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: *First Global Data Ltd (Re)*, 2023 ONCMT 25
Date: 2023-06-22
File No. 2019-22

IN THE MATTER OF
FIRST GLOBAL DATA LTD., GLOBAL BIOENERGY RESOURCES INC., NAYEEM ALLI, MAURICE AZIZ, HARISH BAJAJ and ANDRE ITWARU

REASONS AND DECISION

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

Adjudicators:	Timothy Moseley (chair of the panel) William J. Furlong Dale R. Ponder	
Hearing:	April 3 and 4, 2023	
Appearances:	Mark Bailey Charlie Pettypiece Vincent Amartey	For Staff of the Ontario Securities Commission
	Rebecca Shoom	For Global Bioenergy Resources Inc.
	Nayeem Alli	Appearing on his own behalf
	Simon Bieber	For Maurice Aziz
	Wendy Sun	For Harish Bajaj
	Kevin Richard	For Andre Itwaru
	No one appearing for First Global Data Ltd.	

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REASONS AND DECISION

1. OVERVIEW

[1] On September 15, 2022, this Tribunal found[1] that in more than 100 separate transactions, 80 investors invested approximately $4.46 million in debentures of the respondent First Global Data Ltd. (**First Global**). The fundraising was carried on by the respondent Global Bioenergy Resources Inc. (**GBR Ontario**) and its two principals, the respondents Maurice Aziz and Harish Bajaj. One investor, whom we refer to as **EH**, loaned a further $450,000 directly to GBR Ontario or its Colombian counterpart. The investors lost all their money.

[2] In that decision (the **Merits Decision**), the Tribunal found that:

a. all respondents illegally distributed the First Global debentures, since the sales were completed without a prospectus or an exemption from that requirement;

b. GBR Ontario and Bajaj engaged in the business of trading those debentures without being registered, and Aziz was deemed to have not complied with Ontario securities law in that respect;

c. GBR Ontario, Aziz and Bajaj perpetrated securities fraud with respect to the First Global debentures;

d. GBR Ontario and Aziz perpetrated securities fraud with respect to the loans from EH; and

e. First Global contravened Ontario securities law in issuing one set of interim financial statements that improperly recognized revenue regarding purported licence transactions, and First Global's principals, the respondents Andre Itwaru and Nayeem Alli, were deemed to have not complied with Ontario securities law in that respect.

[3] Staff asks that we impose sanctions against the respondents and that we order them to pay a portion of the Ontario Securities Commission's costs of the

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investigation and this proceeding. For the reasons we set out below, we conclude that it would be in the public interest to order that:

a. First Global and its principals Itwaru and Alli, jointly and severally, disgorge to the Commission $1.51 million, being the amount retained by First Global from the sale of First Global debentures;

b. GBR Ontario and its principals Bajaj and Aziz, jointly and severally, disgorge to the Commission $2.95 million, being the amount that flowed to or for the benefit of GBR Colombia from the sale of First Global debentures;

c. GBR Ontario and Aziz, jointly and severally, disgorge to the Commission an additional $450,000, being the amount loaned directly from EH;

d. First Global pay an administrative penalty of $300,000, and its principals Itwaru and Alli pay administrative penalties of $300,000 and $275,000, respectively;

e. GBR Ontario pay an administrative penalty of $825,000;

f. Bajaj pay an administrative penalty of $750,000;

g. Aziz pay an administrative penalty of $725,000;

h. the respondents be subject to restrictions on their ability to participate in the capital markets (*e.g.,* prohibitions against trading, and against acting as directors and officers), to varying degrees, as explained further below; and

i. the respondents pay costs as follows:

    i. $523,088 by First Global, Itwaru and Alli, jointly and severally;

    ii. $452,723 by GBR Ontario, Bajaj and Aziz, jointly and severally; and

    iii. an additional $104,474 by GBR Ontario and Aziz, jointly and severally.

[4] We begin our analysis by reviewing the legal framework for sanctions. We then analyze how the facts of this case lead us to the sanctions that we have decided would be appropriate. Finally, we consider Staff's request for costs.

2. ANALYSIS – SANCTIONS

2.1 Introduction

[5] The Tribunal may impose sanctions under s. 127(1) of the *Securities Act* (the **Act**)[2] where it finds that it would be in the public interest to do so. The Tribunal must exercise this jurisdiction in a manner consistent with the Act's purposes, which include the protection of investors from unfair, improper or fraudulent practices, and the fostering of fair and efficient capital markets.[3]

[6] The sanctions listed in s. 127(1) of the Act are protective and preventative, and are intended to be exercised to prevent future harm to Ontario's capital markets.[4]

[7] Sanctions must be proportionate to the respondent's conduct in the circumstances of the case.[5] Fashioning the appropriate sanctions is a highly contextual exercise that is dependent on the facts and findings in the particular case. In the analysis that follows, we refer to decisions of the Tribunal in other cases, which are helpful but of limited precedential value when determining the appropriate length of a market ban or the amount of an administrative penalty.[6]

[8] We break our sanctions analysis down into four sections:

a. a review of the factors applicable to sanctions generally;

b. consideration of how those factors apply to each of the three following sets of transactions:

   i. the First Global debentures;

   ii. First Global's purported licence transactions; and

   iii. the loans from EH;

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[2] RSO 1990, c S.5

[3] *Securities Act*, s. 1.1

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

[5] *Bradon Technologies Ltd (Re),* 2016 ONSEC 19 at para 28; and at para 47, citing *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 60

[6] *Quadrexx Hedge Capital Management Ltd (Re),* 2018 ONSEC 3 (***Quadrexx***) at para 20

c. in light of those factors, analysis of Staff's request for financial sanctions, being disgorgement orders and administrative penalties; and

d. analysis of Staff's request for restrictions on participation in the capital markets (including prohibitions against trading, and against acting as directors and officers).

2.2 Factors applicable to sanctions

[9] In previous decisions, the Tribunal has identified a non-exhaustive list of factors applicable to the determination of appropriate sanctions. Those include:

a. the respondents' level of activity in the marketplace, or in other words, the "size" of the contravention;

b. the seriousness of the misconduct;

c. the profit made or loss avoided from the misconduct;

d. whether the misconduct was isolated or recurrent;

e. the respondents' experience in the marketplace;

f. any mitigating factors; and

g. the likely effect that any sanction would have on the respondent ("specific deterrence") as well as on others ("general deterrence").[7]

[10] The Tribunal has also previously discussed how a respondent's inability to pay might be relevant when determining financial sanctions. We return to this factor below.

[11] We will now address the above seven factors and how they apply to each of the three sets of transactions at issue. We begin with the First Global debentures.

2.3 First Global debentures

2.3.1 The respondents' level of activity in the marketplace, or, the size of the contravention

[12] The first of the seven factors listed above is often referred to as "the respondents' level of activity in the marketplace". More precisely, it is a

[7] *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746

collection of characteristics about the activity that made up the contravention. Such characteristics typically include one or more of: the dollar amount, the number of investors affected, the number of individual breaches, and the duration of the misconduct.

[13] The eighty investors in the First Global debentures lost approximately $4.46 million in more than 100 transactions. The amount of the loss places this case neither at the most serious nor the least serious end of the spectrum of cases that come before the Tribunal. The amount is significant, though, and can undermine investor confidence in the integrity of the capital markets, especially because it represented a total loss of the amount invested.[8] Further, the amount combines with the large number of investors to make this a wide-scale fraud.

2.3.2 Seriousness of the misconduct

2.3.2.a Introduction

[14] In assessing the seriousness of the respondents' misconduct, we begin by considering the inherent nature of the contraventions. Then, because frame of mind is particularly relevant for sanctions for fraud, we review each respondent's frame of mind at the time of the contraventions.

2.3.2.b The nature of the contraventions

[15] All three types of contraventions relating to the First Global debentures were inherently serious.

[16] The illegal distribution of the debentures violated the prospectus requirement, a cornerstone of Ontario's securities regulatory regime. A prospectus is fundamental to protecting investors because it ensures they have full, true and plain disclosure of information that equips them to properly assess the risks of an investment and make an informed decision.[9]

[17] Engaging in the business of trading securities without being registered, which GBR Ontario, Bajaj and Aziz did, violated another cornerstone of the securities regulatory regime. The registration requirement ensures that those who engage

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[8] *North American Financial Group Inc (Re)*, 2014 ONSEC 28 (***North American Sanctions***) at para 41

[9] *Limelight Entertainment Inc (Re)*, 2008 ONSEC 4 (***Limelight Merits***) at para 139

in the business of trading in securities are proficient and solvent, and that they act with integrity. Unregistered trading defeats these necessary legal protections and undermines investor protection and the integrity of the capital markets.[10]

[18] GBR Ontario, Bajaj and Aziz also perpetrated fraud, which is one of the most egregious violations of securities laws. It often causes direct harm to investors, and it undermines confidence in the capital markets.[11]

2.3.2.c The individual respondents' frame of mind at the time of the contravention

[19] We also consider the individual respondents' frame of mind at the relevant time.

[20] Staff did not allege, nor did the merits panel find, that any of the respondents intended to deprive investors of their money. However, the inattentiveness shown by First Global, Itwaru and Alli (whom we refer to as **the First Global parties**) was serious, and the recklessness shown by GBR Ontario, Bajaj and Aziz (whom we refer to as **the GBR parties**) was extreme.

[21] Itwaru seeks to downplay his responsibility. He describes his conduct as "innocent mistakes",[12] and says that everyone makes mistakes. He submits that he was not neglectful in the First Global debenture offering, because First Global's in-house counsel was engaged throughout and prepared the subscription agreements that Itwaru signed. Itwaru also submits that the merits panel accepted that he believed at the time that his only obligation was to ensure that each investor completed an accredited investor certificate. We do not read the merits panel's finding that way, but in any event, we cannot accept Itwaru's submission that there was no neglect on his part. For example, Itwaru testified in the merits hearing that First Global's outside counsel's "urging always was make sure that the investors review the accredited investor certificate [and] make sure that they understand" [emphasis added].[13] By Itwaru's own

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[10] *Limelight Merits* at para 135; *Black Panther (Re)*, 2017 ONSEC 8 (***Black Panther***) at para 41

[11] *Money Gate Mortgage Investment Corporation (Re)*, 2021 ONSEC 10 (***Money Gate***) at para 14

[12] Written Submissions of Itwaru, February 9, 2023, at para 29

[13] Merits Hearing Transcript, January 14, 2021, at p 49 lines 5–8

admission, he took no steps to follow that advice or to ensure that others were doing so.

[22] Alli also attempts to downplay his responsibility. He submits that at every step, he and Itwaru merely followed the instructions of, and received approval from, First Global's board of directors. That submission is implausible and is unsupported by findings by the merits panel or evidence in the record. Even if it were true, it would not relieve Alli of responsibility, since no officer is required to take instructions from the board of directors, other than in exceptional circumstances not applicable here.

[23] As for GBR Ontario's principals, the merits panel found that Bajaj and Aziz were at least reckless as to whether there were sufficient operating assets to produce the necessary income, and as to whether any assets had been pledged as promised to secure the First Global debentures. The panel found that those respondents were "cavalier" in promising that investment in the debentures was 100% secure, guaranteed and risk-free.[14] Bajaj in particular was cavalier about what assets, if any, backed the debentures.[15]

[24] In their submissions, neither Bajaj nor Aziz directly addresses his frame of mind at the time of the contraventions. Instead, they both describe themselves as victims of deception. They may be correct, although there is no finding to that effect. Even if there were, it should not help them. They failed to exercise any reasonable diligence about whether they were being deceived, and that failure caused investors significant losses. It would be perverse to find that the respondents are less culpable because their own recklessness allowed them to be deceived.

2.3.2.d Conclusion about the seriousness of the contraventions related to the First Global debentures

[25] Each of the three contraventions related to the First Global debentures (illegal distribution, engaging in the business of trading without being registered, and fraud) is inherently serious. The investors lost all their funds. None of the

[14] Merits Decision at paras 7 and 399

[15] Merits Decision at para 332

individual respondents sought to cause a loss for investors, but Itwaru and Alli were inattentive, and Bajaj and Aziz were reckless or cavalier.

