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Citation: *Odorico (Re)*, 2024 ONCMT 5
Date: 2024-01-25
File No. 2022-18

**IN THE MATTER OF
MARK ODORICO**

REASONS AND DECISION

(Sections 21.7 and 8 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators: Andrea Burke (chair of the panel)
Sandra Blake
Dale R. Ponder

Hearing: In writing, final written submissions received November 29, 2023

Appearances: Alexis Beale For Mark Odorico
Kathryn Andrews For Staff of the Canadian Investment
Marie Abraham Regulatory Organization
Erin Hault For Staff of the Ontario Securities
Commission

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REASONS AND DECISION

1. OVERVIEW

- [1] In a decision dated October 13, 2023 (**First Decision**),¹ we considered an application by Mark Odorico for review of two decisions of the Canadian Investment Regulatory Organization (**CIRO**, formerly the Investment Regulatory Organization of Canada (**IIROC**)).² We set aside the CIRO finding that Odorico misappropriated \$150,000 from two clients (**Set Aside Finding**) and reduced the disgorgement amount ordered by CIRO that was attributable to that finding.
- [2] We requested and received further submissions from the parties as to whether any of the other sanctions ordered by CIRO and not solely attributable to the Set Aside Finding should be varied as a result.
- [3] Odorico submits that all of the sanctions, including those not directly attributable to the Set Aside Finding, as well as the costs ordered should be reduced. Staff of CIRO (**CIRO Staff**) and Staff of the Ontario Securities Commission (**OSC Staff**) submit that none of the remaining sanctions should be reduced.
- [4] These are our reasons and decision to further vary the CIRO Sanctions Decision by reducing from \$50,000 to \$40,000 the fine imposed for misappropriation. We decline to vary the remaining sanctions or the costs ordered.

2. BACKGROUND

- [5] In our First Decision we did not disturb CIRO's other findings of misconduct, namely that Odorico:
- a. misappropriated \$429,000 in funds from client RM;
 - b. made unauthorized trades in client RM's account; and
 - c. failed to cooperate with CIRO's investigation.

¹ *Odorico (Re)*, 2023 ONCMT 34

² *Re Odorico*, 2022 IIROC 6 (**CIRO Merits Decision**) and *Re Odorico*, 2022 IIROC 21 (**CIRO Sanctions Decision**)

[6] Other than reducing CIRO's disgorgement order by the \$150,000 attributable to the Set Aside Finding, we did not disturb any of the other sanctions ordered by CIRO.

[7] Instead, we requested written submissions as to the effect, if any, that setting aside the misappropriation finding should have upon the following sanctions ordered by CIRO that were not made solely with respect to the Set Aside Finding:

- a. a fine of \$50,000 for "Contravention 1" (which included both the misappropriation of funds from RM and the misappropriation of funds from clients JR and MR);
- b. a permanent ban from registration with CIRO in any capacity; and
- c. an order to pay CIRO's investigation and prosecution costs of \$25,000.

[8] Separate and apart from considerations about sanctions relating to the Set Aside Finding, in the First Decision we found that the sanctions imposed by the CIRO panel were reasonable and neither harsh nor excessive.

3. PRELIMINARY MATTER - NEW EVIDENCE

[9] Along with his further written submissions that we requested in our First Decision, Odorico sought to submit and rely upon new affidavit evidence (the **Odorico Affidavit**), relating to two matters:

- a. what Odorico characterized as "additional compelling evidence" tending to undermine or discredit CIRO's finding that Odorico misappropriated client RM's funds; and
- b. Odorico's ability to pay the financial penalties ordered by CIRO.

[10] For the reasons set out below, we have decided not to admit the Odorico Affidavit.

[11] In the First Decision we asked the parties only for written submissions, and not evidence. Odorico did not offer any justification or grounds for the admissibility of the new affidavit evidence at this late stage in the proceeding other than the bare submission that we have discretion to consider it because it is "new and compelling".

- [12] CIRO Staff objected to the admissibility of the Odorico Affidavit on the basis that:
- a. the evidence was neither “new” nor “compelling” and therefore did not meet the established test for admitting fresh evidence;³
 - b. we should not revisit our First Decision in which we found no basis for interfering with CIRO’s finding that Odorico misappropriated client RM’s funds; and
 - c. the argument that Odorico does not have the ability to pay the financial sanctions was not raised before CIRO, nor was it previously raised by Odorico before this Tribunal, prior to the issuance of the First Decision.
- [13] OSC Staff also objected to the admissibility of the Odorico Affidavit and asked that in the event we admit the Odorico Affidavit, we also admit a responding affidavit from OSC Staff.
- [14] Prior to the hearing of Odorico’s review application, Odorico was afforded a number of opportunities to provide notice of his intention to seek to introduce new evidence relevant to his application before the Tribunal that was not before the CIRO panel. Odorico did not provide the required notice in advance of the hearing of his application, nor did he seek to introduce the evidence in the Odorico Affidavit at the evidentiary stage of his application. He also never advanced any argument that CIRO’s financial sanctions should be reconsidered in light of his financial circumstances. The time for Odorico to seek to introduce the additional evidence in the Odorico Affidavit and to advance an argument based upon his financial circumstances is well-past.
- [15] We conclude that it would be unfair and prejudicial to CIRO Staff if we were to admit and consider the Odorico Affidavit at this late stage of the proceeding. Furthermore, we find that in seeking to rely on the Odorico Affidavit at this stage, Odorico is, in essence, seeking to have us revisit our First Decision. This amounts to an inappropriate collateral challenge of our First Decision and, in particular, our prior findings that:

³ First Decision at para 48

- a. there was no basis for us to interfere with the CIRO panel's finding that Odorico misappropriated client RM's funds; and
- b. the sanctions imposed by CIRO were reasonable and neither harsh nor excessive.

