Capital Markets Tribunal
Tribunal des marchés financiers
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Citation: *Feng (Re)*, 2023 ONCMT 43
Date: 2023-11-14
File No. 2021-27

IN THE MATTER OF
JIUBIN FENG and CIM INTERNATIONAL GROUP INC.

REASONS AND DECISION

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

Adjudicators:	Cathy Singer (chair of the panel) Sandra Blake Russell Juriansz	
Hearing:	By videoconference, August 17, 2023	
Appearances:	Adam Gotfried	For Staff of the Ontario Securities Commission
	Rohit Kumar Tina Kaye	For Jiubin Feng and CIM International Group Inc.

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REASONS AND DECISION

1. OVERVIEW

[1] In a decision on the merits dated March 15, 2023 (the **Merits Decision**),[1] the Capital Markets Tribunal found that the respondents, Jiubin Feng and his company CIM International Group Inc. (**CIM**), perpetrated a securities fraud on investors, contrary to s. 126.1(1)(b) of the *Securities Act* (the ***Act***).[2]

[2] Staff of the Ontario Securities Commission asks that we impose two types of sanctions against the respondents under s. 127(1) of the *Act*:

a. permanent restrictions on the respondents' participation in the capital markets; and

b. financial sanctions, including an order requiring the respondents to disgorge funds they obtained improperly and to pay an administrative penalty.

[3] We will address each of these categories in turn, as well as Staff's request that the respondents pay a portion of the Commission's costs of the investigation and this proceeding.

[4] For the reasons set out below, we conclude it would be in the public interest to order that:

a. Feng and CIM shall pay administrative penalties of $500,000 each;

b. Feng and CIM shall jointly and severally disgorge $7,630,000;

c. Feng and CIM shall be subject to permanent restrictions on their ability to participate in the capital markets, subject to a carve-out allowing Feng to trade in his personal registered accounts; and

d. Feng and CIM shall jointly and severally pay costs of the investigation and proceeding in the amount of $206,769.34.

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[1] *Feng (Re)*, 2023 ONCMT 12

[2] RSO 1990, c S.5

2. BACKGROUND

[5] The Merits Decision made the following findings of fact that are relevant to our decision on sanctions and costs:

a. Feng is a real estate developer who was CIM’s principal directing mind;

b. between February 6 and August 2, 2018, the respondents raised $10 million through CIM debentures from 36 investors to develop the “Bayview Creek” real estate project which Feng controlled;

c. the offering documents, marketing materials and in-person representations made by Feng and CIM to investors stipulated that CIM would use the funds exclusively to finance the Bayview Creek project;

d. between February 7 and August 8, 2018, CIM loaned the net proceeds from the debenture offering to Bayview Creek in several tranches at an annual interest rate of 20%, payable semi-annually (**Net Proceeds Loan**);

e. between February 7 and November 14, 2018, approximately $3.39 million of the Net Proceeds Loan were diverted from the Bayview Creek bank account and used for non-Bayview Creek expenses, including for unsecured loans made from Bayview Creek back to CIM, and for investments in, or unsecured loans to, other real estate projects controlled by Feng;

f. in 2019, Feng had a second mortgage registered on the Bayview Creek property to secure a loan made by Feng on behalf of Bayview Creek from a third-party lender, contrary to the series of pledges and covenants made by Bayview Creek to CIM on the Net Proceeds Loan;

g. CIM had also been borrowing funds from Bayview Creek and by June 30, 2019, CIM’s debt to Bayview Creek was nearly as large as Bayview Creek’s debt to CIM for the Net Proceeds Loan;

h. Feng caused CIM to offset the debt between CIM and Bayview Creek, thereby reducing Bayview Creek’s interest obligations to CIM and causing CIM to be unable to pay interest to CIM investors; and

i. CIM defaulted on its interest payments to investors on December 16, 2019.

[6] The Merits Decision found that the respondents raised funds from investors to be used exclusively to finance the Bayview Creek project, but then misapplied investor funds for purposes other than the development of the Bayview Creek project, which was contrary to the representations Feng and CIM made to CIM investors.