2.3.3 Did the respondents benefit (*e.g.*, make a profit or avoid a loss) from the misconduct related to the First Global debentures?

[26] The third of the seven factors listed above asks whether the respondents made a profit, or avoided a loss, as a result of their misconduct. A contravention will generally be worthy of greater sanctions when the contravening party benefits from the misconduct.

[27] First Global benefited directly by receiving $1.51 million of the proceeds from the sale of its debentures. Itwaru and Alli did not benefit directly, but they did benefit indirectly by the infusion of capital into their business that had been experiencing financial difficulties. We cannot accept Itwaru's and Alli's submissions that they did not benefit, which overlook the personal financial interest that they had in First Global's continuing operation and future success.

[28] The remaining $2.95 million flowed to, or for the benefit of, GBR Colombia. Bajaj benefited indirectly as a shareholder of that company, and both Bajaj and Aziz benefited indirectly as shareholders of GBR Ontario, which was generally conflated with GBR Colombia, as the merits panel found and as we explain below. In addition, Bajaj directly benefited by being paid $114,000 in referral fees and $141,000 as reimbursement of expenses that his company incurred.

[29] What the GBR companies and their principals chose to do with the funds afterwards does not change the fact of the benefit in the first place. We therefore cannot agree with GBR Ontario's submission that it derived no benefit because any funds that went into GBR Ontario's bank account were withdrawn and distributed to others.

2.3.4 Were the First Global debenture-related contraventions isolated or recurring?

[30] The fourth of the seven factors asks whether the misconduct was an isolated instance or a recurring series of events.

[31] The misconduct in this case was recurring. The distributions were to 80 investors in 104 separate transactions, over an eight-month period. We reject Itwaru's characterization of these contraventions as isolated.

[32] There is no dispute that the associated misrepresentations giving rise to the finding of fraud were repeated frequently and by various methods of publication.

2.3.5 The individual respondents' experience in the marketplace

[33] The fifth of the seven factors refers to the respondents' experience in the marketplace.

[34] Itwaru's and Alli's experience with a public company was limited to their involvement with First Global. At the time of the misconduct in this case, Itwaru had been First Global's CEO and chair for approximately three years. Alli had been in his role for approximately one year. We do not consider either Itwaru or Alli to have had extensive experience in the marketplace, and particularly with respect to the raising of public funds.

[35] There was no evidence that Bajaj or Aziz had any experience working with public companies, or more generally with the raising of funds from the public. However, both had experience in the financial services industry. Bajaj had previously been a registrant selling scholarship plans, and was a financial advisor. Aziz says that he had worked as an external consultant, connecting businesses to other parties who could help them solve problems.

2.3.6 Mitigating factors

[36] We turn now to identify any mitigating factors.

[37] Staff submits that there are none. Staff asserts that the respondents have neither expressed remorse nor even acknowledged the seriousness of their conduct. We consider those submissions to be an over-generalization, although it is fair to say that every individual respondent tried to distance himself from the misconduct and to blame others.

[38] Staff does acknowledge that all four individual respondents co-operated with Staff's investigation once the issues came to light. However, Staff submits that we ought not to give this co-operation weight, because capital markets

participants are expected to co-operate with the regulator. Staff says the respondents were simply doing what they were expected to do.

[39] There is some validity to that, but we do not think the point goes as far as Staff suggests. The expectation of co-operation is less clear for non-registrants, as these respondents are, than it is for registrants. Further, and in general, some respondents co-operate in investigations, and some do not. There should be an incentive for co-operating, and we therefore take the respondents' co-operation into account as a mitigating factor.

[40] We also note that none of the respondents has previously been the subject of regulatory proceedings. Given the seriousness of the contraventions in this case, however, this mitigating factor is of relatively little weight.

[41] Some of the respondents mention the losses that they themselves have incurred. We agree with Staff's submission that we should not regard this as a mitigating factor, since such losses were entirely of the respondents' own making and flowed from the contraventions.

[42] We will now review potential mitigating factors with respect to each individual respondent.

[43] Itwaru submits that it is apparent from his opening statement at the merits hearing (which he delivered himself, not through counsel) that he recognizes the seriousness of his actions and has demonstrated remorse. That is a generous interpretation. When pressed on this point at the hearing before us, Itwaru's counsel pointed to only two sentences in Itwaru's opening statement. In the first, Itwaru declares that he never intended to harm anyone. That may be, but Staff made no such allegation.

[44] In the second sentence, Itwaru refers to work he says is ongoing to reach a resolution that would benefit all of First Global's stakeholders. He further describes that initiative in his affidavit filed on this hearing. We need not review the initiative in detail; it suffices to say that there is no basis to conclude that the initiative is promising. Even if it were, one could reasonably doubt whether previous First Global investors, who lost their entire investment, would be willing to join in another venture in which Itwaru is the president and CEO, and through

which the investors would have to be patient "to recover their investments over time", to use words attributed to Itwaru in First Global's news release.[16]

[45] In Itwaru's testimony at the merits hearing, he acknowledged that he made mistakes, and said he is sorry that events unfolded as they did. That is unsurprising, given that according to Itwaru, he lost approximately $900,000 plus the value of his First Global shares.

[46] We accept that Itwaru would like to make things right. Giving him the benefit of the doubt, these facts are some evidence of remorse. However, the value of that remorse is undermined by the absence of a clear acknowledgment of the seriousness of the misconduct and of his role in it, and the kind of introspection that would demonstrate a clear understanding of the root causes of the contraventions.

[47] As for Alli, he asserts that he has taken on over $700,000 of commitments personally to repay investors. The evidence in the record confirms that he did make a repayment of $80,000 to a senior First Global employee. He also made interest payments of approximately $15,000 to investor EH regarding EH's loans to GBR Ontario, although he did so on the basis that he would get repaid by GBR. He further testified that he assumed obligations for an additional US$100,000 and C$60,000 to investors, although this evidence was not corroborated, and it is not clear that Alli indeed bears legal responsibility for these amounts, or that he has actually made any payments to those investors.

[48] Overall, we are not persuaded that any of this evidence reflects true remorse by Alli, as opposed to a reflection of the sense of obligation that he felt as a principal and co-founder of First Global. Similarly, we cannot give credit for other payments he mentions that he made for First Global's operating expenses or to vendors on behalf of First Global, because we have no basis to conclude that he made those payments solely for the benefit of the debenture holders, instead of for his own benefit. As a result, we cannot accept these assertions as a mitigating factor.

[16] Exhibit B to the affidavit of Andre Itwaru sworn February 8, 2023

[49] Finally, while we are sympathetic to the health challenges Alli describes, we cannot accept his unsubstantiated assertion that they are related in part to this proceeding. In any event, it was his own conduct that precipitated this proceeding.

[50] As for Bajaj, in his affidavit filed for this hearing, he states that he is remorseful for his involvement in the fundraising, including for presentations given to investors and any inaccurate representations. He acknowledges that his involvement harmed investors and deprived them of their savings. He regrets getting involved with Adriana Rios Garcia (who incorporated GBR Colombia and who figured prominently in the merits panel's discussion of the status of the Colombian assets) and Garcia's husband Martin Grenier. Bajaj points out that he lost $25,000 himself in the venture. We note, as Bajaj does, that this amount is a fraction of what some investors lost.

[51] We accept Bajaj's assertions as far as they go, but we cannot give them significant weight. Bajaj's affidavit contains no self-reflection or consideration of his responsibility and role, and what mistakes he made that caused the misrepresentations to investors. Without that self-analysis, his assertions do not offer comfort to those who would be concerned about investor protection and the integrity of the capital markets.

[52] Further, we cannot give effect to Bajaj's submission that we ought to consider the shame or financial pain that any sanction would cause. The challenges that Bajaj faces are of his own making, and consequences such as shame naturally flow from misconduct of this nature, no matter what the sanctions are.

[53] As for Aziz, he asserts that he made efforts to help some investors after the problems came to light. However, we have no evidence about any such efforts with respect to the First Global debentures, beyond Aziz being part of conversations that explored the kind of solution that Itwaru was contemplating, as mentioned above.

[54] Finally, we must reject the implication in some of the respondents' submissions that their reliance on legal advice throughout is a mitigating factor. For substantially the reasons set out in the merits decision regarding Bajaj's

potential defence of that nature,[17] we find that none of the respondents has provided a sufficient foundation for us to accept their suggestion.

2.3.7 Specific and general deterrence

2.3.7.a The respondents generally

[55] That brings us to the last item in our list of relevant factors, *i.e.*, specific and general deterrence. We begin with comments that apply equally to all respondents.

[56] General deterrence is only one consideration that must be balanced against the other factors relating to sanctions. However, it is always an important consideration, especially for contraventions as serious as those related to the First Global debentures. It must be clear to others who might be inclined to engage in similar misconduct that doing so will attract significant sanctions.

[57] For the purposes of investor protection and confidence in the capital markets, specific deterrence is relevant for all of the respondents, especially in the absence of a clear acknowledgment of what led to the contraventions and investor losses.

2.3.7.b GBR Ontario

[58] We examine GBR Ontario separately because it submits that it is in a different situation. It says that considerations of specific deterrence should not apply to it, because the merits panel made no findings of misconduct by the company apart from those committed by Bajaj and Aziz. It also says that neither individual plays a functional role in managing or operating the company, which has had no operations for several years and has a new director who wants the company to be "clean".

[59] We reject these arguments. A corporation can act only through individuals, so it is illogical to say that the corporation should not be held responsible for misconduct perpetrated by individuals acting on behalf of the corporation. Further, no corporate respondent can absolve itself of findings made against it

[17] Merits Decision at paras 587-595

simply because there have been changes on the board or in management. The merits panel's findings against GBR Ontario stand.

[60] Uncontradicted evidence before us does show that GBR Ontario has no operations, active bank accounts or other assets. It also shows that a substantial investor in the First Global debentures took on roles as a director of GBR Ontario and as its president and treasurer, well after the misconduct by others, in an effort to maximize his chances of recovering some of his investment.

[61] That individual makes clear that he does not intend for GBR Ontario to conduct any further business. In its submissions, GBR Ontario refers to the decision of the British Columbia Securities Commission in *Oei (Re)*, in which that Commission held that in similar circumstances, "there is little public interest necessity" in imposing certain sanctions.[18] However, the same Commission found in an unrelated case that it was in the public interest to impose certain sanctions against dissolved companies because those companies can be easily reinstated.[19] This Tribunal adopted that reasoning when imposing reciprocal sanctions against the same entity following the British Columbia decision.[20]

[62] As this Tribunal did in that case, we prefer the latter reasoning. GBR Ontario can easily be reactivated. In addition, we cannot be certain about control of GBR Ontario, in that despite its current president's assertion that Bajaj has resigned as a director, the corporate profile indicates otherwise, and Bajaj testified that he is still a director as of February 2023. Finally, we think it important for deterrence purposes that a still-existent corporation be held accountable for its actions. Accordingly, we will impose sanctions against GBR Ontario without reference to its current status.

2.3.8 First Global

[63] First Global is apparently defunct, did not participate in this hearing and therefore made no submissions. As with GBR Ontario, we will impose sanctions against First Global without reference to its current status.

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[18] 2018 BCSECCOM 231 at para 128

[19] *SBC Financial Group Inc (Re)*, 2018 BCSECCOM 267 at para 45

[20] *SBC Financial Group Inc (Re)*, 2018 ONSEC 60 at paras 28-29

2.3.9 Conclusion about factors to be considered

[64] The respondents are not experienced capital markets participants. Their contraventions related to the First Global debentures were inherently serious, numerous, recurring, and of moderate but significant size. Investors lost all of their money. Itwaru and Alli were inattentive, and Bajaj and Aziz were reckless or cavalier. Every individual respondent benefited indirectly from the misconduct, although only Bajaj benefited directly, and not to a great extent.

[65] None of the respondents had previously been the subject of regulatory proceedings, and all of them co-operated with Staff's investigation once the problems came to light. They have, in one way or another, expressed some limited remorse, although no outright acknowledgment or clear understanding of their responsibility and what caused the contraventions.

[66] Both general and specific deterrence are important considerations in our determination of what sanctions would be in the public interest. This applies equally to GBR Ontario, despite its assertions about its current status.

