Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Marrone (Re)*, 2023 ONCMT 9
Date: 2023-02-28
File No. 2020-16

IN THE MATTER OF
AURELIO MARRONE

REASONS AND DECISION

(Section 127.1 and subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	M. Cecilia Williams (chair of the panel) Andrea Burke William J. Furlong	
Hearing:	By videoconference, October 21, 2022; final written submissions received November 10, 2022	
Appearances:	Johanna Braden	For Staff of the Ontario Securities Commission
	Murray Stieber Christopher Afonso	For Aurelio Marrone

TABLE OF CONTENTS

REASONS AND DECISION

1. OVERVIEW AND DECISION

[1] These reasons relate to the sanctions and costs hearing regarding Aurelio Marrone. Marrone, an experienced mutual fund sales representative, was named by a client and friend, MU, as her attorney for health and property, an alternate executor of MU's estate, and the sole beneficiary of that estate. In a merits decision dated June 13, 2022,[1] the Capital Markets Tribunal (**Tribunal**) found that Marrone acted unfairly, dishonestly and in bad faith towards his vulnerable client, MU. Marrone did so by failing to follow the required procedures for dealing with conflicts or potential conflicts of interest, including by:

a. accepting the appointment as attorney for property;

b. failing to renounce his appointment as alternate executor; and

c. not immediately reporting these conflicts of interest, as well as the conflict of interest arising from MU naming him the sole beneficiary under her will while she was clearly vulnerable.

[2] The Tribunal further concluded that this conduct was a serious breach of the rules of the Mutual Fund Dealers Association of Canada (the **MFDA**) and of the policies and procedures of his employer, IPC Investment Corporation (**IPC**), which constituted a breach of subsection 2.1(2) of OSC Rule 31-505, which required Marrone to deal fairly, honestly and in good faith with his clients.

[3] Ontario Securities Commission Staff (**Staff**) seeks an order that:

a. imposes permanent market participation bans, including a director and officer ban, on Marrone;

b. reprimands him;

c. requires him to:

i. pay an administrative penalty of $500,000;

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[1] *Marrone (Re)*, 2022 ONCMT 13 (**Merits Decision**)

ii. disgorge $1,859,802, the value of MU's estate based on the evidence submitted by Staff; and

iii. pay costs of the investigation and hearing of $100,000.

[4] For the reasons that follow, we find it in the public interest to order that Marrone be permanently banned from the capital markets, including a director and officer ban, pay an administrative penalty of $500,000, and pay costs in the amount of $85,000. We have not ordered Marrone to disgorge any amount he might receive as a beneficiary of MU's estate.

[5] We begin our analysis by reviewing the legal framework for sanctions and how the facts of this case led us to the sanctions that we have decided to order. Next, we consider Staff's request for costs.

2. SANCTIONS ANALYSIS

2.1 What is the legal framework for sanctions?

[6] In making an order for sanctions under s. 127(1) of the Ontario *Securities Act* (the ***Act***)[2], the Tribunal is to impose sanctions that will protect investors and the capital markets from similar conduct in the future.[3] Sanctions are to be preventive and protective, rather than punitive.[4]

[7] Sanctions must be proportionate to the respondent's conduct in the circumstances.[5] It is appropriate for the Tribunal, when making an order in the public interest that is both protective and preventive, to consider specific and general deterrence. It is important for respondents and other like-minded individuals to be deterred from engaging in similar conduct in the future through the imposition of appropriate sanctions.[6]

[8] The Tribunal has established a non-exhaustive list of factors to consider when deciding sanctions, including those we consider most relevant to this case: the

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[2] RSO 1990, c S.5

[3] *Re Bradon Technologies Ltd.*, 2016 ONSEC 19 (***Bradon***) at para 26

[4] *Bradon* at para 27, citing *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43

[5] *Re York Rio Resources Inc.*, 2014 ONSEC 9 (***York Rio***) at para 36

[6] *Re Moncasa Capital Corp.*, 2013 ONSEC 49 at para 18, citing *Re Cartaway Resources Corp.*, 2004 SCC 26 at para 60

seriousness of the misconduct, the respondent's experience in the marketplace, any mitigating factors including the respondent's remorse and recognition of the seriousness of the misconduct, and specific and general deterrence.[7]

[9] Before turning to applying the sanctioning factors to the facts in this instance, we comment on the authorities relied upon by both parties.

2.2 Relevant authorities

[10] The Tribunal has not previously decided a case with facts like these. Therefore, while it is common for the Tribunal to consider comparable recent cases, we are aware of none and the parties brought no such decisions to our attention.

[11] Staff submits that we should make our decision about appropriate sanctions based on first principles and send a strong message to deter registrants from abusing the trust of their vulnerable clients.