[7] The Merits Decision concluded that the respondents engaged in a course of conduct relating to the securities that they knew perpetrated a fraud on investors, which ultimately caused investors to suffer significant losses.

3. ANALYSIS

3.1 Introduction

[8] The Tribunal may impose sanctions under s. 127(1) of the *Act* where it finds it to be in the public interest to do so. The Tribunal's exercise of its jurisdiction must be consistent with the purposes of the *Act*, which include protecting investors from unfair, improper and fraudulent practices, and fostering fair and efficient capital markets and confidence in the capital markets.

[9] Sanctions are protective and are intended to prevent future harm to investors and to the capital markets, and they must be appropriate and proportionate to the respondent's conduct in the circumstances of the case.[3]

[10] In determining sanctions, the Tribunal has previously identified a non-exhaustive list of factors to consider. The applicability and importance of each factor will vary according to the circumstances of each case.[4] The particular factors that influenced our decisions are set out in the following paragraphs.

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

[4] *York Rio Resources Inc (Re)*, 2014 ONSEC 9 (***York Rio***) at para 34

3.2 Sanctioning factors

3.2.1 Seriousness of the misconduct

[11] The Tribunal has held that fraud is the most egregious violation of securities law and that sanctions must reflect that.[5]

[12] The respondents obtained $10 million from investors over a six-month period through their repeated false representations to investors that the funds would be used exclusively to finance the Bayview Creek project.

[13] Staff submits that, in addition to fraudulently misrepresenting to investors how investor funds would be used, and then misusing the funds, the respondents later offset the debt between CIM and Bayview Creek and registered a second mortgage on the Bayview Creek property, contrary to promises made on the Net Proceeds Loan.

[14] The respondents submit that in considering the seriousness of their misconduct, we should distinguish this case from those where it was found that the parties had engaged in illegitimate business practices, or in activity that was part of a larger fraudulent scheme or from which they were personally enriched as a result of the fraud. The respondents say there is no evidence that their misconduct was part of a larger fraudulent scheme or involved illegal distributions of securities, or that Feng was personally enriched as a result of the fraud.

[15] The respondents submit that fraud falls along a spectrum – with those who commit fraud intending that their victims will lose their money on one end to those who are well-intentioned but misguided or reckless on the other. The respondents submit that the Merits Decision did not find an overt fraudulent scheme or an intent on behalf of the respondents to deprive investors of their money. Rather, the misconduct in this case falls towards the other end of the spectrum, being more demonstrative of a misguided course of conduct.

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[5] *Solar Income Fund (Re)*, 2023 ONCMT 3 (***Solar Income Fund***) at para 20

[16] The Tribunal has stated that, without diminishing the seriousness of fraud, it must be viewed in perspective recognizing that some who commit fraud are well-intentioned but misguided or reckless.[6]

[17] We agree that fraudulent misconduct warrants significant sanctions. We also agree that the conduct in question should be put into context, and we acknowledge that the fraud in this case is not among the most egregious of frauds that have come before this Tribunal. However, we disagree with the respondents in characterizing their actions as closer to being misguided or reckless. The actions of Feng and CIM were deliberate from the start.

[18] In the Merits Decision, it was found that Feng understood what he was representing to investors, and that he understood and participated in using a substantial amount of the proceeds for other purposes. Feng also caused CIM's debt to Bayview Creek to be offset by the debt owed by Bayview Creek to CIM under the Net Proceeds Loan, thereby resulting in CIM being unable to pay interest on the CIM debentures. Feng further had a second mortgage registered on the Bayview Creek property to secure a loan made by Feng on behalf of Bayview Creek from a third-party lender, contrary to the series of pledges and covenants made by Bayview Creek to CIM on the Net Proceeds Loan.

[19] In doing so, Feng and CIM placed investors' investments at a risk they did not bargain for, with all but one of the investors ultimately losing all of their investments and all of the investors losing interest they were entitled to under the debentures.

3.2.2 Level of activity in the marketplace and whether violations were isolated or recurrent

[20] The next two factors are the respondents' level of activity in the marketplace and whether the misconduct was an isolated instance or a recurring series of events.