[67] We will return to consider appropriate sanctions relating to the First Global debentures, after we discuss the sanction factors relating first to the purported licence transactions and then to the loans from EH.

2.4 First Global's purported licence transactions

2.4.1 Introduction

[68] In this section we will review the sanction factors as they relate specifically to the purported licence transactions, and to the resulting improper recognition of revenue, for which First Global, Itwaru and Alli are responsible. We will not repeat our discussion from above about their experience in the marketplace, or about the general principles underlying various sanction factors.

2.4.2 The respondents' level of activity in the marketplace, or, the size of the contravention

[69] The improper reporting of revenue was an isolated contravention that arose from only one set of financial statements, but it involved a significant misstatement. As the merits panel found, First Global's restated financial reports for the 21

months ended September 30, 2017, reduced revenue from $17.4 million to $4.7 million and increased First Global's net loss from $505,000 to $12.4 million.

2.4.3 Seriousness of the misconduct

[70] First Global's contravention is inherently serious. Disclosure is another cornerstone of Ontario securities law and is fundamental to the fairness of the capital markets.[21] Prospective and existing investors must be able to rely on financial information presented in an issuer's continuing disclosure. Materially misstating revenue in the publicly disclosed financial statements of a reporting issuer undermines confidence in the capital markets.

[71] Itwaru's and Alli's frame of mind with respect to the inappropriate recognition of revenue is troubling. The merits panel did accept Itwaru's characterization of his approval of the financial statements as a mistake, rather than an intent to falsely inflate revenue. However, Itwaru and Alli deliberately chose to report revenue in the way they did, despite the interim CFO's concerns, their auditor's express disapproval of that approach, and the numerous red flags that the merits panel found ought to have prompted a thorough investigation and a delay in reporting interim results. These facts increase the seriousness of the contravention.

2.4.4 Did the respondents benefit (*e.g.*, make a profit or avoid a loss) from the contravention?

[72] The misreporting did not directly benefit the respondents. However, any material overstatement of revenue likely leads to an unjustified increase in, or maintenance of, the share price, thereby indirectly providing a short-term benefit to the company and to its shareholders. An indirect benefit of that kind flowed to Itwaru and Alli.

2.4.5 Mitigating factors

[73] We see no mitigating factors in respect of this contravention. We reject Itwaru's and Alli's attempts to blame First Global's board and auditor.

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[21] *Cornish v Ontario (Securities Commission)*, 2013 ONSC 1310 (Div Ct) at para 38

2.4.6 Conclusion about factors to be considered

[74] Isolated though it was, the material misstatement of revenue in the face of the interim CFO's and auditor's objections was a significant contravention. It indirectly benefited First Global, Itwaru and Alli. Itwaru and Alli were responsible for ensuring, within reason, that First Global's financial statements fairly presented the company's results. They failed to do so, and have inappropriately blamed others.

2.5 EH loans to GBR

2.5.1 Introduction

[75] The final set of transactions we examine are the loans totaling $450,000 from investor EH. The merits panel found that:

a. both GBR Ontario and Aziz committed fraud in relation to those loans; but

b. it was unclear whether the loans were to GBR Ontario or GBR Colombia, given that various documents in the record conflated the two entities, leading the merits panel to refer to the entities together as simply "GBR" when the context required.

2.5.2 The size and seriousness of the contravention

[76] EH lost the entire $450,000 investment. That amount from EH alone was approximately 10% of the total funds that GBR Ontario raised through sale of the First Global debentures. The amount was significant for GBR, and much more so for EH. That loss, caused by fraudulent conduct of GBR Ontario and Aziz, significantly compromised EH's financial circumstances and health. In addition, Aziz later tried to convince EH to invest the additional funds through a home equity line of credit. That is an aggravating factor.

2.5.3 Did the respondents benefit (*e.g.*, make a profit or avoid a loss) from the contravention?

[77] No matter whether EH's additional $450,000 went to GBR Ontario or GBR Colombia or both, GBR Ontario benefited from the loans' contribution to the pool of money available for the Colombian projects, which GBR Ontario was obligated to ensure were properly funded.

[78] Aziz did not persuade us that because he made interest payments of approximately $75,000 to EH, contributing to his own significant loss, we should conclude that he derived no benefit. As discussed above, a contravention will generally be worthy of greater sanctions when the contravening party derives a benefit from the misconduct. What that party later does with any funds received through the misconduct will usually be irrelevant, unless, for example, the funds are deployed in a way that mitigates the harm caused by the misconduct. In this instance, the conclusion that Aziz benefited stands, but we take into account the fact that Aziz also made the interest payments to EH.

2.5.4 Mitigating factors

[79] The fact that Aziz made the interest payments to EH acts in his favour, because that is preferable to him not having made any such payments. However, we attach little weight to this factor, since it was his fraud in the first place that resulted in EH not receiving the expected interest payments from the expected source.

[80] Apart from that, there are no mitigating factors with respect to this contravention.

2.5.5 Conclusion about factors to be considered

[81] This contravention was substantially similar to the larger fraud relating to the First Global debentures. The amount was not material for the corporate respondents, but was significant for the investor, who lost the entire investment.

2.6 Disgorgement – First Global debentures

2.6.1 Introduction

[82] Having reviewed the applicable factors, we now turn to financial sanctions, beginning with disgorgement, and followed by administrative penalties. After we determine what financial sanctions would be in the public interest without reference to any respondent's financial circumstances, we consider whether any of those sanctions should be reduced for a respondent in light of that respondent's inability to pay.

[83] For disgorgement in respect of the First Global debentures, Staff seeks $4,461,304.67 against all respondents, on a joint and several basis. For the

reasons set out below, we conclude that it would be appropriate to order disgorgement of $1.51 million against First Global and its principals, and $2.95 million against GBR Ontario and its principals.

[84] That division of the $4.46 million raised reflects the distinct roles that First Global and GBR Ontario played in the events giving rise to this proceeding. The two companies co-operated in the fundraising, and were dependent on each other for it, but this case is unlike those where two or more legally distinct entities act as one for all practical purposes. Below, we analyze the interrelationships in this case, following a review of the legal framework relating to disgorgement, and a discussion of the factors applicable when determining an appropriate disgorgement order.

2.6.2 Legal framework

[85] Paragraph 10 of s. 127(1) of the Act authorizes the Tribunal to order that a respondent who has not complied with Ontario securities law disgorge to the Commission "any amounts obtained as a result of the non-compliance".

[86] When considering whether a disgorgement order is appropriate, and if so in what amount, the following non-exhaustive list of factors applies:

a. whether an amount was obtained by a respondent as a result of the non-compliance with Ontario securities law;

b. the seriousness of the misconduct and whether that misconduct caused serious harm, whether directly to original investors or otherwise;

c. whether the amount obtained as a result of the non-compliance is reasonably ascertainable;

d. whether those who suffered losses are likely to be able to obtain redress; and

e. the deterrent effect of a disgorgement order on the respondents and on other market participants.[22]

[22] *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18 (***PFAM***) at para 56

[87] Some of these factors overlap with the general factors we discussed earlier. There are some differences. We address each of the above factors in turn.

2.6.3 Amounts obtained through non-compliance with Ontario securities law

2.6.3.a Introduction

[88] We begin with the first of the five factors, which calls for us to determine whether each respondent obtained an amount as a result of non-compliance with Ontario securities law.

[89] The parties in this case devoted much of their written and oral submissions to how the words "any amounts obtained as a result of the non-compliance", in s. 127(1)10 of the Act, should apply to them in connection with the First Global debentures. This was especially so because of the unusual structure in this case, where the First Global parties (First Global, Itwaru and Alli) on the one hand, and the GBR parties (GBR Ontario, Bajaj and Aziz) on the other, were jointly involved in raising the approximately $4.46 million of investor funds, but they were not really connected in how the funds were eventually disbursed. First Global kept approximately $1.51 million for its own use, and the remaining $2.95 million was provided ostensibly to or for the benefit of GBR Colombia. The respondents submitted that whatever amount they should be ordered to disgorge, it should not include funds that were directed to the other group of respondents.

[90] The words "any amounts obtained as a result of the non-compliance" do leave room for interpretation. They raise the question of what a respondent's liability should be for illegally obtained funds either where the respondent is not the initial recipient of the funds, or where the respondent does not retain all the funds. Because of the unusual fundraising structure here and the parties' emphasis on this issue, we will review the history of the disgorgement power and its underlying principles.

2.6.3.b History of the disgorgement power

[91] The relevant provision was added to the Act in 2002[23] based on recommendations of the Five Year Review Committee, and came into force in

[23] *Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*, SO 2002, c 22, s 183

early 2003.[24] The committee thought a new disgorgement power should extend only to profits. That is clear from the heading for the relevant section of the committee's report ("Disgorgement of Profits") and from the committee's description (*e.g.*, "…the amount of disgorgement that may be ordered is limited to the amount of the illegal profits").[25]

[92] However, in a manner that reflects the remedial purpose of the disgorgement power, Tribunal decisions have adopted a broader interpretation. Disgorgement orders are not limited to profit alone.

[93] *Allen (Re)* appears to be the first case in which the Tribunal interpreted the new legislative provision. In that case, the respondent Allen undertook a sales program for the securities of an issuer.[26] He employed salespeople to help him. The issuer paid Allen fees or commissions of $600,624, being 60% of the funds raised.[27] The Tribunal found that Allen had engaged in an illegal distribution, had traded without appropriate registration, and had failed to disclose the commissions he received.[28]

[94] Staff asked that Allen be required to disgorge the full $600,624.[29] Allen submitted that the Tribunal should deduct from this amount the costs of the offering and the 20% commission he paid to his salespeople.[30] The Tribunal rejected Allen's submission. It agreed with Staff that the wording of s. 127(1)10 permits the Tribunal to order disgorgement of the gross amount obtained, and that to restrict the disgorgement order to a net amount would reduce the deterrent effect of the disgorgement sanction.[31]

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[24] *Limelight Entertainment Inc (Re)*, 2008 ONSEC 28 (***Limelight Sanctions***) at para 47; *Mega-C Power Corp (Re)*, 2011 ONSEC 4 (***Mega-C***) at para 53

[25] *Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)*, March 21, 2003, (https://www.osc.ca/sites/default/files/2020-12/fyr_20030529_5yr-final-report.pdf) (***Five Year Report***) at pp 5, 210 and 217-18

[26] *Allen (Re)*, 2005 ONSEC 13 (***Allen Merits***) at para 28

[27] *Allen Merits* at para 32

[28] *Allen Merits* at paras 98-100

[29] *Allen (Re)*, 2006 ONSEC 8 (***Allen Sanctions***) at para 31

[30] *Allen Sanctions* at para 35

[31] *Allen Sanctions* at paras 36-37

[95] The Tribunal reinforced this approach in *Limelight Entertainment Inc (Re)*. In that 2008 decision, the Tribunal concluded that it should ask not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity.[32] That approach, which the Divisional Court later endorsed in another case,[33] is more straightforward, and avoids the need for the Tribunal to calculate how much profit was made.[34]

[96] Putting aside the now-resolved issue about whether disgorgement can extend not just to profit but to all funds initially obtained, a question remains about situations where, as here, funds are obtained by one or more groups of respondents operating together. The degree of overlap between groups, and between one group member's involvement and that of another group member, will vary from case to case. In these cases, to what extent is a respondent potentially liable to disgorge the funds that the group obtained, where the particular respondent did not directly obtain or retain all the funds?