[12] Staff has provided an overview of a number of decisions of the MFDA and of the Investment Industry Regulatory Organization of Canada (now both part of the newly consolidated New Self-Regulatory Organization of Canada) (the **SROs**) where respondent investment advisors were sanctioned for failing to disclose conflicts of interest, including conflicts of interest arising where clients designated the respondents as beneficiaries or executors, granted them powers of attorney, or had other personal financial dealings with their clients. Staff brought these decisions to our attention but submits that they are of limited assistance.

[13] Many of those SRO decisions are settlements and, as Staff submits, as negotiated resolutions they typically may have outcomes different than what might be expected from a contested hearing. In addition, in some of the settlements, the financial penalty ordered was less than the financial benefit derived by the respondent. Staff submits that those decisions ought not to be followed in this case. In other of these SRO decisions, the respondent either voluntarily renounced any financial benefit or received a financial penalty at least equal to the financial benefit gained from the misconduct.

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[7] *York Rio* at para 34

[14] Staff also referred us to several Tribunal decisions where registrants were sanctioned for failing to deal fairly, honestly and in good faith with their clients, contrary to OSC Rule 31-505. Staff submits that in these cases, where the respondent has been found to put their interests ahead of those of their clients, the Tribunal has ordered significant financial sanctions, disgorgement, permanent market bans and costs.

[15] The Tribunal cases provided by Staff involve a finding a fraud, generally in the context of raising capital from investors. Staff submits that despite the differences between the facts of these fraud cases and this case, the fraud cases share some features with the facts found in the Merits Decision, in that they all involve registrants who improperly withheld important information from others so as not to compromise their own interests.

[16] Marrone submits that the Tribunal decisions involving findings of fraud are fundamentally different from the facts in this instance and that Staff's attempt to draw a broad connection based on withholding information for personal gain is a false equivalence. Marrone asserts that based on the facts in this case, any comparison to the Tribunal's decisions involving fraud would be misplaced.

[17] Marrone also submits that the SRO decisions provide helpful guidance as to appropriate sanctions.

[18] In the circumstances, we have determined the appropriate sanctions in this instance based on first principles by considering the sanctioning factors as they apply to this case. We find the settlement agreements approved by the SROs to be of limited assistance to our analysis for the very reason that they represent negotiated resolutions that may not necessarily reflect a full consideration of the facts that might have been found and submissions that might have been accepted through a contested hearing.

[19] With respect to other decisions by the SROs, we find them helpful to our understanding of how the SROs view and have dealt with instances of conflicts of interest, particularly in the context of testamentary gifts from clients. However, given the differences in the sanctioning powers of the SROs and the Tribunal, including that the SROs are subject to sanctions guidelines which do not apply to

this Tribunal, we find them of limited assistance in coming to our decision about appropriate sanctions.

[20] We do not find the Tribunal's fraud decisions helpful. We agree with Marrone that the facts in those cases are fundamentally different from those found by the panel in the Merits Decision. However, we do take guidance from the fact that this Tribunal has ordered significant financial sanctions in circumstances where a respondent has been found to have breached OSC Rule 31-505.

[21] We now turn to consider the sanctioning factors as they apply to the facts of this case.

2.3 Application of the sanctioning factors

2.3.1 Seriousness of the misconduct

[22] The Merits Panel found that Marrone's breaches of the MFDA Rules and IPC policies and procedures were serious. They related to conflicts of interest, an elderly, financially unsophisticated and terminally ill vulnerable client, and Marrone's failure to immediately and over a protracted period report the conflicts of interest issues to his employer. All these matters are at the heart of the client relationship, which is fundamental to the purpose of OSC Rule 31-505. The Merits Panel rejected Marrone's argument that these were mere technical breaches.[8] Staff reiterated these points in its submissions.

[23] Marrone submits that the breaches in question involved one client with whom he shared a unique pre-existing personal relationship, thus distinguishing this case from circumstances where an advisor who is a stranger inserts themselves into a client's estate. He submits that there was no repeated pattern of misconduct. He also submits that he did not act on either his appointment as attorney for property or as alternate executor for MU's estate, and that any actual or perceived conflict as a result of the Power of Attorney appointments was limited to a brief period. In addition, Marrone submits that he did not cause any financial harm to MU, has yet to receive any benefit from the estate, and may never receive any benefit from the estate, given that the estate and MU's will are subject to ongoing litigation. Marrone also emphasizes the fact that the Merits

[8] Merits Decision at para 191

Panel did not find that he coerced or exploited MU in any way. In these circumstances, the sanctions sought by Staff are, in Marrone's submission, punitive.