[21] The respondents' level of activity in the marketplace is gauged by a number of factors, including the dollar amount raised, the number of investors affected, the number of individual breaches, and the duration of the misconduct.[7]

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[6] *Money Gate Mortgage Investment Corporation (Re),* 2021 ONSEC 10 (***Money Gate***) at para 16
[7] *Solar Income Fund* at para 15

[22] The Merits Decision found that $10 million was raised from 36 investors over a period of 9 months. We find this level of activity to be fairly significant.

[23] Staff submits that Feng and CIM's fraudulent activities, including the representations made to investors and the diversions of investors' funds, were recurrent. The evidence indicates that Feng's actual diversion of the investors' funds occurred over dozens of transfers of funds by Bayview Creek back to CIM or to other real estate projects controlled by Feng, often immediately after they were deposited into the Bayview Creek bank account.

[24] The respondents submit that the violations in this case were isolated, in that the debenture offering took place over a period of less than six months and the diverted funds were transferred over a period of nine months, both time periods being not as extensive as seen in other comparable fraud cases before the Tribunal.

[25] The respondents cite *Solar Income Fund* as comparable, where there were 22 transactions in 10 months. We distinguish the duration and number of individual transactions in that case from the facts before us in that almost all of those transactions involved the same kind of repetitive transaction (*i.e,* a monthly distribution to unitholders) as opposed to independent transactions like the active financing initiatives carried out by the respondents.

[26] In our view, the duration of the misconduct in this case is not as lengthy as the Tribunal has seen in other instances. However, there was still a significant amount of activity during the period, resulting in a substantial amount of money ($10 million) being raised from a large number of investors (36).

3.2.3 Mitigating factors

[27] Staff submits there are no mitigating factors present in this case, other than a reduction that could apply to disgorgement to account for a $2.37 million settlement between Feng, CIM and one investor (the **Settlement**).

[28] Staff submits that Feng has otherwise refused to take accountability for his actions or recognize and acknowledge the seriousness of his and CIM's fraudulent activities.

[29] The respondents submit that Staff's characterization of Feng and CIM is unfair in that the respondents had the right to, and chose to, exercise their rights to make full answer and defence at the merits hearing.

[30] The respondents also submit that there are several mitigating factors that ought to guide the Tribunal in determining the appropriate sanctions, including:

a. Feng did not personally profit;

b. there is no evidence that this was a fraudulent scheme intended on defrauding investors;

c. this was not a case alleging illegal distributions in addition to fraud;

d. the Tribunal found that only a portion of investor funds were diverted;

e. Feng was inexperienced in the capital markets having never operated as CEO of a public company;

f. the Settlement;

g. Feng has commenced a civil lawsuit in an attempt to recover investor funds in relation to the Mackenzie Creek Project (another real estate project controlled by Feng);

h. neither Feng nor CIM have any regulatory or disciplinary history with the Tribunal;

i. Steven Sun, the President of the Canada-China Realty Professional Association, provided a strong character reference for Feng as to the nature of Feng's good character and contributions to the community;

j. the diverted funds were loaned to other legitimate real estate projects;

k. Bayview Creek continued to pay for Bayview Creek expenses after August 2018; and

l. English is not Feng's first language.

[31] We have considered all of these factors and note throughout our analysis those we find relevant in determining appropriate sanctions.

[32] We note, as the Tribunal has previously held,[8] that the respondents' choice to defend themselves at the merits hearing and any lack of remorse on their part, are not aggravating factors in determining sanctions.

3.2.4 Specific and general deterrence

[33] The final factor is the likely effect that any sanction would have on the respondents ("specific deterrence") as well as on others ("general deterrence").

[34] Staff submits that the sanctions it has requested will be effective in meeting these twin goals while the respondents submit that undue emphasis on general deterrence may result in a penalty that is disproportionate and punitive.

[35] The Tribunal has found that misconduct that is of the most egregious kind (such as fraud), must carry with it significant sanctions to achieve the necessary deterrent effect.[9] We agree. Both specific and general deterrence are important considerations in our determination of what sanctions would be in the public interest.