[97] The Tribunal addressed one aspect of this question in *Limelight*, stating that "individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled."[35] The Tribunal adopted the same approach in 2010 in *Sabourin (Re)*, in which the Tribunal ordered the individual respondent (Sabourin) and certain corporate respondents to disgorge the full amount of funds raised, less the amount that had been returned to investors. The order imposed joint and several liability on Sabourin and the corporate respondents because Sabourin was the directing mind of those corporations, and it would have been impossible to treat them separately.[36]

[98] Some years later, in its sanctions decision in *David Charles Phillips (Re)*, the Tribunal thoroughly reviewed the principles underlying the disgorgement

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[32] *Limelight Sanctions* at para 49

[33] *Phillips v Ontario Securities Commission*, 2016 ONSC 7901 (***Phillips v OSC***) at para 71

[34] *Limelight Sanctions* at para 49

[35] *Limelight Sanctions* at para 59

[36] 2010 ONSEC 10 (***Sabourin***) at para 70; see also *Quadrexx* at para 46

remedy, and reaffirmed that the Tribunal may order disgorgement regardless of whether the particular respondent personally obtained the funds.[37]

[99] In dismissing the appeal from the Tribunal's decision in *Phillips*, the Divisional Court endorsed the Tribunal's approach, holding that it was "consistent with the plain wording of the legislation, the purpose of the legislation and prior case law."[38] As the Divisional Court put it in a later case, the "issue of whether disgorgement orders should be limited to the amount that the fraudsters obtained personally, either directly or indirectly, has been litigated and lost".[39]

[100] To summarize, these decisions and others identify three co-existing purposes for the broader interpretation of "obtained":

a. it ensures that a wrongdoer does not benefit from the misconduct;[40]

b. it deters that wrongdoer and others;[41] and

c. it provides a more straightforward method of calculation.[42]

2.6.3.c Staff's request for joint and several liability for $4.46 million

[101] In the case before us, Staff suggests a different approach. Staff submits that we should order all respondents to disgorge the full $4.46 million, jointly and severally, on two bases. The first basis is a "but for" analysis, which Staff says should lead to joint and several liability because the amount would not have been raised had it not been for the involvement of all respondents.

[102] That argument has some superficial appeal in this case, because both First Global and GBR Ontario played pivotal roles. GBR Ontario needed a public company to carry out its mission, and First Global permitted itself to be used in that way. However, it does not necessarily follow that the funds would not have been raised but for the participation of all respondents. For example, even though Aziz was fully involved in the illegal distribution, and even though his

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[37] 2015 ONSEC 36 (***Phillips Sanctions***) at para 20

[38] *Phillips v OSC* at paras 65, 78; *Al-Tar Energy Corp (Re)*, 2011 ONSEC 1 (***Al-Tar***); *Mega-C*

[39] *North American Financial Group Inc v Ontario Securities Commission*, 2018 ONSC 136 (Div Ct) (***North American v OSC****)* at para 217

[40] *Al-Tar* at para 71; *PFAM* at para 48

[41] *Al-Tar* at para 71; *PFAM* at para 48

[42] *Limelight Sanctions* at para 49

fraudulent misconduct undoubtedly contributed to the raising of funds (although to an indeterminable degree), it cannot be said that had he not been involved at all, no funds would have been raised. Even putting that aside, though, we reject a "but for" approach, for which Staff offers no authority. It is too automatic, and it excessively stretches the wording of s. 127(1)10.

[103] Staff's second basis for asking for joint and several liability for the entire amount comes closer to the principles set out in previous decisions. Staff submits that because the illegal distribution and fraud in this case were intertwined, and because both forms of misconduct contributed to the full amount being raised, a joint and several order against all parties is in the public interest.

[104] We do not agree with this proposed reformulation of the test for disgorgement generally or, more specifically, for deciding who obtained what amounts as a result of non-compliance. Misconduct is often intertwined, in the sense that a given set of actions can give rise to more than one contravention. That is a different concept from an individual and their company being intertwined, where they should not be regarded as distinct for the purposes of deciding what funds were obtained. We are not persuaded that intertwined misconduct (as opposed to intertwined entities) justifies joint and several liability.

[105] We do agree with Staff's submission that this case is different from those in which the Tribunal ordered limited disgorgement against a respondent whose only role was that of a sales agent, and the amount ordered to be disgorged was restricted to the compensation received by the sales agent.[43] Here, neither Bajaj nor Aziz played a role that was as compartmentalized as that of someone whose only role is as a salesperson. GBR Ontario was the engine for the entire fundraising, with Bajaj as its directing mind.[44] While the merits panel found it unnecessary to decide whether Aziz was a directing mind of GBR Ontario for all purposes, the panel made clear that Aziz played a role well beyond that of a salesperson.[45]

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[43] *Sabourin* at paras 71-72

[44] Merits Decision at para 47

[45] Merits Decision at paras 143 and 392

[106] Given that we decline to adopt a "but for" approach or Staff's proposed reformulation of the applicable test, and given that the facts of this case do not reflect a narrowly limited role for the individual respondents, how should we apply "obtained by"? We answer that question separately for each respondent.

2.6.3.d Amounts obtained by the First Global parties

[107] At least initially, First Global obtained the entire $4.46 million, *i.e.*, the proceeds of the sale of the First Global debentures. When a debenture was sold, the funds were deposited directly into the trust account of First Global's lawyer. We address below the implications of some of the funds then being directed elsewhere, but it cannot be seriously disputed that First Global obtained the full amount as a result of non-compliance with Ontario securities law, since all of the proceeds flowed from the illegal distribution.

[108] As for Itwaru, we have no difficulty concluding that he was a directing mind of First Global, despite his submissions to the contrary. We reach that conclusion not just because the merits panel found that he was a "principal" of First Global, and not just because he was First Global's chief executive officer and the chair of its board of directors from the company's inception, although those are all highly persuasive facts. In addition, Itwaru was directly and centrally involved in choosing to commence the debenture offering, and in carrying out the offering, including the negotiation of the foundational agreement between First Global and GBR Colombia. For all these reasons, we apply to Itwaru the principles from *Limelight* and *Sabourin* cited in paragraph [97] above. He should not be viewed separately from the corporation that he, as CEO and principal, directed and controlled.

[109] We apply these same principles to Alli and reach a similar conclusion. Alli was First Global's chief financial officer and a director, and the merits panel described him as a principal of the company. He too was involved in the negotiation of the agreement between First Global and GBR Colombia, and like Itwaru he signed and accepted subscription documents on behalf of First Global. In respect of the debenture offering, Alli was also a directing mind. Alli correctly submits that there is no evidence that he realized any direct profit from the transactions at issue; in fact, says Alli, he has lost significant amounts himself. That may be

true, but it does not exclude the indirect benefit described above at paragraph [27], and either way, it does not affect the above analysis about whether he is a directing mind.

[110] For these reasons, we conclude that First Global, Itwaru and Alli all "obtained" the full amount of $4.46 million within the meaning of s. 127(1)10 of the Act.

2.6.3.e Amounts obtained by the GBR parties

[111] In contrast, GBR Ontario did not directly receive any funds from the offering. Further, neither GBR Ontario nor either of its principals Bajaj and Aziz shared an identity with First Global, in the way that Sabourin did with his corporations. GBR Ontario was entirely distinct from First Global. The two corporations did not have common directors or officers, and the only formal relationship between the two companies was contractual. Unlike the situation in *Sabourin*, there is no difficulty here separating the entities.

[112] We therefore have no basis to conclude that at the point in time when investors provided their funds, GBR Ontario "obtained" some or all of the $4.46 million. GBR Ontario and its principals were central to all the fundraising, including of the $1.51 million that went to First Global. However, playing a central role does not amount to "obtaining" the funds raised. GBR Ontario did not obtain any part of the $1.51 million.

[113] That brings us to the remaining $2.95 million. The merits panel found that:

a. GBR Ontario and its principals were raising funds for both First Global and the Colombian natural resource projects;

b. with respect to the Colombian projects, the presentations and marketing documents often conflated GBR Colombia and GBR Ontario, and investors received the message that the two entities were one; and

c. $2.95 million was provided to or for the benefit of GBR Colombia.

[114] For the purposes of determining an appropriate disgorgement order, and to use the reasoning in *Sabourin* and other cases, we should not separate the activities of GBR Ontario from those of GBR Colombia. They were separate corporate entities, but the respondents treated them as if it were all one fundraising and project execution enterprise. Bajaj was a significant shareholder of both. The

respondents themselves were unclear about which entity they were referring to at any given time, and most importantly, the message to investors was that "GBR" was one enterprise. For these reasons, we conclude that within the meaning of s. 127(1)10 of the Act, GBR Ontario obtained the $2.95 million.

[115] Should Bajaj and/or Aziz be accountable for that amount as well? We answer "yes" to that question. Bajaj and Aziz were two of three founding shareholders of GBR Ontario, which was incorporated solely to carry out the fundraising. The company carried on no other business at any time, and it acted only through those three individuals. Bajaj was GBR Ontario's president and Aziz was a director. Bajaj and Aziz were both heavily involved in GBR Ontario's fundraising activities (despite Aziz's submission to the contrary). It would be impossible to attribute a specific portion of GBR Ontario's activities or of the funds raised to either Bajaj or Aziz. Further, we cannot accept Aziz's attempt to minimize his accountability because he merely brought people together. He did that, but after he did that, he continued to be involved in the business, including through to his interactions with investor EH.

[116] We also reject Aziz's emphatic submission that we should view him differently because there is no evidence that any funds flowed to him or that he obtained any benefit at all. He expected to receive a substantial interest in GBR Colombia, as is reflected in that company's unanimous shareholders agreement. The wrongfulness of his misconduct is not mitigated by the venture's lack of success.

[117] Aziz was also a shareholder of GBR Ontario, which kept approximately $378,000 of the $2.95 million. In any event, we need not conclude that Aziz did receive funds, because as explained above, his and Bajaj's shared identity with GBR Ontario renders them equally responsible for all of GBR Ontario's activities.

[118] Accordingly, we conclude that GBR Ontario, Bajaj and Aziz all "obtained" $2.95 million within the meaning of s. 127(1)10 of the Act.

2.6.3.f Conclusion about what amounts the respondents obtained as a result of their non-compliance with Ontario securities law

[119] We have concluded that under s. 127(1)10, First Global, Itwaru and Alli obtained $4.46 million as a result of non-compliance with Ontario securities law, and that GBR Ontario, Bajaj and Aziz obtained $2.95 million as a result of non-compliance

with Ontario securities law. These amounts are an upper limit for any disgorgement order we may make. We now turn to consider the other factors relevant to determining what orders would be appropriate.

2.6.4 The seriousness of the misconduct, and whether the misconduct caused serious harm

[120] As we found above beginning at paragraph [14], the three contraventions relating to the First Global debentures were serious. This is especially true with respect to the fraud.

2.6.5 Whether the amount obtained as a result of the non-compliance is reasonably ascertainable

[121] In our discussion above about which respondents obtained which amounts, we concluded that the relevant amounts are easily ascertainable. No party suggested otherwise.

2.6.6 Whether those who suffered losses are likely to be able to obtain redress

[122] It is open to a respondent to show that those who suffered losses as a result of the respondent's misconduct are likely to be able to obtain redress. None of the respondents here made that submission. We referred above to efforts that Itwaru and Alli said they have been making to engineer a resolution that might result in the investors recovering some of their losses. However, whatever those efforts have been, they have been unsuccessful to date, and we heard nothing to suggest that there is a reasonable prospect of recovery.

2.6.7 The deterrent effect of a disgorgement order

[123] It is essential both for the protection of investors and for the promotion of confidence in the capital markets that those entrusted with investor money adhere to sound practices that reflect the importance of that trust. None of the respondents in this case demonstrated sufficient care. Any disgorgement order we make must demonstrate unequivocally, to the respondents and others, that great responsibility comes with accepting funds from the investing public.

[124] Alli submits that he has no profit or other gain to give up, and given the failure of First Global and GBR, and the consequent losses for him, there is no need for

specific deterrence. Alli assures us he would not engage in similar conduct in the future. He therefore asks that we not order disgorgement against him, but if we do, he suggests an amount of $100,000 with two years to pay. We agree that the specific deterrent value of a disgorgement order against Alli is limited, especially assuming he has suffered the losses he claims, but it is not non-existent. Further, the need for general deterrence and the need to restore confidence in the capital markets remain.

2.6.8 Assessment of appropriate disgorgement regarding the First Global debentures

[125] For the reasons we have set out above, the highest possible disgorgement order would be in the amount of $4.46 million for the First Global parties and $2.95 million for the GBR parties. However, the Tribunal need not order disgorgement of the full amount. The Tribunal retains discretion to apply the remaining four factors and to order a lower amount of disgorgement, or none at all.[46] In exercising that discretion, we balance the potential deterrent effect of our order on the respondent and on others with the other sanctioning factors.[47]

[126] Staff submits that we should order disgorgement of the full $4.46 million amount without any reduction, since the investors lost all of their investments. The respondents submit that we should order no or only nominal disgorgement.