[16] We also accept CIRO Staff's and OSC Staff's submissions that the contents of the Odorico Affidavit are neither "new" nor "compelling". The evidence in the Odorico Affidavit relates to extracts taken from a Statement of Claim in a civil proceeding that dates back to 2019 and the evidence about Odorico's financial circumstances does not on its face appear to be recent. Further, the evidence relating to Odorico's financial circumstances is not detailed and falls short of the evidentiary burden on a party alleging impecuniosity.⁴

4. ISSUES AND ANALYSIS

[17] CIRO Staff submits that no additional adjustments should be made to the sanctions and costs ordered by CIRO as a consequence of the Set Aside Finding.

[18] CIRO Staff submits that the \$50,000 fine against Odorico for misappropriation remains reasonable and appropriate for the misappropriation of client RM's funds given the repeated occurrences of misconduct, the lengthy time span of the misconduct, the large sum of money at issue and the fact that the client was vulnerable. CIRO Staff further submits that the permanent ban should be upheld on the basis of the surviving contraventions found by CIRO (including the misappropriation of client RM's funds) and in light of prior decisions,⁵ sanctions principles, CIRO's Sanctions Guidelines, the public interest and the facts of this case. OSC Staff supported CIRO Staff's position.

[19] Odorico submits that all of the sanctions, including those not directly tied to the Set Aside Finding, should be reconsidered and reduced because they flowed from the misconduct and credibility determinations that were partially set aside.

⁴ *VRK Forex & Investments Inc (Re)*, 2022 ONCMT 28 at paras 54-55 and 59, *aff'd* 2023 ONSC 3895 (Div Ct); *Solar Income Fund Inc (Re)*, 2023 ONCMT 3 at paras 76-79

⁵ CIRO Sanctions Decision at Schedule A

- [20] Odorico submits that the \$50,000 fine for misappropriation should be significantly reduced and the permanent ban should be replaced with an unspecified period of suspension because:
- a. CIRO's sanctions decision was heavily influenced by a pattern of conduct, including the finding of misappropriation from more than one client, whereas the misconduct was only in respect of one client (RM) with whom Odorico had a pre-existing relationship;
 - b. CIRO did not take into account the mitigating factor of Odorico's ability to pay; and
 - c. the precedent cases cited by the CIRO panel in support of the \$50,000 fine for misappropriation and the permanent ban no longer apply and the more appropriate precedent is *Re O'Brien*,⁶ where a financial advisor borrowed money from an elderly client and CIRO ordered a \$100,000 fine and a two year suspension.⁷ The Alberta Securities Commission reviewed the CIRO decision and lowered the fine to \$50,000 and the suspension to nine months.⁸
- [21] Odorico also submits that CIRO ordered costs on a global basis and that because one finding of misconduct has been set aside, the costs awarded "should be varied accordingly".
- [22] We disagree with Odorico's submission that the sanctions ordered by CIRO for contraventions unrelated to the Set Aside Finding should be reconsidered and reduced. The separate fines imposed on Odorico for unauthorized trading (\$25,000) and for the failure to co-operate with CIRO's investigation (\$50,000) were distinct from the finding of misappropriation and we see no reason to disturb them. They were not unduly severe in the circumstances and there is nothing suggesting that the CIRO panel imported considerations related to the Set Aside Finding when imposing these sanctions.

⁶ *Re O'Brien* 2020 IIROC 10 (**O'Brien**)

⁷ *O'Brien* at paras 1-9

⁸ *Re O'Brien*, 2020 ABASC 160 at para 271

- [23] We have considered and given no weight to Odorico's submission (without admissible supporting evidence) that the sanctions should be varied or reduced because CIRO did not take into account Odorico's ability to pay. This is a new argument that was not raised with the CIRO panel, nor did it form any part of Odorico's grounds for bringing this application or Odorico's submissions to the Tribunal on the hearing of the application that resulted in the First Decision.
- [24] Odorico's reliance on *Re O'Brien* is misplaced because although we set aside one finding of misappropriation, we did not interfere with the finding that Odorico misappropriated \$429,000 of client RM's funds, which misconduct is more severe than findings of borrowing from a client.
- [25] We do agree that the fine for misappropriation should be reduced to reflect the Set Aside Finding, while not interfering with the finding that Odorico misappropriated funds from client RM. We therefore reduce the fine for misappropriation (or "Contravention 1") from \$50,000 to \$40,000, representing a reduction roughly proportionate to the reduction in the amount of the total misappropriated funds resulting from the Set Aside Finding in the First Decision.
- [26] We decline to substitute a temporary suspension for the permanent ban ordered by CIRO and agree with CIRO Staff's submissions that the permanent ban should be upheld on the basis of the surviving contraventions found by CIRO (including, significantly, the misappropriation of client RM's funds) and in light of prior decisions, sanctions principles, CIRO's Sanctions Guidelines, the public interest and the facts of this case.
- [27] We decline to reduce the costs awarded by the CIRO panel as the \$25,000 ordered by the CIRO panel already represented a significant reduction from the actual costs (approximately \$165,000) incurred by CIRO Staff.

5. CONCLUSION

[28] For the reasons set out above we order that that the fine imposed by CIRO relating to misappropriation (or "Contravention 1") be reduced from \$50,000 to \$40,000.

Dated at Toronto this 25th day of January, 2024

"Andrea Burke"

Andrea Burke

"Sandra Blake"

Sandra Blake

"Dale R. Ponder"

Dale R. Ponder