expenditure by the respondent of the funds that were obtained as a result of the contravention as a mitigating factor. This would encourage, rather than deter, such conduct. In short, inability to pay is not relevant to the determination of an order requiring disgorgement; *cf.*, e.g., *Re Tassone,* 2019 IIROC 3, paras. 38-40; *Re Jenkins*, note 46 above, para. 22.

[54] See, e.g., *Re Diaz*, note 43 above, paras. 46-50 (undue weight given to inability to pay).

[55] See paras. 13-21 and 25, above.

[56] See sections 3 and 4, below (suspension, CPH and supervision).

[57] Paras. 59-62, below.

[58] Sanction Guidelines, p. 5 (principle 5).

[59] See para. 5, above.

[60] Consolidated Rule 8210(1) authorizes both a suspension and a prohibition of approval. IIROC Staff requested the latter as Shields is not currently employed by a dealer member of IIROC. As the effect is the same, "suspension" is used in these Reasons to include a prohibition of approval.

[61] Shields Affidavit, paras. 2-3 and 7-8. The affidavit does not state how many firms he approached or when he did so.

suspension should run from October 7, 2019, or from January 2020, when his employment with the other firm ended. Alternatively, he submitted that the suspension should take into account the eight-month delay in this proceeding that was caused by the current pandemic.[62]

¶ 44 A hearing panel has a discretion to impose a suspension for "any period of time".[63] Prior decisions have exercised this discretion to make a suspension retroactive to the date of dismissal, when a respondent's employment in the industry was terminated as a result of the respondent's contravention[64] and when a loss of employment was caused by events that were not so related.[65]

¶ 45 The general deterrent effect of a retroactive suspension based on a loss of employment that is not related to a respondent's contravention is minimal, as it approaches a symbolic sanction, even though it becomes a part of the respondent's disciplinary record. A respondent's period of unemployment warrants greater weight in determining a sanction package, if it is imposed as a form of discipline by the employing member firm or if it otherwise is based on his contraventions, as it is in effect similar to a suspension.[66] Although Shields' resignation was not related to his contraventions, his inability to obtain a position following it was, as it was based on this proceeding. Accordingly, Shields' absence from futures trading since January 2020 is relevant to the timing of a suspension.

¶ 46 The delay in this proceeding as a result of the pandemic is also relevant to the suspension period. Although the pandemic inconvenienced everyone and as IIROC Staff argued, is not unique to Shields, the eight-month postponement of this proceeding has affected Shields specifically in that it would effectively extend his period of non-approval, if a suspension were wholly prospective. A delay of this nature for which the respondent is not responsible may be treated as a mitigating factor when considering the timing of a suspension.[67]

¶ 47 Shields' inability to obtain employment and the delay from the COVID-19 pandemic should be considered along with Shields' improper conduct. In the Panel's view, the seriousness of Shields' KYC and suitability contraventions, including his knowing submission of false NCAFs for VP and ED and his repeated failures to address his clients' risk tolerance, require a prospective suspension. In all the circumstances, Shields should receive one-year's credit against the two-year suspension the parties agree would otherwise be appropriate. The effect of this is a suspension (or a continued period of non-approval) of one year from the date of the Panel's sanction hearing.

4. Re-Approval: CPH and Supervision

¶ 48 IIROC Staff and Shields agreed that Shields should be required to rewrite the CPH examination upon re-registration. As this re-education process should reinforce Shields' understanding of his KYC and suitability obligations, the Panel agrees with this submission. It would further the preventive and protective purposes of IIROC's disciplinary process. Shields should be required to rewrite and pass the CPH examination before his re-registration takes effect.

¶ 49 In his proposed basket of sanctions, Shields included a requirement for strict or close supervision for a period following his re-registration. His counsel submitted that as the supervision requirement is prospective, its imposition would address concerns the Panel might have about general deterrence, if Shields were able to

[62] The Merits Hearing was initially scheduled to begin in March 2020, but was postponed to September 2020 because of the onset of COVID-19.
[63] Consolidated Rule 8210(1)(iv) and (vi).
[64] See, e.g., *Re Smith,* 2014 IIROC 16, paras. 21-22 (settlement); *Re Bazilinsky,* 2018 IIROC 13, paras. 13-14 (settlement).
[65] *Re Conacher,* 2018 IIROC 15, paras. 12-13 (settlement); *Re Conville,* 2013 IIROC 5, para. 43(a). Although the facts of each case differ, these differences do not affect the principles underlying imposition of a retroactive suspension.
[66] See, e.g., *Re Nott*, note 51 above, para. 141.
[67] See, e.g., *Re Mills*, note 11 above, OSCB, p. 4152; *Re Nott*, note 51 above, paras. 112-115; see also *Re Bélisle,* 2021 IIROC 23, para. 67.