[127] The respondents point out that in *Money Gate Mortgage Investment Corporation (Re)*, the Tribunal reduced the disgorgement amount to reflect the fact that some of the raised funds were used in a manner consistent with the representations made to investors.[48] Here, however, none of the funds raised were used in a manner that conformed to all of the GBR parties' representations. Some of the respondents submitted that in determining an appropriate disgorgement amount we should exclude the $150,000 that may have gone to the development of a biodiesel facility, since that use was consistent with what was represented to investors. However, as Staff submits, the GBR parties also represented that the First Global debentures would be fully guaranteed and

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[46] *Quadrexx* at para 47; *Hutchinson (Re)*, 2020 ONSEC 1 at para 42

[47] *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 64

[48] *Money Gate* at para 57

secured by assets owned by GBR Colombia.[49] As the merits panel concluded, no title or security interest was ever transferred to or for the benefit of GBR Colombia. No funds were used in a manner completely consistent with the representations made to investors, so there is no basis to reduce the disgorgement amount for reasons similar to those in *Money Gate*.

[128] With respect to the First Global parties, Staff correctly submits that they provided the mechanism through which the funds were raised. However, the circumstances of this case are unusual, given the arrangement between the two separate and distinct groups, through which each group would receive a significant portion of the investor funds they raised. The relationship between First Global and GBR Ontario did not feature the overlapping identity that appeared in *Sabourin*, among other cases. Further, we agree with Itwaru's submission that the finding of fraud against the GBR parties, and the absence of such a finding against the First Global parties, underscores the importance of distinguishing between the two groups in our disgorgement orders. For these reasons, we consider it appropriate to exclude from First Global's liability the $2.95 million transferred to or for the benefit of GBR Colombia. That leaves the $1.51 million that First Global received through the debenture financing and retained for its own purposes.

[129] That reduction does risk minimizing First Global's central role in being the mechanism by which $2.95 million went to or for the benefit of GBR Colombia. Our decision should not be read to permit corporations (particularly public issuers) and their senior officers to cavalierly allow themselves to be used as a vehicle for improper conduct, and to do so with impunity. In our view, that concern is best addressed by an administrative penalty, which we discuss below.

[130] Having determined that $1.51 million is the appropriate disgorgement amount for First Global, we turn to Itwaru and Alli.

[131] Itwaru asks that we not order disgorgement against him, but if we do, he suggests $25,000. He cites *Energy Syndications Inc (Re)* as an example of a case in which the Tribunal ordered disgorgement of only a portion of the funds

[49] Merits Decision at paras 234, 270-271 and 342

raised. In that case, two individual respondents were ordered to disgorge $50,000 each, compared to between $141,000 and $152,000 in sales commissions that each received, in a scheme in which neither individual was a directing mind, and the findings against them did not involve any deliberate deceit or misleading behaviour.[50]

[132] None of the findings against Itwaru in this case involves deliberate deceit or misleading behaviour, but:

a. Itwaru was one of two directing minds of First Global;

b. he was personally engaged in negotiating the foundational agreement with GBR Colombia;

c. he was actively involved in the capital raise on a day-to-day basis by accepting and signing subscription agreements; and

d. the amounts involved here, including investor losses, were significantly higher than in *Energy Syndications*.

[133] That reasoning applies equally to Alli.

[134] We are sympathetic to the implications of a substantial disgorgement order against Itwaru and Alli. They were naïve and overly trusting, but we cannot overlook their inattentiveness as to their responsibilities. We are struck by the fact that on Itwaru's own evidence, First Global's lawyer said directly to them that it was important to ensure that investors understood the subscription agreement. Despite this advice, First Global, Itwaru and Alli completely abdicated that responsibility. Instead, they were comfortable assuming without any verification whatsoever that the GBR parties, whom they had not previously met, were carrying out that critical function. In the face of that, we cannot reduce the extent to which Itwaru and Alli should share accountability with First Global.

[135] As for the GBR parties, Staff correctly notes that they acted as a dealer to find and sign up investors. Their role went well beyond that, though. The GBR parties were not mere conduits of information. They managed the fundraising, and they

[50] 2013 ONSEC 40 at paras 71 and 77-79

were responsible for the many misrepresentations made to investors about how the raised funds would be used.

[136] We place no weight on the fact that only a small portion of the $2.95 million remained with GBR Ontario. We are guided by the words of the Divisional Court, which has held that because the purpose of a disgorgement order is to restore confidence in the capital markets, the focus should not be on "whether the fraudsters pocketed the money for themselves". Instead, the focus should be on the fact that the money was improperly diverted at all.[51] What fraudsters do with the funds does not lessen the seriousness of the behaviour, and it is reasonable to impose severe sanctions for their misconduct.

[137] We see no reason to reduce GBR Ontario's liability for disgorgement below the $2.95 million obtained. As we explained above, we are not persuaded by GBR Ontario's submission that practically speaking it is a new company and that we should not hold it responsible for the acts of Bajaj and Aziz.

[138] As for Bajaj, he submits that the deterrent value of any disgorgement order will be reduced because Garcia and Grenier are not respondents. We cannot accept that submission, because it implies that Garcia and Grenier contravened Ontario securities law and that they would therefore have shared liability for part or all of the disgorgement order. Given that they are not parties, we cannot make that finding against them.

[139] Apart from a claim of impecuniosity, which we address below, we see no reason to reduce Bajaj's or Aziz's liability for disgorgement below that of GBR Ontario, the sole-purpose vehicle they created to sell the First Global debentures to raise funds for the Colombian operation.

[140] Applying the above factors and analysis, we conclude that it would be in the public interest to order disgorgement in the following amounts:

a. $1.51 million by First Global, Itwaru and Alli, jointly and severally; and

b. $2.95 million by GBR Ontario, Bajaj and Aziz, jointly and severally.

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[51] *North American v OSC* at para 218

[141] In our view, these disgorgement orders are necessary to protect investors, to promote confidence in the capital markets, and to deter these respondents and others from engaging in similar misconduct.

2.7 Disgorgement – loans from EH

[142] Staff seeks disgorgement of an additional $450,000 from GBR Ontario and Aziz, on a joint and several basis, in respect of the loans from investor EH. As we explain below, we will make that order.

[143] While the merits panel was unable to determine with certainty whether EH's $450,000 went to GBR Ontario or GBR Colombia or both (because the documentary and oral evidence was inconsistent), the panel concluded that Aziz perpetrated fraud in respect of those funds, that he did so on behalf of GBR Ontario, and that he was GBR Ontario's directing mind in doing so.[52] Accordingly, both GBR Ontario and Aziz obtained the $450,000 within the meaning of s. 127(1)10 of the Act.

[144] This fraud was isolated to one investor and was recurrent only in the sense that the $450,000 came in two instalments. However, it was serious because of the significance of the amount for EH.

[145] The $450,000 amount is easily ascertainable and is undisputed. Aziz submits, though, that we should deduct the approximately $75,000 of interest payments that he made to EH. Staff submits that we should not do so, and we agree. This Tribunal's disgorgement power does not affect rights as between private parties, and any entitlement EH had to interest is unaffected by whether her loans were obtained in contravention of Ontario securities law. GBR had the use of EH's money. The interest payments compensate for that use. The one Tribunal decision that Aziz cites, in which interest payments were deducted, says only that it does so to "avoid double counting".[53] The decision does not explain further. We prefer the Tribunal's approach in two subsequent cases, where the

[52] Merits Decision at para 482

[53] *Maple Leaf Investment Fund Corp*, 2012 ONSEC 8 at para 34

amount of disgorgement reflected inflows less redemptions, or principal returned to investors, but with no deduction for interest payments.[54]

[146] There is no evidence that EH is likely to obtain redress.

[147] As for the deterrent effect of a disgorgement order regarding EH's loans, we refer to our comments at paragraph [123] above.

[148] Applying the principles set out above with respect to the First Global debentures, we therefore conclude that it is in the public interest to order disgorgement of $450,000 by GBR Ontario and Aziz, jointly and severally.

2.8 Administrative penalties

2.8.1.a Introduction

[149] We will now review Staff's request for administrative penalties. Staff seeks the following:

a. in respect of the First Global debentures:

   i. $200,000 against each of First Global, Itwaru and Alli;

   ii. $750,000 against each of GBR Ontario and Bajaj; and

   iii. $650,000 against Aziz;

b. in respect of the loans from EH to GBR, $250,000 against each of GBR Ontario and Aziz; and

c. in respect of the improperly recognized revenue on First Global's interim financial statements, $200,000 against each of First Global, Itwaru and Alli.

[150] Paragraph 9 of s. 127(1) of the Act provides that if a person or company has not complied with Ontario securities law, the Commission may require the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.

[151] Determining the amount of an administrative penalty is not a science. The parties provided us with precedent decisions, but those precedents reflect a wide

[54] *North American Sanctions* at paras 63-65; *2196768 Ontario Ltd (Rare Investments)*, 2015 ONSEC 9 at paras 14, 74

range of sanctions that vary according to the circumstances. The sanctions imposed in other cases, and the reasons for those sanctions, largely serve to suggest a possible range of penalties and a principled approach to determining appropriate penalties in this case.

[152] In determining what an appropriate administrative penalty would be, we must take a global view of all the sanctions we impose on each respondent individually, taking into account the disgorgement we order and the fact that subject to limited exceptions, we will prohibit the respondents from participating in the capital markets. We must consider both specific and general deterrence, and the extent to which those objectives are achieved by the other sanctions we impose.[55] The administrative penalties must also be meaningful and not just reflect a "cost of doing business". Factors to be considered in determining an appropriate administrative penalty include:

a. the scope and seriousness of a respondent's misconduct;

b. whether there were multiple or repeated breaches of the Act;

c. whether the respondent realized any profit as a result of his or her misconduct;

d. the amount of money raised from investors;

e. the harm caused to investors; and

f. the level of administrative penalties imposed in other cases.[56]

[153] We have already addressed all but the last of these factors. In our analysis below, we will consider relevant precedents in the context of that earlier discussion.

[55] *Quadrexx* at para 58

[56] *Money Gate* at para 67

2.8.1.b First Global debentures

2.8.1.b.i The GBR parties

[154] In respect of the sale of the First Global debentures, we begin by considering the GBR parties' serious contraventions – illegal distribution, being in the business of trading without proper registration, and fraud.

[155] Staff submits that a $750,000 administrative penalty would be appropriate for Bajaj. He proposes a lower but unspecified amount, payable over ten years. His two principal submissions are firstly that his role was more akin to that of a salesperson rather than a directing mind, and secondly, that we must distinguish this case from those in which the respondents deliberately set out to deceive investors and to deprive them of their funds.

[156] We reject Bajaj's description of his role. He was one of GBR Ontario's directing minds, he ran the fundraising, and he was most prominent for investors. He is a former registrant, and his cavalier conduct here is inexcusable given that experience. We prefer Staff's submission as to the appropriate penalty. Below, we will return to Bajaj's proposal for a payment plan.

[157] As for Aziz, Staff proposes $650,000, to reflect his lesser role compared to Bajaj. Aziz submits, without suggesting a specific amount, that the administrative penalty should be significantly lower. We do not accept Aziz's characterization of the gap between his degree of involvement and Bajaj's. Aziz played a key role throughout, signing documents and cheques, selling some of the debentures himself, and speaking at investor meetings. We agree with Staff's proposal.

[158] Staff proposes $750,000 for GBR Ontario. We agree. There is no reason on these facts that GBR Ontario's administrative penalty should be any different from Bajaj's.

[159] In our view, the administrative penalties set out above align with the precedent cases provided to us, including in particular the following cases that involve a similar set of contraventions, *i.e.*, fraud, illegal distribution, and unregistered trading, as well as substantial losses for the investors:

a. *Money Gate*, a 2021 decision with administrative penalties of $750,000 and $600,000 against the two individual respondents, who had

perpetrated a fraud on more than 150 investors, including by diverting approximately $1.5 million in funds contrary to representations in the offering memoranda;

b. *Meharchand* in 2019, in which the individual respondent was ordered to pay an administrative penalty of $550,000 following a fraud of C$1.5 million and US$140,000 involving more than 100 investors;

c. the 2018 case of *Quadrexx*, in which the Tribunal ordered administrative penalties of $600,000 against each individual respondent for three separate frauds totaling $3.4 million and involving at least 37 investors; and

d. *North American Financial Group*, a 2014 decision in which investors lost approximately 50% of the principal in a $4 million car lease financing scheme, resulting in administrative penalties of $600,000 on each of the individual respondents, who were the directing minds of the corporate respondents.