3.3 Restrictions on participation in capital markets

3.3.1 Introduction

[36] Staff asks that we impose an order permanently restricting the respondents from participating in the capital markets. Specifically, Staff asks for an order that:

a. trading in any securities or derivatives by Feng and CIM cease permanently;

b. the acquisition of any securities by Feng and CIM cease permanently;

c. any exemptions contained in Ontario securities law do not apply to Feng and CIM permanently;

d. Feng resign any positions he holds as a director or office of an issuer or registrant;

e. Feng be permanently prohibited from acting as a director or officer of an issuer or registrant; and

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[8] *Kitmitto (Re)*, 2023 ONCMT 4 (***Kitmitto***) at para 15

[9] *Money Gate* at para 33

f. Feng and CIM be permanently prohibited from becoming or acting as registrants or promoters.

[37] The respondents submit that the market participation bans sought by Staff in relation to Feng are disproportionate in light of the Tribunal's jurisprudence and when assessed against the particular circumstances of this case.

[38] We find that it is in the public interest to permanently prohibit the respondents from participating in Ontario's capital markets, subject to limited exceptions for certain personal trading once all monetary sanctions and costs are paid, as discussed below.

3.3.2 Appropriate market participation bans

[39] The market participation bans sought by Staff are frequent in cases of fraud.[10]

[40] Staff submits that no exceptions to any of the requested sanctions for personal trading are appropriate in this case as the respondents' conduct was deceitful and harmful to investors.

[41] The respondents submit that Feng's continued participation in the capital markets as it relates to trading will not be detrimental to the integrity of the capital markets as the misconduct did not relate to any personal trading by Feng. The respondents similarly submit that a permanent ban on acting as an officer or director is disproportionate to the circumstances of this case.

[42] Should the Tribunal find that permanent market participation bans are warranted, the respondents submit that a carve-out is appropriate. We note that in making this submission, the respondents did not provide any specifics about the nature of the trading carve-out sought, nor the reasons for seeking the carve-out. However, the respondents pointed us to two Tribunal decisions, *Money Gate* and *Solar Income Fund*, where respondents were found to have committed fraud but were granted carve-outs to trade in and acquire securities in their personal registered accounts.[11]

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[10] *Money Gate*; *Natural Bee Works Apiaries Inc (Re)*, 2019 ONSEC 31; *Quadrexx Asset Management Inc (Re)*, 2018 ONSEC 3 (***Quadrexx***); *Bradon Technologies Ltd (Re)*, 2016 ONSEC 19 (***Bradon Technologies***)

[11] *Money Gate* at paras 36-38; *Solar Income Fund* at paras 148-156

[43] Staff opposes the inclusion of a carve-out, but asks that if we impose one, it should only take effect once all monetary sanctions and costs are paid by the respondents.

[44] We find permanent market participation bans to be appropriate in the circumstances. The fraudulent misconduct, its serious nature, and the need to send a message of deterrence, all support permanent market restrictions. These restrictions are necessary to protect investors and restore confidence in the capital markets.

[45] With respect to a trading carve-out, we note that previous Tribunal decisions have articulated that participation in Ontario's capital markets is a privilege, not a right.[12] By engaging in fraudulent misconduct, the respondents have proven to us that they cannot be trusted to participate in the capital markets unchecked. However, a permanent ban, with no trading carve-out should be reserved for the most egregious misconduct.[13]

[46] We do not find it necessary nor in the public interest to withhold a carve-out allowing Feng to trade in his personal registered accounts. However, without the benefit of submissions on a director and officer carve-out, we cannot entertain this additional request.

[47] We find it is in the public interest to include a carve-out in our order that largely mirrors the language used in the *Solar Income Fund* decision. The carve-out will enable Feng to trade in and acquire securities in registered accounts of which he is the owner.

[48] We did not receive any submissions from the respondents concerning Staff's request that financial sanctions and costs be paid before the carve-out is to take effect. While past panels have commented that such a term may be viewed as punitive,[14] since the term was not contested by the respondents our order will stipulate that the carve-out is to be subject to the satisfaction of the respondents' financial obligations to the Commission.