[24] We agree with the Merits Panel and conclude that Marrone's misconduct is serious. Registrants are in a position of trust with their clients. Clients need to have confidence that their advisors will not place their interests ahead of their clients' interests. This is all the more important where the client is vulnerable, as MU was given her advanced age, terminal illness, lack of formal education and financial sophistication, and her personal relationship with Marrone. MU's vulnerability was reinforced, in our view, by the fact that the lawyer who prepared her will and powers of attorney wanted a capacity assessment performed and yet a formal capacity assessment was never obtained.

[25] Additionally, the seriousness of Marrone's conduct is heightened by three further factors. The first factor is the materiality of the amounts that Marrone managed for MU (which represented all of MU's financial assets, except for her condominium, and one third of Marrone's book of business).

[26] The second factor is the extent of Marrone's involvement with the preparation and execution of MU's estate documentation. Marrone:

a. provided MU with a list of lawyers and, after she chose RD, arranged all the meetings between MU and RD;[9]

b. Marrone was advised by RD, after RD's first meeting with MU, that he did not believe MU was capable to give instructions and that Marrone should get an opinion about her competency from the appropriate government agency;[10]

c. a doctor, who was not identified as a competency assessment officer, provided Marrone with a certificate stating that MU was capable of giving instructions about her health, which Marrone hand-delivered to RD;[11]

[9] Merits Decision at paras 87-88, 98, 111

[10] Merits Decision at paras 90-93

[11] Merits Decision at para 95

d. RD provided Marrone with copies of the draft powers of attorney and will;[12]

e. Marrone was present in MU's hospital room on both occasions when RD arrived to have the estate documents signed, although he left when asked by RD to do so;[13]

f. Marrone was aware that, on RD's first visit to have MU sign the documents, MU was not prepared to sign and asked RD why she would leave her estate to Marrone when she had family;[14] and

g. RD provided Marrone, on MU's instructions, with the signed copies of the estate documentation.[15]

[27] We note that the Merits Panel did not find that Marrone coerced or exploited MU. However, these facts that demonstrate the extent of Marrone's involvement with the preparation and execution of MU's estate documents (i) heighten his actual and perceived conflicts of interest and (ii) reinforce how obvious it should have been to Marrone that he had obligations to immediately address these conflicts.

[28] The third factor is Marrone's failure to immediately report the conflicts of interest. Because of that failure, we cannot know what steps IPC might have taken on learning of the facts giving rise to those conflicts. We also cannot know what steps MU might have taken on being advised of the conflicts.

[29] We do not agree with Marrone's submission that his pre-existing personal relationship with MU somehow lessens the seriousness of the misconduct. Indeed, as found by the Merits Panel, Marrone's close friendship with MU actually increased MU's vulnerability and was an aggravating factor.[16]

[30] Furthermore, in all the circumstances, we reject Marrone's submission that because he did not cause financial harm to MU, significant sanctions are not appropriate. While the level of financial harm suffered by a victim can be an

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[12] Merits Decision at paras 97-100
[13] Merits Decision at paras 101-112
[14] Merits Decision at paras 103-104
[15] Merits Decision at paras 114-118
[16] Merits Decision at paras 58 and 174

important factor when determining the level of seriousness of misconduct and imposing sanctions, it is neither the only factor nor is it a necessary factor to a conclusion that misconduct is serious and warrants significant sanctions. In this case, it is our view that the factors outlined are not lessened by the fact that MU may not have suffered financial harm in these circumstances and we find that Marrone's misconduct was very serious. We note that two of the MFDA decisions cited by Marrone involved settlement decisions regarding conflicts of interest where the fact that the client did not suffer financial harm was considered to be a mitigating factor.[17] As indicated earlier, we find settlements to be of limited assistance to us in our analysis and neither of these decisions takes away from our comments above about the seriousness of Marrone's misconduct.

2.3.2 Respondent's experience in the market

[31] Marrone was a registered mutual fund salesperson, employed for 20 years with IPC and its predecessor firm. He managed a book of business representing approximately 150 clients with approximately $6 million in mutual fund investments.

[32] The Merits Panel found that Marrone was aware of the IPC policies and procedures throughout his many years as an IPC Approved Person.[18] In December 2016, prior to his appointment as MU's attorney for property and health, alternate executor and sole beneficiary in May 2017, Marrone affirmed he had "read, fully understood, and will comply with" the requirements in IPC's National Policies and Procedures Manual 4.2 and the Compliance Bulletins issued by IPC from time to time.[19] Marrone admitted that he understood he could not accept "gratuities" from clients, and he understood that all direct or indirect monetary benefits he received from clients must flow through IPC. Staff reiterated these points in its submissions.