[160] This case stands at the most serious end of the spectrum of the above precedents, because of the total amount involved, the large number of investors, and the fact that unlike the investors in some of the above cases, the First Global debenture holders lost their entire investment. The GBR respondents' misconduct might warrant even higher administrative penalties had they deliberately set out to defraud the investors, as opposed to merely being reckless and cavalier, and had they not co-operated with Staff once the issues came to light.

2.8.1.b.ii The First Global parties

[161] Unlike the GBR parties, the First Global parties neither engaged in the business of trading without being registered nor committed fraud. Their only contravention in connection with the debentures was the illegal distribution.

[162] Staff proposes an administrative penalty of $200,000 for each of First Global, Itwaru and Alli.

[163] Itwaru proposes an administrative penalty of $7,500. We cannot accept that submission, in view of his role as directing mind of First Global, and his failure to

take any reasonable steps to ensure that investors were afforded the protections that First Global's own lawyer had urged.

[164] As the issuer whose securities were sold to investors, First Global was the main gatekeeper. As CEO, Itwaru was in the best position to ensure that First Global carried out its gatekeeper obligations. He did not. Instead, First Global gained the benefit of significant capital while avoiding the cost (in time and money) of the diligence that ought to have accompanied the fundraising. This failure proved to be at the expense of the investors.

[165] In our analysis above about the appropriate disgorgement order against First Global, we highlighted that the amount of $1.51 million that we are ordering includes no component that relates to the $2.95 million that flowed to or for the benefit of GBR Colombia. We indicated that it was important that the administrative penalty we impose against First Global be sufficient to deter public companies and those who direct them from allowing their companies to be used as a vehicle for this kind of misconduct. For this reason, the administrative penalty must be significant.

[166] In our view, a $175,000 administrative penalty is proportional to Itwaru's misconduct and to the magnitude of the harm that resulted.

[167] Alli proposes a penalty of $100,000 payable over two years. As we have discussed, Alli did not have the same ultimate responsibility that Itwaru did, but his involvement was pivotal. As CFO, Alli played a central role in the capital raise. He shared with Itwaru the responsibility to ensure that First Global heeded the advice of its lawyer. We conclude that it is in the public interest to order that Alli pay an administrative penalty of $150,000, reflective of the slightly lesser role that he played with respect to this contravention.

[168] As noted above, First Global (which is defunct) did not appear at the hearing and made no submissions. We have no reason to order an administrative penalty against it that is any different from the $175,000 that we are ordering against Itwaru.

[169] The administrative penalties set out above align with the two precedent contested cases provided to us:

a. *Energy Syndications*, a 2013 case in which the Tribunal imposed a $200,000 administrative penalty on the corporate respondents and their directing mind, jointly and severally, where the respondents had raised $3 million from at least 69 investors in connection with a legitimate underlying business involving the sale of land agreements and solar panel agreements, but the investors suffered significant losses; and

b. *XI Biofuels*, a 2010 case where the Tribunal imposed a $200,000 administrative penalty against the two individual respondents who had raised C$231,000 and US$1.1 million through "a sophisticated multi-jurisdictional scheme [structured] to avoid regulatory oversight", but through which investors lost hundreds of thousands of dollars.

[170] We note that in each of those cases, the respondents were found not only to have carried out an illegal distribution, but also (unlike the First Global respondents) to have engaged in the business of trading securities without being registered. We have taken into account this difference, as well as the respondents' co-operation with Staff. However, these differences are counterbalanced by an aggravating factor here – that the illegal distribution enabled the GBR parties to commit the fraud. We have also taken into account the passage of time since the above precedents.

[171] Staff also cited two settlements, *Systematech Solutions Inc (Re)*[57] and *GITC Investments and Trading Canada Ltd (Re)*.[58] We place little weight on these settlements because they are negotiated and not determined on a full factual record, although neither case gives us any reason to adjust the figures we determined above. We take the same view of the settlement in *MM Café Franchise Inc (Re)*[59] that Itwaru cited to us.

[57] (2013) 36 OSCB 11240
[58] (2015) 38 OSCB 9141
[59] 2017 ONSEC 13

2.8.1.c EH loans to GBR

[172] Staff requests an administrative penalty of $250,000 for each of GBR Ontario and Aziz with respect to EH's $450,000 loans to GBR. GBR Ontario proposes no administrative penalty at all. Aziz also proposes a lesser but unspecified penalty.

[173] The evidence with respect to these loans largely replicates that associated with the sale of the First Global debentures, with two notable differences: (i) Bajaj was not involved in these loans; and (ii) Aziz tried to convince EH to invest additional funds through a home equity line of credit, which, as we noted above, we consider to be an aggravating factor.

[174] Given the virtually identical underlying foundation, and given that the EH loans represented approximately 10% of the funds raised through the debentures, administrative penalties for these loans should be approximately 10% of those imposed ($750,000 for GBR Ontario and $650,000 for Aziz) in respect of the debentures. For Aziz, we increase that penalty to account for the fact that he played the central role in the EH loans, and to account for his pressure on EH to borrow the funds to invest. We determine that each of GBR Ontario and Aziz should pay an administrative penalty of $75,000.

2.8.1.d Improper recognition of revenue

[175] Staff proposes an administrative penalty of $200,000 for each of First Global, Itwaru and Alli with respect to the improper recognition and reporting of revenue in the one set of interim financial statements.

[176] Itwaru proposes an administrative penalty of $7,500. Alli proposes an administrative penalty of $100,000 payable over two years.

[177] The merits panel found that Alli and Itwaru authorized First Global's non-compliance. Both were fully aware of, and engaged in, the revenue recognition issue. They also both signed the financial reporting documents that contained the impugned accounting treatment and executed certificates of compliance for those documents. They did so over the objections of their interim CFO and their auditor.

[178] The parties did not identify any contested cases that approximate the facts of this finding. Staff cited four settlements. As we noted earlier, we place little

weight on sanctions in settlement cases, but in the absence of any contested cases we will briefly refer to the two most relevant.

[179] In *Cronos*, revenue of $7.6 million of revenue was improperly recognized across three separate transactions, and approximately US$235 million of goodwill and intangible assets were overstated. Cronos' chief compliance officer played a significant role in one of the three transactions. Cronos paid a $1.3 million administrative penalty, and the chief compliance officer made a voluntary payment of $50,000.

[180] *Electrovaya* involved repeated disclosure violations relating to "unbalanced and incomplete news releases" and "overly optimistic disclosure." Electrovaya's president and CEO agreed to pay an administrative penalty of $250,000.

[181] The administrative penalties we impose against Itwaru and Alli should reflect the fact that these sanctions follow a contested hearing, and that unlike *Cronos*, here there will be no substantial administrative penalty paid by the issuer. The amounts we order should be well above the amount of the voluntary payment that Cronos's chief compliance officer agreed to.

[182] Given the isolated nature of the revenue recognition issue, and the respondents' co-operation, we consider Staff's request for administrative penalties of $200,000 to be high. It is in the public interest to require each of First Global, Itwaru and Alli to pay an administrative penalty of $125,000. We do not distinguish between Itwaru and Alli, given the comparability of their involvement on this issue.

2.9 Financial sanctions – ability to pay

[183] Alli and Bajaj ask for special consideration with respect to financial sanctions, because of their circumstances and the impact such sanctions would have on them. Ability to pay is a relevant factor for financial sanctions, although it is generally not the predominant or determining factor.[60]

[184] Neither Alli nor Bajaj has met the test for receiving special consideration.

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[60] *Rezwealth Financial Services Inc (Re)*, 2014 ONSEC 18 at para 69

[185] Alli asks for at least two years to pay any financial sanctions. He bases that time period on his proposed administrative penalty of $100,000 and disgorgement of $100,000. He asks that the time to pay be longer if we impose greater sanctions.

[186] No previous decision was brought to our attention in which, following a contested hearing, the Tribunal permitted a respondent to pay financial sanctions through an instalment plan. Alli gave us no specific reason to do so in this case. We appreciate that the financial sanctions we are ordering are likely to be onerous. That by itself is insufficient reason to add a payment structure over Staff's objection. It is open to Alli, as it is to any respondent who must pay financial sanctions, to negotiate payment terms with the Commission.

[187] Bajaj submitted evidence of his financial circumstances, in support of his requests that: (i) any financial sanctions be reduced or waived; and (ii) he be permitted to pay any financial sanctions by way of an instalment plan. Bajaj has a negative net worth and he earns a small income. He says that he can no longer support his wife or daughter, and that he has become financially dependent on his son. He has had difficulty securing employment.

[188] Staff opposes any accommodation for Bajaj. Staff submits that Bajaj is only 57 years old, and still has an opportunity to earn employment income. Staff also rejects Bajaj's submission that he is too old to carry on any business.

[189] In addition, Staff submits that Bajaj failed to make adequate disclosure regarding a significant asset arising out of the breakdown of his marriage, being a potential equalization interest in matrimonial assets. We were not persuaded that there was any such valuable asset or that Bajaj's disclosure regarding matrimonial assets was deficient.

[190] Bajaj has shown difficult financial circumstances, but we do not accept that his situation is like that of the respondent in *Solar Income Fund* who was excused from financial sanctions because of exceptional financial and personal hardship.[61] The fraud in this case was significantly greater and significantly more egregious, and Bajaj's financial challenges are of his own making.

[61] 2023 ONCMT 3 (***Solar Income Fund***) at paras 80-85

[191] We agree with Staff's submission that giving too much weight to ability to pay undermines the more important sanctioning objectives described above. The financial sanctions we are ordering are necessary to deter Bajaj and others in the capital markets from engaging in fraudulent conduct.[62]

[192] We reject Bajaj's request for a payment plan for the same reasons as we did with respect to Alli.

2.10 Restrictions on participation in the capital markets

2.10.1 Introduction

[193] As against all respondents, Staff seeks market restrictions, including a prohibition against trading and acquiring securities, and against trading in derivatives, as well as a denial of the benefit of any exemptions contained in Ontario securities law. Staff asks that those restrictions apply:

a. for ten years for First Global, Itwaru and Alli; and

b. permanently for GBR Ontario, Bajaj and Aziz.

[194] As against the individual respondents, Staff seeks additional restrictions, namely that:

a. each individual respondent resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

b. for ten years for Itwaru and Alli, and permanently for Bajaj and Aziz, each individual respondent be prohibited from becoming or acting as a registrant, investment fund manager or a promoter; and

c. for ten years for Itwaru and Alli, and permanently for Bajaj and Aziz, each individual respondent be prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager.

[195] Staff submits that the requested sanctions are proportionate to the misconduct at issue, are consistent with past cases of comparable misconduct, and appropriately achieve both specific and general deterrence.

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[62] *Al-Tar* at para 49

[196] Itwaru, Alli and Aziz all seek carveouts from any market participation restrictions, to permit limited personal trading and/or to permit continuation in an officer or director role. We consider those requested carve-outs below, after we assess the proposed sanctions. We begin with the First Global parties.

2.10.2 First Global parties

[197] Of the cases that Staff cited to us in support of the requested sanctions against the First Global parties, the two most helpful are:

a. *Cartu*,[63] in which the Tribunal imposed 15- and 10-year bans against two individual respondents who had effected an illegal distribution and had engaged in the business of trading without being registered; and

b. *Energy Syndications*, in which the Tribunal imposed a 10-year ban on the respondents for the same two contraventions.

[198] In both decisions, as is the case with the First Global parties, there was no finding of fraud.

[199] Itwaru submits that in his case, the market restrictions should be limited to one year. He submits that the cases Staff cites do not support the extent of the market sanctions Staff seeks because his circumstances are very different from cases involving fraud or other deceptive practices. He argues that no director or officer bans are necessary in his case, and he makes the unsubstantiated claim that he needs to be an officer or director to make a living. Alternatively, if we impose any director or officer restrictions, Itwaru submits that they should be limited to six months.