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[12] *Erikson v Ontario (Securities Commission),* 2003 CanLII 2451 (ONSC) at para 55

[13] *Solar Income Fund* at para 144

[14] *Kitmitto* at para 23, citing *VRK Forex & Investments Inc (Re)*, 2022 ONCMT 28 at para 39

3.4 Financial sanctions

3.4.1 Introduction

[49] Staff seeks two financial sanctions against the respondents:

a. disgorgement of $7,630,000; and

b. an administrative penalty of $750,000 for each of Feng and CIM.

[50] The respondents submit that the financial sanctions sought by Staff are excessive and not supported by the Tribunal's jurisprudence.

[51] The respondents also submit that Feng does not have the financial resources to satisfy the total amount of monetary sanctions and costs sought in this case. We discuss Feng's ability to pay in our analysis below.

[52] We conclude that it would be in the public interest to order the disgorgement amount sought by Staff, but lower administrative penalties of $500,000 for each of Feng and CIM.

3.4.2 Disgorgement

[53] Staff seeks a disgorgement order of $7,630,000, to be paid by the respondents on a joint and several basis, representing the amount obtained by the respondents minus the Settlement. For the reasons below, we find it is in the public interest to order disgorgement of this amount.

[54] 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.[15]

[55] In coming to our conclusions, we considered all the relevant factors for disgorgement and the circumstances in this case.[16]

3.4.2.a.i Did the respondents obtain an amount as a result of non-compliance with Ontario securities law?

[56] The objective of a disgorgement order is to deprive wrongdoers of ill-gotten gains, reflecting the view that it would be inappropriate for those who contravene Ontario securities law to be able to retain any illegally obtained profits.[17]

[57] The test in paragraph 10 of s. 127(1) is whether the respondents "obtained amounts" as a result of their non-compliance. There is no requirement to show that the respondents directly or indirectly profited from the amounts obtained or that any of those amounts flowed directly to them.[18]

[58] Staff submits that the respondents obtained $10 million from investors, based on dishonest and fraudulent representations that investor funds would be used exclusively to finance the Bayview Creek project. For this reason, Staff submits that the appropriate disgorgement order is $7.63 million, which includes a reduction resulting from the Settlement.

[59] The respondents argue that Staff pursued an allegation that $3.39 million of the $10 million proceeds raised from investors was used in a manner contrary to what investors were told, and that Staff cannot now seek a disgorgement order based on $10 million. The respondents further submit that the Settlement amount should be deducted from the $3.39 million.

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[15] *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18 at para 56
[16] *York Rio* at para 34
[17] *Limelight Entertainment Inc (Re)*, 2008 ONSEC 28 at para 47
[18] *Limelight* at para 49

3.4.2.a.ii Seriousness of the misconduct and whether the misconduct caused serious harm

[60] We discuss the seriousness of the misconduct in section 3.2.1. As we noted, while the fraud in this case is not amongst the most serious that has come before the Tribunal, it is nevertheless serious as investors were exposed to risks they did not bargain for and experienced significant losses.

3.4.2.a.iii Are those who suffered losses likely to be able to obtain redress?

[61] The respondents argue that there is the potential for investors to recover additional funds depending on the outcome of a civil proceeding commenced by Feng against a former partner in the Mackenzie Creek project for actions taken that allegedly caused the value of the units of the Mackenzie Creek project, some of which were held by CIM as security for the CIM debentures, to be written down to a nominal value of $1.

[62] No evidence was produced with respect to the potential for investors to recover additional funds if Feng is successful in his civil proceeding. Accordingly, we do not provide a deduction relating to that proceeding.

3.4.2.a.iv Deterrent effect on the respondents and others

[63] A disgorgement order is appropriate where it will ensure that the respondents do not benefit in any way from their breaches of the *Act,* and it deters others from similar misconduct, thereby protecting investors and restoring confidence in the capital markets.[19]

[64] As noted above, the respondents argue that any undue emphasis on deterrence may result in a penalty that is disproportionate and punitive. We appreciate this concern. We must ensure that all of the sanctions we impose are proportionate to the misconduct at issue.