[33] We conclude that, given Marrone's 20 years of experience and knowledge of his employer's policies and procedures, his failure to comply with his obligations as a

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[17] *Sukman (Re)*, 2016 CanLII 29420 (CA MFDAC) (***Sukman***) at para 17; *Karasick (Re)*, 2015 CanLII 39865 (CA MFDAC) at para 52(f)

[18] Merits Decision at para 167

[19] Merits Decision at para 166

registrant, including with IPC's policies and procedures, and his choice to put his own interests ahead of those of his vulnerable client is deserving of significant sanctions.

2.3.3 Mitigating factors

[34] We note that Marrone has no history of discipline or misconduct. This one mitigating factor is insufficient, in our view, to counter the weight of the other sanctioning factors in our analysis.

[35] Staff submits that there is no evidence that Marrone accepts the seriousness of his misconduct. He is not entitled therefore to the mitigating benefit that accompanies admissions and genuine remorse.

[36] Marrone submits that Staff is seeking penalties that suggest Marrone manipulated and took advantage of MU's vulnerabilities, while the Merits Panel made no such findings. Marrone also submits that his non-compliance with IPC's policies and procedures did not cause any financial harm to MU. In addition, Marrone submits that he never acted under the Power of Attorney or the alternate executorship and that he has yet to receive (and may never receive) any benefit from MU's testamentary bequest.

[37] We agree that Marrone is entitled to make a full answer and defence to the allegations against him. However, Marrone continues to consider his personal relationship with MU as a positive, distinguishing factor rather than the aggravating factor the Merits Panel found it to be. We agree with Staff's submissions that Marrone's submissions during this sanctions and costs hearing continued to imply that his breaches were minor or technical in nature, a position rejected by the Merits Panel.[20] In addition, Marrone, in our view, misses the main conclusion in the Merits Decision that he failed to deal, honestly, and in good faith with his client MU by accepting the appointment as attorney for property, failing to renounce his appointment as alternate executor and not immediately reporting these conflicts of interest as well as the conflict of interest arising from MU naming him the sole beneficiary under her will, while she was clearly

[20] Merits Decision at para 191

vulnerable. As we note in [30], that Marrone did not financially harm MU is of little relevance.

[38] We conclude that Marrone has failed to acknowledge the importance of the industry's rules and his employer's policies regarding managing conflicts of interest and has not recognized the seriousness of his misconduct. He is not, therefore, entitled to the mitigating benefit that can come from a recognition of the misconduct and a genuine expression of regret. Furthermore, it is our view that his failure to acknowledge the seriousness of his misconduct weighs in favour of the need for specific deterrence.

2.3.4 Specific and general deterrence

[39] Staff submits that significant sanctions are required to achieve specific and general deterrence. As regards specific deterrence, Staff submits that Marrone knew the applicable rules and policies about the management of conflicts of interest, yet when faced with multiple conflicts he acted in his own interest rather than following those rules and policies. Staff also submits that Marrone has not demonstrated any insight into his misconduct, by continuing to imply that the breaches were minor or technical in nature.

[40] Staff submits that general deterrence is a central concern in this matter. Investors need to trust that their dealing representatives, in whom they have placed extraordinary trust, especially in instances of vulnerable clients, are treating them honestly, fairly and in good faith. Dealing representatives need to clearly understand that the consequences of ignoring conflicts of interests or putting their interests ahead of their clients cannot be considered the cost of doing business.

[41] Marrone submits that there is no need for specific deterrence as this case is unique given the close, family-like relationship between Marrone and MU and the fact that there is no evidence of there having been any issues or concerns with any of Marrone's other clients. Similarly, Marrone submits that general deterrence is not required as this is not a case of an advisor taking advantage of or manipulating a client.

[42] Marrone's misconduct is a breach of an obligation that is at the heart of the client relationship. We find that Marrone continues not to recognize the fact that

his close, personal relationship with a vulnerable client aggravated, rather than mitigated, conflicts of interest that had to be managed in accordance with the policies and procedures of his firm and the MFDA. In our view, specific deterrence is required as a result.

[43] In addition, it is our view that other registrants need to understand that a breach of their duty to deal honestly, fairly and in good faith with their clients, by not managing client conflicts of interest in the interests of their clients, will have serious consequences. We agree with Staff that sanctions should be such that registrants will realise the risks associated with putting their interests ahead of their client's are too high.

2.4 What are the appropriate sanctions?

[44] We have concluded that Marrone's misconduct was serious, he had significant experience in the market, he was aware of his firm's policies and procedures for managing conflicts of interest and chose not to comply with them, and his lack of recognition of the seriousness of his misconduct denies him the mitigating benefit that can come from an admission or demonstration of genuine remorse. In the circumstances, and considering the need for specific and general deterrence, significant sanctions are warranted in the public interest. We address the specific sanctions below.

2.4.1 Market bans

[45] We find that permanent market bans, including a permanent director and officer ban, are appropriate in this case.