[200] Itwaru submits that we can include in our sanctions order a requirement for him to take and pass one or more courses of instruction regarding duties and obligations of directors and officers and ethical responsibilities. If this is not appropriate for an order of the Tribunal, he says he is willing to undertake to take such a course.

[201] We give no weight to this suggestion. If Itwaru were truly committed to pursuing some governance-related education, it has been open to him to do that at any

[63] 2022 ONCMT 21

time. Many years have passed since the problems that gave rise to this proceeding; if Itwaru has not pursued the suggested courses on his own, we see no value in imposing such an obligation now.

[202] As for Alli, he submits that market restrictions against him should be limited to two years. Regarding director and officer bans, Alli volunteers to never serve in either capacity with a public company permanently rather than have a ban formally imposed by order of this Tribunal.

[203] In response, Staff argues that neither Itwaru nor Alli offers any authority to support his request for market and conduct sanctions that are significantly shorter than those found in comparable decisions. Staff rejects Alli's suggestion that he volunteer not to act as a director or officer.

[204] Itwaru's and Alli's misconduct warrants restrictions on their participation in the capital markets. Taking into account our analysis of the sanction factors and considering that First Global was a reporting issuer and each of Itwaru and Alli was a director and senior officer, those restrictions must be meaningful.

[205] Having said that, Staff's requests against Itwaru and Alli are more severe than necessary. It is significant that neither Itwaru nor Alli was alleged to have engaged in the business of trading without being registered. That distinguishes this case from the precedents cited to us. The merits panel did find that the First Global parties breached Ontario securities law in respect of the one set of interim financial statements, and while that contravention is serious, it was an isolated instance. Further, Staff has agreed that the respondents co-operated once the issues came to light.

[206] We conclude that it is in the public interest to order the following against the First Global parties, subject to our discussion below regarding carve-outs:

a. five-year market restrictions against each of Itwaru and Alli;

b. seven-year director and officer bans against each of Itwaru and Alli; and

c. seven-year market restrictions against First Global.

[207] In determining the length of bans that would protect investors and restore confidence in the capital markets, we saw no reason to distinguish between Itwaru and Alli, given their roles and similar levels of involvement. We chose

longer terms for the director and officer bans than we did for the trading restrictions because their misconduct directly engages responsibilities they had as directors and officers of First Global. As noted above, First Global is defunct. It is appropriate to order market restrictions against the company for a term that is the longer of the two terms applicable to Itwaru and Alli.

2.10.3 GBR Parties

[208] We turn now to the GBR parties.

[209] Staff seeks permanent trading restrictions and denial of exemptions against GBR Ontario. Once again, GBR Ontario submits that there were no findings of misconduct by it that were distinct from the acts committed by Bajaj and Aziz as directing minds. GBR Ontario says that market restrictions would serve no purpose, because neither Bajaj nor Aziz plays any functional role in the company, and it has had no operations for years. It submits that a reprimand would be sufficient to achieve general and specific deterrence.

[210] For the reasons we expressed above beginning at paragraph [58], we do not accept GBR Ontario's submissions. We agree with Staff that since the company's only activity was as a vehicle for the fraud in this case, it would be in the public interest to order permanent market restrictions against it.

[211] Bajaj submits that banning him permanently from trading and from acting as a director or officer would be punitive and would prevent him from obtaining meaningful employment and securing a necessary source of income to support himself and his daughter. He would continue to be a financial burden on his son and the public. He therefore submits that any market restrictions against him should be limited to five years.

[212] Aziz also submits that any market sanctions against him should be limited to five years and that anything more would be punitive.

[213] In reply, Staff argues that market and conduct bans of only five years would be unprecedented for respondents that engaged in securities fraud. We agree. The Tribunal has repeatedly found that it is in the public interest to deprive permanently those who commit fraud of the privilege of participating in the

capital markets. The exceptions are rare and involve unusual mitigating circumstances that are not present here.

[214] Bajaj and Aziz pose an ongoing risk to investors. Taking that into account, and considering our analysis above regarding applicable sanction factors, with particular focus on the size of the contravention and the seriousness of the misconduct, a failure to impose significant sanctions would cause a substantial loss of confidence in the integrity of the capital markets and would expose investors to unnecessary risks. We agree with Staff that it would be in the public interest to impose permanent restrictions on Bajaj and Aziz.

2.11 Market sanctions - carve-outs

2.11.1 Itwaru

[215] We now address the question of whether the individual respondents should benefit from any carve-outs from the market sanctions. We begin with Itwaru.

[216] Itwaru asks us to allow him to trade in his Tax-Free Savings Account and Registered Retirement Savings Plan. Staff does not object. We shall so order, on the following terms that were proposed by Staff in its written submissions, and accepted by Itwaru in oral submissions:

a. trading limited to mutual funds, exchange-traded funds, government bonds and guaranteed investment certificates for the account of any registered retirement savings plan, registered retirement income fund and tax-free savings account (as defined in the *Income Tax Act*[64]) in which Itwaru has sole legal and beneficial ownership; and

b. where the trade is transacted through a registered dealer in Ontario to whom Itwaru has given a copy of our order.

[217] In Staff's written submissions, Staff sought one additional condition, which would deny Itwaru the benefit of this carve-out until he has satisfied any monetary obligations (sanctions or costs) contained in our order. At the hearing, Itwaru did not address that request. Our order will therefore include that term as Staff proposes.

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[64] RSC, 1985, c 1 (5th Supp)

[218] Itwaru also asks that any director and officer ban not apply to two corporations with which he remains involved. Those are Azira Corporation, which he describes as his "personal corporation", and Money Moov Payments Inc., the corporation that Itwaru wishes to have acquire shares of First Global as part of the resolution he contemplates, as discussed above.

[219] We are not prepared to grant those carve-outs. Money Moov Payments Inc. has raised investment capital and intends to issue securities to the public market. We are unaware of any Tribunal precedent in which a respondent subject to a director and officer ban was permitted to continue in that role with an issuer of that kind. As for Azira Corporation, Itwaru tendered no evidence about it; the only reference we have is the mention in his written submissions of it being his "personal corporation". That information is insufficient both about the corporation's activities and beneficiaries, among other things.[65] Itwaru has not met his burden of showing that the principles of investor protection and confidence in the capital markets would still be adequately supported if we were to grant the requested carve-outs.

2.11.2 Alli

[220] Alli asks that any trading ban against him be suspended for one year, to enable him to pay any monetary sanctions and costs. He sought no other carve-outs, although when we asked for his position if we were to impose market restrictions for more than the two years he proposed, he agreed that carve-outs similar to those Itwaru seeks (as discussed above) would be satisfactory.

[221] If we are to impose a director and officer ban, Alli submits that it should be for only one year. Alli says that he needs to be an officer or director to make a living, but does not substantiate that statement.

[222] We are sympathetic to his stated desire to earn money to pay monetary sanctions and costs, but it would be unprecedented to impose a trading ban and suspend it for a period of time to allow the respondent to make better use of the capital markets. Such a term would undermine both the specific and general deterrent value of the sanctions, would fail to respond adequately to the

[65] *Solar Income Fund* at para 154

seriousness of the misconduct, and would not be in the public interest. However, we are prepared to grant Alli a carve-out on the same terms as those for Itwaru.

2.11.3 Aziz

[223] Aziz requests a trading carve-out, because he is quickly approaching retirement age without any pension plan or other annuity to rely on after he is no longer able to work. He asks that he be able to personally hold or trade securities to invest his own money, if necessary. The carve-out he proposes would not be limited to registered accounts or otherwise.

[224] Staff opposes any carve-out for him.

[225] We agree with Staff that it would not be in the public interest to grant Aziz a trading carve-out (particularly the wide-ranging one he seeks, which precludes the necessary risk assessment), in view of the nature and seriousness of the fraud he committed, and the need for proportionality and deterrence.[66] Further, for us to grant a carve-out for a respondent requires confidence that the respondent fully understands the conditions that are part of the carve-out, and that the respondent will abide by those conditions. Where a respondent commits fraud, especially a particularly serious fraud such as the one here, it is difficult to have the necessary trust. We are unable to be sufficiently confident that Aziz would understand and respect the boundaries of a carve-out.

2.11.4 Bajaj

[226] Bajaj made no clear request for a carve-out of any kind. In his written submissions, he contemplates that for a period of time (he suggests five years), he will be denied the use of any exemptions contained in Ontario securities law. He asks that any denial of exemptions be "except for exemptions used in respect of trading in or acquiring securities in accordance with the exemptions in the above paragraph".[67] We could find no paragraph "above" in the submissions that this relates to.

[227] The lack of clarity is of no consequence. Even had Bajaj clearly asked for a carve-out, we would have denied his request as we did Aziz's. The finding of

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[66] *Black Panther* at paras 68-69; *Lyndz Pharmaceuticals Inc (Re)*, 2012 ONSEC 25 at paras 78-81

[67] Written Submissions of Harish Bajaj, February 9, 2023, at para 64(e)

fraud against him, and the nature and seriousness of the fraud, place this case in the category where an unconditional ban on participation in the capital markets is warranted.

2.12 Reprimand

[228] Staff seeks a reprimand, unless we order the sanctions they requested and our reasons include a clear denunciation of the respondents' conduct. Both those conditions are substantially satisfied. We therefore follow Staff's invitation not to impose a reprimand.

2.13 Conclusion as to sanctions

[229] In our analysis above, we have addressed each element of sanctions separately. However, we have also looked at the sanctions overall for each respondent, and we have ensured that as a whole they are proportionate to that respondent's misconduct.[68] This approach is particularly reflected in the administrative penalties we are imposing against the First Global parties, which, for the reasons we explained above, are higher than they would be had we ordered a greater disgorgement amount against them.

[230] We describe the sanctions in detail at the end of these reasons, but in brief, we order:

a. First Global, Itwaru and Alli, jointly and severally, to disgorge $1.51 million;

b. GBR Ontario, Bajaj and Aziz, jointly and severally, to disgorge $2.95 million in respect of the First Global debentures;

c. GBR Ontario and Aziz, jointly and severally, to disgorge $450,000 in respect of the loans from investor EH;

d. administrative penalties of:

   i. $825,000 against GBR Ontario;

   ii. $750,000 against Bajaj;

[68] *MCJC Holdings Inc (Re)* (2002), 26 OSCB 8206 at para 56

iii. $725,000 against Aziz;

iv. $300,000 against each of First Global and Itwaru; and

v. $275,000 against Alli;

e. permanent market restrictions against each of GBR Ontario, Bajaj and Aziz;

f. seven-year market restrictions against First Global;

g. seven-year director and officer prohibitions against Itwaru and Alli; and

h. subject to limited carve-outs applicable after they satisfy any financial sanctions and costs ordered, five-year trading restrictions against Itwaru and Alli.

3. ANALYSIS – COSTS

3.1 Introduction

[231] We turn now to consider Staff's request for costs. Section 127.1 of the Act authorizes the Tribunal to order a respondent to pay the costs of an investigation and of the proceeding that follows it, if the respondent has been found to have contravened Ontario securities law. The obligation to reimburse costs is reasonable, because the Commission's budget, including its enforcement budget, is paid by fees charged to registrants, issuers and others. A costs order is discretionary and is designed to reduce the burden on market participants to pay for investigations and enforcement proceedings.[69]

[232] Staff seeks costs of $1,080,285 as follows:

a. First Global debentures: $452,723 against the GBR parties on a joint and several basis, and $226,361 against the First Global parties on a joint and several basis;

b. Loans from EH to GBR: $104,474 against Aziz and GBR Ontario on a joint and several basis; and

[69] *Quadrexx* at para 118; *PFAM* at para 111

c. First Global purported licence transactions: $296,727 against Itwaru, Alli and First Global on a joint and several basis.

[233] Staff seeks additional costs of $14,145 against Alli in respect of his motion for a stay, brought after the closing of the evidentiary portion of the merits hearing.

[234] For reasons we explain below, we conclude that it would be appropriate to order that the respondents pay costs as Staff requests, except that Alli shall pay no costs in respect of his motion for a stay.