re-register immediately or very shortly without supervision. It would also address Shields' suitability contraventions in that both strict and close supervision would require review of trades in accounts with Shields, the former before a trade is executed and the latter afterward but daily. He said a requirement for close supervision would be sufficient and cited decisions that imposed supervisory periods of 18 and 24 months.[68]

¶ 50 In her submissions, IIROC Staff said she did not object to a requirement for supervision, although Staff did not request this sanction because supervision relates to trading and would not catch a failure to speak to a client or to discuss the client's awareness of risk and would thus not provide protection against this type of conduct. In response to a question from the Panel, Shields' counsel said that supervision would also deal with account opening and that a compliance officer at a firm that accepted Shields would be mindful of this responsibility, especially in view of the Merits Decision. Although in his submission the method of supervision should be left to the compliance officer, it could include documentation requirements. Shields could be required, for example, to take specific steps to determine a client's risk tolerance or to take notes of his discussions with clients, and his calls could be recorded; all such documentation could be reviewed.

¶ 51 Supervision of a registrant's dealings serves a protective, as well as a deterrent function. In the Panel's view, a period of supervision as a term of Shields' re-registration is warranted, provided that it addresses his KYC contravention. This is necessary, as the essence of Shields' suitability failings was his failure to know his clients.[69] For this purpose, close supervision for one year is sufficient to ensure both Shields' consciousness of his responsibilities and ongoing compliance review at his firm. As close supervision deals with trading in accounts after they have been accepted, a term of Shields' re-registration should be that he not only be subject to close supervision, but also that the opening of new accounts with him be closely supervised. The Panel expects that in adopting procedures to supervise account opening, the compliance officer in his new firm will have regard to the Merits Decision, including Shields' failure to document his conversations with prospective clients in fulfilment of his KYC obligations.[70]

5. Costs

¶ 52 IIROC Staff initially requested costs of $65,000 based on a bill of costs attached to the Newmarch Affidavit. The bill of costs showed total costs of $363,049.75 for time spent by IIROC enforcement counsel and investigators from 2019, but only $2,300 for the period following April 1, 2021.[71] Although the time shown as spent from March 31, 2020 to March 31, 2021 totalled $127,071, the bill of costs showed $254,042.50 for this period and a reduced amount of $127,071 "to allow for duplication due to postponement" of the Merits Hearing.

¶ 53 In response to a question from the Panel concerning these figures in the bill of costs, IIROC Staff said it must be an error and requested an opportunity to address this question in a brief written submission following the hearing. As Shields had no objection, the Panel granted this request and set times for IIROC Staff's further submission and a reply by Shields. IIROC Staff subsequently filed the Newmarch Supplementary Affidavit, sworn on October 21, 2021, with a revised bill of costs. Shields did not file a reply.

¶ 54 The Supplementary Affidavit described the initial bill of costs as containing a mathematical miscalculation, without explanation. The revised bill of costs was identical to the initial bill of costs, except for the section on total costs. It showed total costs of $363,819.75 (an additional $770) and time spent between March 31, 2020 and March 31, 2021 as $127,071, followed by a line stating that this amount was reduced by 50 per cent, to $63,500, "to allow for duplication due to postponement". The Supplementary Affidavit

[68] *Re Yaskiw,* 2017 IIROC 19 (18 months strict supervision); *Re Groome*, note 47 above (24 months strict supervision).
[69] See Merits Decision, para. 132.
[70] See *ibid.*, para. 92, note 81.
[71] It thus included almost no time for this sanction hearing. It also did not include any time for the attendance of one of the two enforcement counsel who attended the Merits Hearing.

provided no further information concerning the nature of the miscalculation or these changes. On the basis of the revised bill of costs, IIROC Staff requested costs of $63,500.

¶ 55 Based on his financial circumstances and his inability to pay, Shields requested an order for costs of $30,000.

¶ 56 An order for payment of IIROC's investigation and hearing costs is authorized by Consolidated Rule 8214. Costs are intended as a form of reimbursement of expenditures that are ultimately funded by IIROC's dealer members and approved persons. Although they are not sanctions under Consolidated Rule 8210, and are not intended as a deterrent, the effect of a costs order on a respondent is the same as a monetary penalty and is likely to be so viewed by respondents. For this reason, costs should be addressed in the entire context of a proceeding to avoid their having a punitive effect. In addition to customary costs considerations relating to the conduct of the proceeding, determination of an amount for costs should be assessed in light of the sanctions imposed under Consolidated Rule 8210, with particular attention to the amounts of any fine and disgorgement. A respondent's inability to pay should also be taken into account in this assessment.