[46] Staff submits that permanent market bans, including director and officer bans, are required to protect the public, preserve public confidence in the mutual fund industry, and ensure specific and general deterrence. Staff submits that permanent market bans are consistent with the decisions of the SROs in conflict of interest cases.

[47] Unlike the SROs, the Tribunal has the authority to restrict a respondent's right to be or act as a director or officer. Staff submits that it is also appropriate that Marrone be permanently banned from being or acting as a director or officer as avoiding potential and actual conflicts of interest and properly managing

conflicts, including disclosing them, is a cornerstone obligation of those holding these offices. Staff submits that Marrone's breaches show he cannot be trusted to uphold such obligations.

[48] In addition, Staff submits that permanent market bans will not prevent Marrone from earning a living but will prevent him from abusing his status as a registrant.

[49] Marrone submits that permanent market bans are inappropriate in the circumstances. Marrone has not worked as a mutual fund sales agent since IPC dismissed him without cause in January 2018. Marrone asserts that potential employers have withheld job offers due to the MFDA's investigation and he has not sought further employment as a mutual fund salesperson. Marrone submits that, as a result, he has effectively already experienced a market ban of five years, and no additional ban should be ordered.

[50] Marrone submits that an order banning him from being or acting as a director or officer is not appropriate because the conduct at issue in this case was limited to his role as an advisor.

[51] Marrone submits that specific and general deterrence would not be achieved in this case. The findings against him, he submits, were isolated to a set period involving only one client, with whom he shared a unique pre-existing personal relationship. He submits there is no evidence to suggest the breaches form part of a repeated pattern of behaviour.

[52] We conclude that permanent market bans are appropriate in this case for the following reasons. Marrone, as a registrant, was in a position of trust with a vulnerable client. The Merits Panel took his pre-existing relationship with his client into consideration and concluded that it was an aggravating, rather than mitigating, factor. Clients need to be able to trust that their advisors will properly manage conflicts and potential conflicts by putting their clients' interests ahead of their own. This obligation is at the heart of the client relationship. The Merits Panel found that Marrone put his interests ahead of his client's interests and, as a result, failed to deal honestly, fairly and in good faith with her. Marrone and other like-minded individuals need to understand that a breach of this obligation will not be tolerated and will have serious consequences.

[53] We conclude that a permanent director and officer ban is appropriate to be included in the market bans. We agree with Staff that management of conflicts of interest is a fundamental obligation of directors and officers. Marrone has demonstrated that he cannot uphold that obligation.

2.4.2 Administrative penalty

[54] We conclude that an administrative penalty of $500,000 is appropriate in this case.

[55] Staff submits that an administrative penalty of $500,000 reflects the aggravated nature of the breach and the need to protect vulnerable clients and is proportionate to the amount of money at issue in this matter. Staff emphasizes that the administrative penalty has to be proportional to the amounts at issue, and be large enough, given the size of the benefit that might be obtained, to send the message to Marrone and others that it is not worth the risk to put one's interests ahead of the interests of one's client.

[56] Marrone submits that the administrative penalty proposed by Staff is punitive and based on decisions that are not congruent with the facts of this case as they are either Tribunal decisions involving findings of fraud or SRO decisions with fraud-like elements. Marrone submits that, of the SRO decisions, three are helpful as they involve elements similar to this case where the fines imposed ranged from $10,000 to $80,000.[21] Two of these cases were settlements and one involved an agreed statement of facts.

[57] In addition, Marrone submits that his ability to work as a mutual fund sales representative has been permanently impaired. He estimates that his total loss of potential income since 2018 for his remaining work-life is approximately $1,300,000 to $1,700,000. These losses, Marrone submits, eclipse the administrative penalty sought by Staff and are an argument against a significant administrative penalty.

[58] We reject Marrone's position. In the circumstances of this case, it is our view that any loss of income suffered by Marrone is a foreseeable consequence of his misconduct and is irrelevant to our determination of the appropriate

[21] *Coccimiglio (Re)*, 2019 IIROC 27; *Sukman*; *McCullough (Re)*, 2017 IIROC 27

administrative penalty. Marrone did not provide any evidence regarding his financial status or any efforts to replace his income. Accordingly, we give this submission no weight.

[59] As we indicated earlier, given the unique nature of this case we do not find any of the cases cited by either party of particular assistance. The unique nature of this case is the significance of the conflicts of interest, which was elevated by the following factors:

a. MU's vulnerability;

b. the size of her account and the fact that it represented a significant proportion of Marrone's book of business;

c. the value of MU's estate;

d. the extent of Marrone's involvement with the preparation and execution of MU's estate documentation; and

e. the fact that Marrone's conduct deprived IPC and MU of the opportunity to address the conflicts of interest presented by MU appointing Marrone as her attorney and alternate executor, and naming him as her sole beneficiary.