3.2 Analysis

[235] The costs associated with the investigation and proceeding were understandably significant. This was a long, serious and complex matter. The investigation involved the collection of more than 12,000 documents, approximately 2,000 of which formed part of the record in this proceeding. Staff's allegations, which it was substantially successful in proving, related to three sets of contraventions. The fraud was multi-layered and involved many individuals, several jurisdictions, and an extensive record that was replete with contradictory evidence. The merits hearing lasted more than thirty days.

[236] As is the case with an administrative penalty, determining the amount of a costs award is not a science. We are guided primarily by the following considerations:

a. although a respondent found to have contravened Ontario securities law should expect to pay costs, a large costs award can reasonably be viewed as punitive, and may adversely and inappropriately affect a respondent's willingness, and ability, to pursue a full defence;

b. the misconduct here was very serious, which underscores the importance of a regulatory response;

c. the proceeding was long and complex; and

d. there was no conduct by Staff or the respondents that unnecessarily lengthened the merits hearing, or that contributed meaningfully to shortening it; we reject Staff's suggestion that the respondents unduly complicated the merits hearing because they should have admitted certain allegations against them to narrow the scope of the issues at the merits hearing. Respondents are entitled to preserve their rights to understand

the case against them and to defend against the allegations against them.[70]

[237] Staff's evidence shows its costs and disbursements associated with the investigation, pre-hearing activities and merits hearing. Its affidavit lists members of Staff and external counsel, and includes detailed records of the time they spent on these activities. Staff excluded from its calculation various categories, including the time spent by employees who recorded 35 or fewer hours, and by employees in Enforcement Branch functions that support the investigation and litigation functions. After making those deductions, and then using hourly rates the Tribunal has previously adopted for the relevant positions, the costs and disbursements total $2,726,421.53.

[238] Staff then reduced that amount primarily by narrowing the list of employees in each of the investigation and litigation phases to only two, being the primary litigation counsel and the primary investigator. This resulted in an adjusted total of $1,468,643.01.

[239] Relying on an analysis of the number of witnesses for Staff and of the proportion of the total time those witnesses spent testifying, and also considering the number of paragraphs in the merits decision devoted to each of the three principal contraventions in this case, Staff apportioned its costs claim as follows:

a. 65% to the First Global debentures;

b. 10% to the loans from EH to GBR; and

c. 25% to the First Global purported licence transactions.

[240] We do not consider the number of paragraphs in a merits decision that are devoted to each set of transactions to be a reliable indicator of the portion of time spent by Staff. There may be many reasons why greater space in the reasons is devoted to a particular set of transactions. However, Staff's other basis for apportionment, *i.e.*, testimony time of each witness, is a reasonable factor. On that basis alone, Staff's apportionment is fair, and we accept it.

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[70] *2241153 Ontario Inc et al (Re)*, 2016 ONSEC 10 at paras 16-17

[241] Staff then further reduced the three amounts to arrive at its claim. It did so by applying discounts as follows to reflect Staff's view of its relative success concerning the allegations relating to the various transactions:

a. First Global debentures: a 25% discount to reflect dismissal of the s. 44(2) allegations;

b. Loans from EH to GBR: a 25% discount to reflect dismissal of the s. 44(2) allegations; and

c. First Global purported license transactions: a 30% discount to reflect dismissal of some of the allegations.

[242] With these reductions, Staff claims total costs and disbursements of $1,080,285. That figure represents a reduction of approximately 60% from the starting number, which already reflected the various exclusions mentioned above.

[243] The respondents do not question the factual basis behind Staff's total. However, they submit that the claim is excessive, and that they should not be required to pay any costs or that they should pay a significantly reduced amount. With respect to Staff's mixed success, various respondents proposed a simple calculation based on the number of statutory (or similar) provisions contravened, compared to the number of contraventions alleged. We reject this approach to calculating costs, which entirely disregards the time associated with investigating and litigating any particular contravention.

[244] Some respondents make specific submissions, as follows.

[245] We are not persuaded by Itwaru's reference to decisions by the Investment Industry Regulatory Organization of Canada (the predecessor to the current Canadian Investment Regulatory Organization), which he submits reflect a more conservative approach to costs. The context for decisions of a self-regulatory organization is different, given that members instead of market participants fund regulatory operations, and we see no reason to depart from this Tribunal's well-established approach to costs.

[246] Itwaru also proposes a greater discount to reflect Staff's mixed success. We cannot agree. The factual matrix underlying Staff's s. 44(2) allegations (which were dismissed) is substantially similar to that underlying the illegal distribution

contraventions, and we consider a 25% discount to be more than fair to the respondents.

[247] Similarly, we conclude that while Staff's allegations of inappropriate recognition of revenue were successful only in respect of one of four sets of financial statements, the investigation, analysis and hearing time would not have been significantly reduced had Staff's allegations been limited to the one set of financial statements in respect of which the merits panel found a contravention. The reason no contravention was found in respect of the year-end statements and the Q1 and Q2 statements was the availability of a due diligence defence. The underlying facts and analysis applied equally across all four sets of statements. We have some sympathy for Itwaru's submission that if the allegations in this regard had been limited to the Q3 statements, the substantive allegation might not have been contested, but that is too speculative to be given significant weight. In any event, we consider a 30% discount to be more than fair to the respondents.

[248] Alli points out that Staff did not allege that he perpetrated a fraud. He submits that the costs sought do not reflect that fact. It is true that neither Itwaru and Alli was alleged to have committed fraud. However, it was necessary to hear and analyze facts relating to all parties' interactions with investors in order to understand each respondent's role and responsibilities. By effectively outsourcing the fundraising activity to GBR Ontario and its principals, Itwaru and Alli forced an overall view of the facts. Indeed, that overall view likely operated to the benefit of the First Global parties, by making it clear that it was the GBR Ontario principals who made the misrepresentations to the investors. We see no reason to further discount the costs claimed against Alli.

[249] GBR Ontario submits that we should make no costs order against it because of its current status. For the reasons we set out earlier, we reject this position.

[250] Bajaj proposes a greater deduction because the s. 44(2) allegations were dismissed. We reject this suggestion for the same reasons as with respect to Itwaru.

[251] We were not persuaded by Aziz's submission that Staff unduly lengthened the proceeding. None of the aspects that Aziz cites was improper or unreasonable.

[252] We consider Staff's request for costs in respect of its allegations to be fair and proportionate. Although the amount is high, that reflects the length and complexity of this matter.

[253] We will not order costs, though, in respect of Alli's motion to stay the proceeding. The merits panel did conclude that the motion was brought significantly late in the proceeding, that it was frivolous (because it related to irrelevant matters), and that it "did not approach" the necessary standard for granting a stay.[71] However, despite these findings, we exercise our discretion not to order additional costs against Alli. He was unrepresented by counsel in bringing the motion, and we appreciate that the legal tests relating to a stay motion are not necessarily intuitive.

[254] We would reach the same conclusion even if we were to adopt Staff's submission that we should regard the stay motion as essentially an extension of the hearing, considering the costs of the motion to be part of the costs of the hearing. Even if we were to do that, we would still analyze the motion costs separately, in the same way that Staff has broken down the hearing costs by contravention and by respondent.

3.3 Conclusion about costs

[255] Considering all the above factors, we will order costs as follows:

a. in respect of the First Global debentures, $452,723 against GBR Ontario, Bajaj and Aziz jointly and severally, and $226,361 against First Global, Itwaru and Alli jointly and severally;

b. in respect of EH's loans to GBR, $104,474 against GBR Ontario and Aziz jointly and severally; and

c. in respect of the purported licence transactions, $296,727 against First Global, Itwaru and Alli jointly and severally.

[71] *First Global Data Ltd (Re)*, 2022 ONCMT 24

[256] That results in the following total costs orders:

a. against First Global, Itwaru and Alli, $523,088 jointly and severally;

b. against GBR Ontario, Bajaj and Aziz, $452,723 jointly and severally; and

c. against GBR Ontario and Aziz, an additional $104,474 jointly and severally.

4. CONCLUSION

[257] The sanctions we have specified above are proportionate to the misconduct in this case, and are appropriate when viewed globally in the context of each respondent. The combination of sanctions for a particular respondent:

a. ensures that none of them profited, directly or indirectly, from their misconduct;

b. takes account of the mitigating factors, including in particular the respondents' co-operation with Staff throughout the investigation;

c. differentiates based on degree of culpability; and

d. effects both general and specific deterrence, thereby protecting investors and promoting confidence in the capital markets.

[258] The costs orders are reasonable in the context of the investigation and proceeding, and are fairly apportioned among the respondents and according to the various contraventions of Ontario securities law.

[259] For the reasons set out above, we shall issue an order that provides as follows:

a. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the Act:

i. GBR Ontario, Bajaj and Aziz shall cease trading in any securities or derivatives, or acquiring any securities, permanently;

ii. First Global shall cease trading in any securities or derivatives, or acquiring any securities, for a period of seven years; and

iii. Itwaru and Alli shall cease trading in any securities or derivatives, or acquiring any securities, for a period of five years, except that after each individual has fully paid the amounts ordered against him in subparagraphs (e), (f) and (g) below, he may trade in

mutual funds, exchange-traded funds, government bonds and guaranteed investment certificates for the account of any Registered Retirement Savings Plan, Registered Retirement Income Fund or Tax-Free Savings Account (as those terms are defined in the *Income Tax Act*) of which only he has sole legal and beneficial ownership, through a registered dealer in Ontario to whom he has given both a copy of our order and a certificate from the Commission confirming that he has paid the monetary sanctions and costs as required;

b. pursuant to paragraph 3 of s. 127(1) of the Act:

   i. any exemptions contained in Ontario securities law shall not apply to GBR Ontario, Bajaj or Aziz, permanently;

   ii. any exemptions contained in Ontario securities law shall not apply to First Global, for a period of seven years; and

   iii. any exemptions contained in Ontario securities law shall not apply to Itwaru or Alli, for a period of five years;

c. pursuant to paragraphs 7, 8, 8.1 and 8.2 of s. 127(1) of the Act:

   i. Bajaj and Aziz shall resign any positions that they hold as directors or officers of any issuer or registrant, and are prohibited permanently from becoming or acting as directors or officers of any issuer or registrant; and

   ii. Itwaru and Alli shall resign any positions that they hold as directors or officers of any issuer or registrant, and are prohibited for a period of seven years from becoming or acting as directors or officers of any issuer or registrant;

d. pursuant to paragraph 8.5 of s. 127(1) of the Act:

   i. GBR Ontario, Bajaj and Aziz are prohibited permanently from becoming or acting as a registrant or as a promoter;

   ii. First Global Data is prohibited for a period of seven years from becoming or acting as a registrant or as a promoter; and

iii. Itwaru and Alli are prohibited for a period of five years from becoming or acting as a registrant or as a promoter;

e. pursuant to paragraph 9 of s. 127(1) of the Act:

i. GBR Ontario shall pay to the Commission an administrative penalty of $825,000;

ii. Bajaj shall pay to the Commission an administrative penalty of $750,000;

iii. Aziz shall pay to the Commission an administrative penalty of $725,000;

iv. First Global shall pay to the Commission an administrative penalty of $300,000;

v. Itwaru shall pay to the Commission an administrative penalty of $300,000; and

vi. Alli shall pay to the Commission an administrative penalty of $275,000;

f. pursuant to paragraph 10 of s. 127(1) of the Act:

i. First Global, Itwaru and Alli are jointly and severally liable to disgorge to the Commission $1.51 million;

ii. GBR Ontario, Bajaj and Aziz are jointly and severally liable to disgorge to the Commission $2.95 million; and

iii. GBR Ontario and Aziz are jointly and severally liable to disgorge to the Commission an additional $450,000; and

g. pursuant to s. 127.1 of the Act:

i. First Global, Itwaru and Alli shall pay costs to the Commission in the amount of $523,088, for which amount they shall be jointly and severally liable;

ii. GBR Ontario, Bajaj and Aziz shall pay costs to the Commission in the amount of $452,723, for which amount they shall be jointly and severally liable; and

iii. GBR Ontario and Aziz shall pay additional costs to the Commission in the amount of $104,474, for which amount they shall be jointly and severally liable.

Dated at Toronto this 22nd day of June, 2023

"Timothy Moseley"

Timothy Moseley

"William J. Furlong"

William J. Furlong

"Dale R. Ponder"

Dale R. Ponder