¶ 57 Similar considerations might be seen as informing IIROC's cost requests, which are usually a relatively small proportion of the investigation and hearing costs incurred, often in the range of 20 per cent, as IIROC Staff's initial cost request was in this case. [72] IIROC Staff explained the initial request in terms of reasonableness and proportionality and as reflecting a reduction for duplication of effort.

¶ 58 In view of the amount of disgorgement and the fine, and taking into account Shields' inability to pay and the amounts requested by IIROC and by Shields, the Panel has determined to order costs of $35,000.

6. Summary

¶ 59 For the preceding reasons, the Panel has determined that the following package of sanctions for Shields' conduct and contraventions is appropriate. Shields shall pay disgorgement of $64,054.80 and a fine of $40,000; re-approval of his employment by a dealer member is prohibited for one year from October 20, 2021, the date of the sanction hearing; as a condition of his re-registration, he must have successfully rewritten the CPH examination; as a term of his re-registration, the opening of accounts with him and trading in such accounts must be closely supervised for one year. In addition, Shields shall pay costs of $35,000. In the Panel's view, this package of sanctions is proportionate to the nature of Shields' multiple contraventions and will make clear to others that due care is essential to the fulfilment of their KYC and suitability obligations.

¶ 60 Although Shields must pay a total of $139,054.80 under the Panel's order, which is effective as of its date, the Panel has not required that he do so prior to re-approval by IIROC. Shields' counsel expressed a concern that sanctions of approximately $130,000, the total of sanctions and costs requested by IIROC Staff, would impose further delay on Shields' re-registration and possibly result in a permanent ban. To avoid these potential consequences, he requested a fine and costs totalling $50,000.

¶ 61 The Panel has not required full payment of the $139,054.80 as a condition of Shields being re-approved and obtaining employment as a futures broker with a dealer member of IIROC.[73] Shields is in the middle of his career. His history in futures trading indicates that he has the potential to earn sufficient income to enable him to pay this amount, if given a reasonable opportunity.[74] The Panel understands that IIROC Staff has the

[72] See, e.g., *Re Tassone*, note 35 above, para. 35 (22 per cent); see also *Re Sadeghi*, note 35 above, para. 89 (approximately 31.5 per cent).

[73] *Cf. Re Sadeghi*, note 35 above, para. 95 (requiring payment prior to re-registration).

[74] This potential is demonstrated by the amount of Shields' employment income for 2019 shown in the two year comparative summary of his 2020 income tax return. Although he conducted only a fraction of his prior trading in 2019, his employment income for that year was $495,740, which likely did not include the $269,000 withheld by RJO. Even though the $495,740 included an undisclosed amount for loan forgiveness attributable to legal fees related to his clients' actions against him and RJO, it is indicative of his earning capacity.

discretion to allow him a reasonable time to do so.

¶ 62 Shields should be able to negotiate a payment plan with IIROC Staff that does not preclude his re-registration after his suspension.[75] Such a plan might include payment of the disgorgement amount prior to Shields' re-registration and monthly payments beginning soon thereafter. A pre-registration payment of this nature is close to the $50,000 total requested by Shields to enable him to obtain re-registration without any suspension. To be clear, these suggestions should not be viewed as a condition imposed by the Panel. Rather, they recognize the possibility for Shields to negotiate a payment plan with IIROC Staff that will satisfy IIROC's preventive and protective goals, without detracting from the deterrence engendered by the Panel's decision.

III. DECISION

¶ 63 The Panel orders that:

(a) Shields pay disgorgement of $64,054.80;

(b) Shields pay a fine of $40,000;

(c) Shields not be approved as a registrant before October 20, 2022;

(d) Shields successfully re-write the CPH examination before he is re-registered;

(e) as a term of Shields' re-registration, the opening of accounts with him and trading in such accounts must be closely supervised for one year; and

(f) Shields pay costs of $35,000.

Dated at Toronto, this 21 day of December 2021.

Philip Anisman

Deborah Leckman

Edward Jackson

[75] In this respect, IIROC is similar to a successful party in a civil action, who may agree on a payment plan with the unsuccessful defendant; *cf*. OSA, s. 151 (enforcement as order of the Superior Court of Justice). Any such negotiations are not a part of the Panel's order.