3.4.2.a.v Conclusion

[65] As noted above, the parties disagree on what the appropriate disgorgement amount should be in this case. Staff proposes a disgorgement order of the total amount raised by the respondents, while the respondents propose the amount

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[19] *Al-Tar Energy Corp (Re)*, 2011 ONSEC 1 at para 71

found in the Merits Decision to be used in a manner contrary to what investors were told. Both parties propose the Settlement amount be deducted from any disgorgement ordered, and we agree. Therefore, we must decide whether the appropriate order is at the high end of $7,630,000 or low end of just over $1 million.

[66] Even though a central purpose of disgorgement orders is to deprive wrongdoers of ill-gotten gains, a respondent wrongdoer who benefits only indirectly rather than directly cannot raise the indirect nature of the benefit as a shield to a disgorgement order.[20] Feng was a director and officer of CIM and a directing mind of CIM, and he also controlled Bayview Creek and the other projects in which CIM had an interest. Feng, indirectly through CIM, obtained the investor funds in connection with the debenture offering.

[67] It has also been found that disgorgement orders should be based on gross amounts obtained, rather than net amounts,[21] recognizing however that disgorgement of the full amount is not mandatory, and the Tribunal has the discretion to order a lower amount.[22]

[68] The respondents rely upon the decision in *Money Gate* where the Tribunal decided to exercise its discretion to reduce the disgorgement order by the amounts found to be loaned in conformance with the promises made to investors, based on the specific circumstances of that case.[23]

[69] Every case is different. In this case, we decide not to exercise our discretion to lower the disgorgement amount except for the Settlement amount. Our focus is on how the funds were obtained. Unlike *Money Gate* where the misrepresentations were of a general nature,[24] in the case before us funds were obtained through the specific misrepresentation that funds would be used exclusively to finance the Bayview Creek project.

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[20] *Solar Income Fund* at para 93
[21] *Bradon Technologies* at para 85
[22] *Quadrexx* at para 47
[23] *Money Gate* at para 57
[24] *Money Gate Mortgage Investment Corporation (Re),* 2019 ONSEC 40 at para 306

[70] For these reasons, we conclude that it is in the public interest to order disgorgement of $7,630,000 to be paid jointly and severally by CIM and Feng.

3.4.3 Administrative penalty

[71] Staff seeks an administrative penalty of $750,000 for each of Feng and CIM.

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

[73] Determining the amount of an administrative penalty is not a science.[25] There are, however, factors to be considered in determining an appropriate administrative penalty, including:

a. the scope of the seriousness of a respondent's conduct;

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

c. whether the respondent realized any profit as a result of his 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.[26]

[74] We have addressed a number of these factors already in these reasons. In our analysis below, we will consider relevant precedents in the context of our earlier discussion.

[75] Staff submits that a $750,000 administrative penalty against each respondent is appropriate given the significant amount of investor funds that were lost and diverted by Feng. A higher administrative penalty will send a strong message to market participants that this type of misconduct will not be tolerated.

[76] Staff points us to the following precedent decisions in support of its request:

a. *Money Gate*, a 2021 decision in which administrative penalties of $750,000 and $600,000 were ordered against the two individual

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[25] *Solar Income Fund* at para 112
[26] *Money Gate* at para 67

respondents, who had perpetrated a fraud on more than 150 investors, and diverted over $8.7 million of investor funds for the benefit of the respondents and their related entities;

b. *Meharchand (Re)*,[27] a 2019 decision 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. *Quadrexx,* a 2018 decision in which the Tribunal ordered administrative penalties of $600,000 against each individual respondent for three separate frauds totalling $3.4 million and involving at least 37 investors; and

d. *North American Financial Group (Re)*,[28] 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.

[77] The respondents submit that in the context of these precedents and in light of the particular facts of this case, a $750,000 administrative penalty against each of the respondents is excessive. In the decisions cited by Staff, the misconduct was more egregious than what was found in this case, in each case the Tribunal ordered monetary penalties far below Staff's recommendation (for all but one respondent) and involved additional contraventions of the *Act*.

[78] The respondents also submit that a lower amount is appropriate given that Feng's conduct was not motivated by personal profit.