[60] In this instance, and recognizing that the maximum amount of an administrative penalty is $1 million for each breach,[22] we find that an administrative penalty of $500,000 is appropriate. The amount of the administrative penalty also appropriately sends the message that Tribunal sanctions cannot be viewed as a mere licensing fee for failing to properly address conflicts of interest.

2.4.3 Reprimand

[61] Staff also seeks an order that Marrone be reprimanded. We decline to make that order.

[62] Staff submits that reprimands censure misconduct and reinforce the importance of compliance with Ontario securities law,[23] and are an appropriate sanction for registrants who breach the rules they are expected to know and uphold. Staff did

[22] *Act*, s 127(1)

[23] *Stableview (Re)*, 2022 ONCMT 17 at para 26

not make any submissions that identified anything unique to this case as warranting a reprimand.

[63] Marrone made no specific submissions regarding a reprimand.

[64] If a reprimand is treated as an automatic add-on to other sanctions, its value may be diminished in other circumstances where a reprimand is better suited.[24] We conclude that it is neither necessary nor in the public interest to issue a reprimand in this case where a breach of Ontario securities law has been found, significant sanctions are imposed and the reasons for decision sufficiently condemn the misconduct.

2.4.4 Disgorgement

[65] We decline to issue an order for disgorgement, for the following reasons.

[66] Staff seeks an order that Marrone disgorge an amount equal to any benefit he receives from MU's estate resulting from the fact that MU's will names him as sole beneficiary. The estate's value, based on the evidence submitted by Staff, is approximately $1,859,802 and Staff seeks an order for disgorgement of this amount. The estate and MU's will were the subject of ongoing litigation at the time of the sanctions and costs hearing and it was not known when or how that litigation would be resolved, what the value of the estate would be at the time of resolution, or whether Marrone would receive any amounts from the estate. Staff submits that, accordingly, the disgorgement order should provide that it may be varied if Marrone's interest in the estate is reduced.

[67] Marrone submits that disgorgement should not be ordered because this would override or interfere with MU's testamentary intentions, there is no causal connection between the breach of Ontario securities law found by the Merits Panel and Marrone's interest under MU's will, nothing in the *Act* or MFDA Rules prohibits Marrone from receiving a benefit under a client's will, and a disgorgement order would, in any event, be unfair in circumstances where Marrone has not received, and may never receive, any proceeds from MU's estate.

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[24] *Money Gate Mortgage Investment Corporation (Re)*, 2021 ONSEC 10 (***Money Gate***) at para 39

[68] The Tribunal may order disgorgement of any amounts obtained as a result of the non-compliance with Ontario securities law.[25] By ensuring that persons do not benefit from their misconduct, a disgorgement order serves the goals of general and specific deterrence.[26]

[69] The preliminary issue for determination by us is whether Marrone obtained (or kept) his interest as sole beneficiary of MU's estate as a result of his non-compliance with Ontario securities law. We conclude, for the reasons set out below, that this pre-condition to a disgorgement order is not met on the facts of this case. Given this conclusion, it was not necessary for us to consider Marrone's other submissions as to why a disgorgement order should not be issued.

[70] The Merits Decision does not find or conclude that Marrone obtained or kept his interest as the sole beneficiary of MU's estate as a result of a breach of Ontario securities law. Furthermore, we conclude that the findings of fact in the Merits Decision also do not permit us to find or conclude that Marrone obtained or has kept his interest as a beneficiary of MU's estate as a result of a breach of Ontario securities law.

[71] The Merits Decision concluded that: "Marrone acted unfairly, dishonestly and in bad faith towards his vulnerable client by failing to follow the required procedures for dealing with conflicts or potential conflicts of interest, which was a significant breach of the MFDA Rules and IPC policies and procedures, and this constituted a breach of OSC Rule 31-505."[27] This was the breach of Ontario securities law that was found.

[72] The Merits Panel found breaches of MFDA Rules 2.3.2(a)(1) and 2.3.1(a)(ii) arising from Marrone's acceptance of the Power of Attorney for property and his failure to renounce his appointment as alternate executor. In addition, the Merits Panel's finding of a breach of Ontario securities law was based upon Marrone's failure to comply with MFDA Rule 2.1.4, which mandates a multi-step process for the identification, reporting, assessment, and management of conflicts of

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[25] *Act*, s 127(1)

[26] *Money Gate* at para 44

[27] Merits Decision at para 195

interest[28] and his failure to comply with IPC's policies and procedures Manual 4.2 that mirrored MFDA Rule 2.1.4.[29] Marrone was found to have breached Ontario securities laws because, in part, he failed to immediately disclose to IPC the conflict or potential conflict of interest arising from his being designated as sole beneficiary and alternate executor under MU's will and being appointed attorney for property.

