



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF THE
SECURITIES ACT, RSO 1990, c S.5**

- AND -

**IN THE MATTER OF
SAILESHWAR RAO NARAYAN, PROSPERITY DEVELOPMENT GROUP LTD.,
and PROSPERA MORTGAGE INVESTMENT CORPORATION**

REASONS AND DECISION

Hearing: In writing

Decision: December 15, 2016

Panel: Alan Lenczner Commissioner and Chair of the Panel

Submissions by: Malinda Norman For Staff of the Commission

No one made submissions on behalf of Saileshwar Rao Narayan, Prosperity Development Group Ltd., and Prospera Mortgage Investment Corporation

REASONS AND DECISION

- [1] Enforcement Staff of the Ontario Securities Commission ("Staff") seek orders pursuant to subsection 127(1) of the *Securities Act*¹ against Saileshwar Rao Narayan, Prosperity Development Group Ltd., and Prospera Mortgage Investment Corporation. Staff relies on paragraph 4 of subsection 127(10) of the Act, seeking to reciprocate orders of the Alberta Securities Commission (ASC) dated August 11, 2016 made against these respondents.
- [2] A copy of the ASC Decision dated August 11, 2016 is attached to these Reasons as Appendix I. The ASC Decision contains a full description of the factual misconduct and breaches of the Alberta *Securities Act*² perpetrated by the respondents.
- [3] There can be no doubt that, were the respondents to engage in the same conduct in Ontario, they would be in flagrant breach of several provisions of the Act and guilty of fraud. The ASC noted the loss to the public and found that Narayan raised over \$5,800,000 from the public of which approximately \$1,800,000 was seized, leaving a shortfall of \$4,000,000.
- [4] Staff has requested that the hearing to reciprocate the ASC Decision in Ontario be conducted by way of a written hearing. I am satisfied that the respondents have been served with the requisite materials and, not having made any response pursuant to the Order from this Commission dated October 31, 2016, it is appropriate that I determine this matter on a written record.
- [5] I have reviewed the analysis and considerations of sanctions addressed by the ASC, including mitigating factors with respect to Respondents' admissions and cooperation with ASC Staff, and conclude that they are well reasoned and equally appropriate had the conduct occurred in Ontario and involved breaches of the Ontario *Securities Act*.
- [6] Regrettably, Canada does not have one securities act with pan-Canadian jurisdiction. It thus behooves the Ontario Securities Commission to review and to determine whether statutory breaches and egregious conduct in another province are contrary to the public interest and should be sanctioned. This multiplication of effort, although necessary to protect the investing public and to enhance the integrity of the capital markets, is inefficient, a waste of resources and costs unnecessary monies. It is to be hoped that the Legislature of Ontario will amend the Act to permit, as in Alberta and other provinces, reciprocating orders by simple registration.
- [7] In making an order in the public interest, I am guided by the purposes of the Act and Supreme Court of Canada's guidance that public interest orders are neither remedial nor punitive, but protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. I find that it is necessary to limit the respondents' participation in Ontario's capital markets to protect Ontario investors and Ontario's capital markets from similar misconduct by the respondents. Accordingly, I find that it is in the public interest in this matter to

¹ RSO 1990, c S.5.

² RSA 2000, c S-4.

issue the orders as requested by Staff which are similar as those imposed by the ASC.

[8] I will therefore issue the following order:

- a. against Narayan that:
 - i. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Narayan shall cease permanently, except that this order does not preclude him from trading in securities through a registrant (who has first been given a copy of the ASC Order and a copy of this Order) in:
 1. registered retirement savings plans, registered retirement income funds, or tax-free savings accounts (as defined in the *Income Tax Act* (Canada)) or locked-in retirement accounts for Narayan's benefit;
 2. one other account for Narayan's benefit; or
 3. both, provided that:
 - A. the securities are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange, or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer; and
 - B. Narayan does not own legally or beneficially more than 1% of the outstanding securities of the class or series of the class in question;
 - ii. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Narayan is prohibited permanently, except that this order does not preclude him from purchasing securities through a registrant (who has first been given a copy of the ASC Order and a copy of this Order) in:
 1. registered retirement savings plans, registered retirement income funds, or tax-free savings accounts (as defined in the *Income Tax Act* (Canada)) or locked-in retirement accounts for Narayan's benefit;
 2. one other account for Narayan's benefit; or
 3. both, provided that:
 - A. the securities are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange, or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer; and
 - B. Narayan does not own legally or beneficially more than 1% of the outstanding securities of the class or series of the class in question;
 - iii. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Narayan permanently;

- iv. pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Narayan resign any positions that he holds as a director or officer of any issuer, registrant or investment fund manager;
 - v. pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Narayan is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager; and
 - vi. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Narayan is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;
- b. against Prosperity Development that:
- i. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of Prosperity Development shall cease permanently;
 - ii. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Prosperity Development shall cease permanently;
 - iii. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Prosperity Development is prohibited permanently; and
 - iv. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Prosperity Development permanently;
- c. against Prospera Mortgage that:
- i. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities of Prospera Mortgage shall cease permanently;
 - ii. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Prospera Mortgage shall cease permanently;
 - iii. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Prospera Mortgage is prohibited permanently; and
 - iv. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Prospera Mortgage permanently;

Dated at Toronto this 15th day of December, 2016.