[79] The respondents submit that an administrative penalty of approximately half the amount requested by Staff is appropriate and point us to two additional Tribunal decisions in support:

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[27] 2019 ONESC 7

[28] 2014 ONSEC 28

a. *Rezwealth Financial Services Inc (Re)*,[29] a 2014 decision in which the Tribunal ordered one of the individual respondents to pay an administrative penalty of $500,000 as a result of his involvement in a Ponzi scheme. The respondent raised over $3 million from at least 56 investors over a number of years and used $1 million for personal purposes; and

b. *Lyndz Pharameuticals (Re)*,[30] a 2012 decision in which the Tribunal imposed administrative penalties of $500,000 and $600,000 on each of the individual respondents. The individual respondents were found to have, among other things, used $655,000 and $700,000, respectively, of investor funds for personal expenses unrelated to the business of Lyndz Pharmaeuticals Inc.

[80] As we have stated above, the conduct at issue here is serious but not one of the most egregious fraud cases that has come before the Tribunal. After reviewing the decisions above, we agree that an administrative penalty of $750,000 against each respondent is excessive. Such amounts may reasonably be viewed as punitive when viewing all of the sanctions globally. However, a 50% reduction would fall short of achieving the necessary deterrent effect of an administrative penalty.

[81] We find that an administrative penalty of $500,000 against each of Feng and CIM is in the public interest and more in line with previous decisions of this Tribunal, as well as the seriousness of the misconduct at issue. We believe this amount will still achieve both general and specific deterrence.

3.4.4 Ability to pay financial sanctions

[82] The respondents submit that Feng does not have the financial resources to satisfy the monetary sanctions and costs being sought against him. However, they have not provided any evidence to support this claim.

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[29] 2014 ONSEC 18 (***Rezwealth***)

[30] 2012 ONSEC 25

[83] Ability to pay is a relevant factor for financial sanctions, although it is generally not the predominant or determining factor.[31]

[84] The respondents have not demonstrated that their ability to pay is a factor we should consider in our analysis because they have not provided any evidence to support their claim. Without sufficient evidence, we cannot meaningfully entertain the possibility of reducing any of the monetary sanctions we will be imposing on the respondents and decline to do so.

3.5 Costs

[85] We turn now to Staff's request that the respondents pay a portion of the costs incurred by the Commission in this proceeding and in the investigation of this matter.

[86] 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.

[87] Staff seeks costs totaling $265,153.09 against the respondents, to be paid on a joint and several basis.

[88] Staff provided an affidavit regarding costs and disbursements, which shows Staff's costs of the investigation, pre-hearing activities and merits hearing. The affidavit lists members of Staff who participated in each phase, the hourly rates for their positions (which have been previously approved by the Tribunal), and the time spent by them. The total costs incurred were $336,875.34, comprised of fees of $325,265.00 and disbursements of $11,610.34.

[89] The fees excluded were:

a. the time spent by law clerks, students-at-law, employees in the case assessment and E-Discovery & Analytics teams, assistant investigators and junior litigators;

b. the time spent by employees who recorded 35 or fewer hours on the matter;

[31] *Rezwealth* at para 69; *Solar Income Fund* at para 70

c. the time incurred in connection with changing the primary investigator in the matter; and

d. the time incurred in connection with the sanctions and cost hearing.

[90] Staff then reduced the total costs by 21.29% from $336,875.34 to $265,153.09.

[91] The respondents submit that the costs sought by Staff are excessive and not in line with the Tribunal's jurisprudence, having regard to the complexity of the investigation and the length of the proceeding.

[92] The respondents argue that the total costs awarded against the respondents should be half of the total costs incurred by Staff, or approximately $168,000, and cited two decisions of the Tribunal in support.

[93] In *Solar Income Fund*, following a 15-day hearing, the respondents were found to have committed fraud. The merits hearing was lengthy but did not involve any novel issues, and Staff and the respondents each asserted arguments that did not succeed. The Tribunal awarded costs of $150,000, less than half of what Staff were seeking in costs.[32]

[94] In *Doulis (Re)*,[33] following a 10-day hearing, in which no novel issues were involved and the respondents asserted allegations of wrongdoings by Staff, which did not succeed, the Tribunal awarded costs of $198,619.78, an approximate 33% reduction from Staff's request.[34]

[95] When determining costs, the Tribunal should apply a balanced approach that takes into account various factors.