[73] There is nothing in the Merits Decision that supports a conclusion that Marrone's failure to properly disclose MU's testamentary bequest to IPC either resulted in Marrone being named as a beneficiary under MU's will or remaining as a beneficiary under MU's will.

[74] To the contrary, the Merits Decision addresses the question of what might have happened had Marrone disclosed the bequest to IPC and goes only so far as to observe that such disclosure "may have put his significant inheritance at risk."[30] The Merits Decision's recognition of the possibility that timely compliance by Marrone with his disclosure obligations "may" have put the inheritance under MU's will at risk, is very different than a finding on a balance of probabilities that Marrone's failure to disclose the conflict accounts for or resulted in his interest or continued interest under MU's will.

[75] Based on the available record, we are not in a position to know or decide what would have transpired had Marrone immediately disclosed MU's testamentary gift to IPC. Nor can we know or decide what MU would have done and whether she might have revoked the bequest had she been advised of the conflict or potential conflict of interest.

[76] Regarding the preliminary issue of whether Marrone obtained (or kept) his interest as sole beneficiary of MU's estate as a result of non-compliance with Ontario securities law, Staff made oral submissions that a sufficient nexus between Marrone's benefit under MU's will and Marrone's breach of Ontario securities law exists. In Staff's submission, a sufficient nexus exists because Marrone's failure to disclose the conflict to IPC prevented IPC from investigating

[28] Merits Decision at para 139

[29] Merits Decision at paras 142, 167

[30] Merits Decision at para 179

and dealing with the conflict and also meant that MU was not advised of the conflict and was unable to react to it. Staff also submitted that his breach of Ontario securities law is the only reason that no one can say what would have happened to Marrone's interest under MU's will had the conflict been appropriately disclosed. Staff submitted that it would be regulatory mischief if a disgorgement order is not made and Marrone is entitled to retain benefits under MU's will, especially given that Marrone could not properly have accepted money from MU when she was alive. Staff's arguments did not satisfy us that a disgorgement order can be made in this case.

[77] Although the MFDA guidance on accepting monetary benefits from clients, which provides that "all monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member"[31] is referenced in the Merits Decision, it did not ground the Merits Decision's finding of a breach of Ontario securities law. At the merits hearing, Marrone submitted that being a beneficiary of a client's estate is not a breach of MFDA Rules or IPC policies and procedures, that IPC policies do not prohibit the receipt of monetary benefits from a client, and that he is not in breach of IPC policies as he has not yet received any benefit from the estate.[32] Despite these matters being raised and argued, the Merits Panel did not find that receipt of a benefit by Marrone by way of his designation as sole beneficiary under MU's will (or Marrone's failure to disavow MU's testamentary bequest) was a breach of MFDA Rules or IPC policies and procedures or a breach of Ontario securities law.

2.4.5 Conclusion regarding the appropriate sanctions

[78] We conclude that it is in the public interest to order that Marrone be permanently banned from the capital markets, including a director and officer ban, and pay an administrative penalty of $500,000.

3. COSTS ANALYSIS

[79] The Tribunal may order a person to pay the costs of an investigation and hearing if the Tribunal is satisfied that the person has not complied with Ontario

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[31] Merits Decision at para 155

[32] Merits Decision at para 157

securities law.[33] A costs order is not a sanction. It is a means to recover investigation and hearing costs. Respondents should contribute to enforcement costs where there has been a finding that they contravened Ontario securities law.[34]

[80] The Tribunal considers several factors when making a costs order,[35] including those most relevant, in our view, to this case:

a. the seriousness of the allegations and the parties' conduct;

b. the reasonableness of the requested costs;

c. OSC Staff's conduct during the investigation and the proceeding, and how it contributed to the costs of the investigation and the proceeding;

d. whether the respondent contributed to a shorter, more efficient, and more effective hearing; and

e. whether the respondent participated in a responsible, informed and well-prepared way.

[81] Staff seeks costs of $100,000, which it submits reflects a discount of almost 60 percent of the costs it incurred.

[82] Staff submits that the costs are reasonable. This case involved a coordinated effort between the MFDA and Staff, who worked together on the case and acted jointly as litigation counsel. The Merits Panel expressly concluded that this was an efficient and effective use of both MFDA and Staff resources, resulting in a more efficient investigation.[36]

[83] Staff has not included in its request any costs for work by MFDA counsel, investigators, or the MFDA investigator witness. Staff included in its costs calculation only the time spent by Staff's lead investigator, lead counsel during the investigation and lead counsel during the merits hearing. All other Staff costs

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[33] *Act*, ss 127.1(1), 127.1(2)

[34] *2241153 Ontario Inc. (Re)*, 2016 ONSEC 10 at para 16

[35] *Bradon* at paras 114-115

[36] Merits Decision at para 50

were excluded. With these exclusions, Staff's costs came to $235,000. Staff is, however, seeking $100,000.

[84] The merits hearing took place on 11 days over 5 months, followed by written submissions. Staff submits that Marrone contributed to the length of the proceeding as he made no admissions and advanced multiple arguments as to why the allegations against him should be dismissed in their entirety, all of which were rejected by the Merits Panel. Staff also submits that Marrone's choice to testify over three hearing days contributed to the length and complexity of the proceeding, as the Merits Panel did not find him a credible witness and did not believe the story he was telling.[37]

[85] Marrone submits that a significant amount of Staff's costs was incurred investigating and litigating whether Marrone took advantage of MU, and the true nature of Marrone's relationship with MU, including preparing witnesses who offered little probative evidence. The Merits Panel ultimately accepted that Marrone and MU were personal friends and placed little weight on the evidence of two of the seven witnesses called by Staff.[38] Yet, Marrone had to counter this evidence.

[86] Marrone originally proposed that Staff's requested costs be reduced by the amount associated with the hearing days devoted to the evidence of those two witnesses. He subsequently withdrew that request. Marrone submitted that while the costs Staff sought were excessive, it was difficult to provide a specific alternate cost calculation as Staff's affidavit in support of costs provided insufficient particulars. In oral submissions Marrone suggested costs in the range of $25,000 to $50,000. We find that suggested range to be too low.

[87] In our view, a cost order of $85,000 is appropriate. In arriving at this amount for costs, we do not treat the fact that Staff's cost request excludes the MFDA's costs as an additional discount to Staff's costs. It is not clear to us that the Tribunal's ability to order payment of investigation and hearing costs under s. 127.1 accords us the authority to order payment of the costs of another organization. We note that hearing costs are limited to those incurred by or on

[37] Merits Decision at para 57

[38] Merits Decision at paras 61, 65

behalf of the Commission, while there is no such limitation in respect of investigation costs. In the absence of any submissions on this point, we decline to consider the exclusion of MFDA's costs as an additional discount, without drawing any conclusions on the question of whether s. 127.1 might permit the Tribunal to order payment of investigation costs of SROs.

[88] We disagree with Staff that advancing a vigorous defence should have an impact on costs in this instance. A respondent is entitled to make full answer and defence to the allegations against them. While the Merits Panel did not find Marrone credible, there is nothing in the Merits Decision to suggest that his defence was improper, vexatious or unreasonable.

[89] We agree with Marrone that there should be some discount to the costs claimed by Staff to reflect the fact that investigative and hearing time was spent on a theory and witnesses that the Merits Panel ultimately discounted. As noted, Marrone did not offer specific guidance on how such a discount should be arrived at, which would have been of assistance to us in determining the specific quantum of the discount. We have chosen to apply a discount to Staff's requested amount resulting in a costs order of $85,000. This further discount is not based upon any precise assumptions or specific assessment of investigative and hearing time spent on the theory and witnesses that the Merits Panel discounted. Rather, the discount was arrived at by exercising our discretion to consider that Staff expended time and resources pursuing a theory that was ultimately not accepted by the Merits Panel.

4. CONCLUSION

[90] For the above reasons, we shall issue an order that provides that:

a. any registration granted to Marrone under Ontario securities law is terminated permanently, pursuant to paragraph 1 of s. 127(1) of the *Act*;

b. Marrone shall immediately resign any position that he holds as a director or officer of an issuer, pursuant to paragraph 7 of s. 127(1) of the *Act*;

c. Marrone is prohibited permanently from becoming or acting as a director or officer of any issuer, pursuant to paragraph 8 of s. 127(1) of the *Act*;

d. Marrone is prohibited permanently from becoming or acting as a director or officer of any registrant, pursuant to paragraph 8.2 of s. 127(1) of the *Act*;

e. Marrone is prohibited permanently from becoming or acting as a director or officer of any investment fund manager, pursuant to paragraph 8.4 of s. 127(1) of the *Act*;

f. Marrone is prohibited permanently from becoming or acting as a registrant, an investment fund manager or a promoter, pursuant to paragraph 8.5 of s. 127(1) of the *Act*;

g. Marrone shall pay an administrative penalty of $500,000, pursuant to paragraph 9 of s. 127(1) of the *Act*; and

h. Marrone shall pay Staff's costs of the investigation and the hearing in the amount of $85,000, pursuant to s. 127.1 of the *Act*.

Dated at Toronto this 28th day of February, 2023

"*M. Cecilia Williams*"

M. Cecilia Williams

"*Andrea Burke*"

Andrea Burke

"*William J. Furlong*"

William J. Furlong