[96] A respondent found to have contravened Ontario securities law should expect to contribute to the costs, with a view to reducing the burden on market participants to pay for investigations and enforcement proceedings. However, a large costs award can reasonably be viewed as punitive. The potential for such an award may adversely affect a respondent's willingness, and ability, to pursue a full defence.

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[32] *Solar Income Fund* at para 112
[33] 2014 ONSEC 40 (***Doulis***)
[34] *Doulis* at paras 3, 82, 91

[97] In this case, we begin with total costs of $336,875.34. We must consider the length of the hearing, which was six days, the complexity of the issues, Staff's degree of success in establishing its allegations (Staff was successful in proving its main allegation on the merits), the time spent by Staff on the matter, and the financial sanctions imposed on the respondents.

[98] We do not question the factual basis behind the total costs accrued or the total costs sought by Staff, but we do consider the reduced number to be at the high end of what we would expect for a case of this nature, including in relation to the cases cited by the respondents.

[99] We agree that the costs award in this case should be lowered, but by 40% rather than 21.29% as Staff has proposed. Not including disbursements, this brings us to $195,159. With disbursements, we arrive at the amount of $206,769.34. We find it to be fair and reasonable in the circumstances that the respondents should be liable for total costs, including fees and disbursements, of $206,769.34, on a joint and several basis.

4. CONCLUSION

[100] For the reasons set out above, we will issue an order as follows:

a. with respect to Feng:

i. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the *Act*, Feng is permanently prohibited from trading in any securities or derivatives, or from acquiring any securities, except that after he has fully paid the amounts in subparagraphs (vi), (vii) and (viii) below, he may trade securities or derivatives, and acquire securities in a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Education Savings Plan, Registered Disability Savings Plan or Tax-Free Savings Account (as those terms are defined in the *Income Tax Act*[35] of which only he is the sole legal and beneficial owner, through a registered dealer in Canada to whom he has given both a copy of our order and a

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

certificate from the Commission confirming that he has paid the required amounts;

ii. pursuant to paragraph 3 of s. 127(1) of the *Act,* any exemptions contained in Ontario Securities law shall not apply to Feng permanently;

iii. pursuant to paragraphs 7 and 8.1 of s. 127(1) of the *Act*, Feng shall resign any positions that he holds as a director or officer of an issuer or registrant;

iv. pursuant to paragraphs 8 and 8.2 of s. 127(1) of the *Act*, Feng is permanently prohibited from acting as a director or officer of an issuer or registrant;

v. pursuant to paragraph 8.5 of s. 127(1) of the *Act*, Feng is permanently prohibited from becoming or acting as a registrant or promoter;

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

vii. pursuant to paragraph 10 of s. 127(1) of the *Act*, Feng shall, jointly and severally with CIM, disgorge to the Commission the amount of $7,630,000; and

viii. pursuant to s. 127.1 of the *Act*, Feng shall, jointly and severally with CIM, pay to the Commission $206,769.34 for the costs of the investigation and proceeding; and

b. with respect to CIM:

i. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the *Act*, CIM is permanently prohibited from trading in any securities or derivatives, or from acquiring any securities;

ii. pursuant to paragraph 3 of s. 127(1) of the *Act,* any exemptions contained in Ontario Securities law shall not apply to CIM permanently;

iii. pursuant to paragraph 8.5 of s. 127(1) of the *Act*, CIM is permanently prohibited from becoming or acting as a registrant or promoter;

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

v. pursuant to paragraph 10 of s. 127(1) of the *Act*, CIM shall, jointly and severally with Feng, disgorge to the Commission the amount of $7,630,000; and

vi. pursuant to s. 127.1 of the *Act*, CIM shall, jointly and severally with Feng, pay to the Commission $206,769.34 for the costs of the investigation and proceeding.

Dated at Toronto this 14th day of November, 2023

"Cathy Singer"

Cathy Singer

"Sandra Blake"

Sandra Blake

"Russell Juriansz"

Russell Juriansz