"Alan Lenczner"

Alan Lenczner, Q.C.

APPENDIX 1

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Narayan, 2016 ABASC 228

Date: 20160811

**Saileshwar Rao Narayan, Prosperity Development Group Ltd.,
Prospera Mortgage Investment Corporation, and Prospera Management Corp.**

Panel:	Bradley G. Nemetz, QC Dr. Ian Beddis Fred Snell, FCA
Representation:	Natasha Noel for Commission Staff Craig Leggatt for the Respondents
Submissions Completed:	March 9, 2016
Decision:	August 11, 2016

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I. INTRODUCTION

[1] Mr. Saileshwar Narayan (**Narayan**) is the principal behind Prospera Mortgage Investment Corporation (**Prospera Mortgage**), Prosperity Development Group Ltd. (**Prosperity Development**), and Prospera Management Corp. (**Prospera Management**), and, together with Narayan, Prospera Mortgage and Prosperity Development, the **Respondents**).

[2] Narayan used Prospera Mortgage and Prosperity Development to raise over \$5,800,000 from the public. Contrary to the stated use of funds, Prospera Mortgage did not acquire mortgages as security for loans with the \$2,343,000 raised from investors. Prosperity Developments' project never advanced beyond lending \$845,000 (from the over \$3,400,000 raised from the public) to a numbered company controlled by Narayan's brother and receiving in return a mortgage which appears, due to postponement to subsequent mortgages, to have no value.

[3] Narayan used Prospera Management to provide management services for Prospera Mortgage and Prosperity Development, and Prospera Management was the recipient, either directly or indirectly, of a great deal of investor money raised by these two companies.

[4] When the Alberta Securities Commission (ASC) intervened it was able to freeze only approximately \$1,795,000 of funds raised. The investors have lost approximately \$4,000,000.

[5] Staff of the ASC (**Staff**) alleges that in excess of \$1,000,000 of investor money went to Narayan, his wife and family, much of it to support their lavish lifestyles.

[6] The Respondents admitted to the various breaches of Alberta securities laws ranging from the illegal distribution of securities, acting as a dealer without the required registration, engaging in a course of conduct that perpetrated a fraud on investors, breaching undertakings given to the ASC, and making prohibited representation, and misleading statements to investors. Narayan admitted that he was an officer and director of the respondent corporations (**Corporate Respondents**) and that he authorized the breaches of Alberta securities laws by the Corporate Respondents.

[7] Staff asked for various orders permanently prohibiting Narayan, Prospera Mortgage, and Prosperity Development, from participating in the capital market and sought against Narayan a disgorgement order of \$1,100,000, an administrative penalty of \$350,000, and a cost award of \$109,161.68.

[8] Mr. Leggatt, counsel for the Respondents, took no issue with the Respondents' liability for securities laws violations as charged, but submitted that the panel should only prohibit Narayan from participating in the capital markets for 10 years, limit the disgorgement order to \$800,000, and limit the administrative penalty to between \$100,000 and \$200,000. He also submitted that costs be significantly less than Staff requested.

[9] For the reasons set out we find sufficient evidence to sustain the alleged securities laws violations advanced by Staff. In consequence, we order an array of permanent capital market bans against each of Narayan, Prospera Mortgage, and Prosperity Development. We also order

that Narayan pay a total of \$1,275,951 comprising an administrative penalty of \$300,000, a disgorgement order of \$880,951, and a cost award of \$95,000.

II. FACTS

[10] The background facts set out above come from a combination of admissions, agreed exhibits, testimony of a retired ASC investigative accountant, testimony of the wife of one of the investors, and the testimony of Narayan.

[11] Narayan was 42 years old at the time of our hearing. He has a diploma in business from NAIT and worked for a mining company for approximately a year. Thereafter he sold life insurance from 2002 until 2005. He was a registered mutual fund salesman for two and a half months in 2005. He was sanctioned by the Alberta Life Insurance Council for acting "in a dishonest or untrustworthy manner" in misleading clients, and he was suspended for 30 days and ordered to pay a penalty of \$7,500.

[12] In 2008, Prospera Management was incorporated followed by Prospera Mortgage in 2010 and Prosperity Development in 2012.

A. Prospera Mortgage

[13] Narayan began raising money from the public by selling preferred shares of Prospera Mortgage in 2010. Reliance was had to the offering memorandum exception pursuant to section 2.9 of National Instrument 45-106 (**OM Exemption**), and an offering memorandum was filed with the ASC on November 17, 2010. That document explained that Prospera Mortgage's business was to provide mortgage financing to developers and owners of real estate in Alberta and British Columbia, and that the company intended "to pay out all of its net income and net realized capital gains as dividends" so as to avoid income tax obligations. The offering memorandum identified Prospera International Corporation (a company of which Narayan was director) as the manager, although Narayan testified that Prospera Management was used instead. The manager was to receive an annual management fee equal to 2.5% of the assets under management, and in return it was responsible for "the out of pocket expenses and disbursements" incurred in the management of Prospera Mortgage.

[14] A second offering memorandum, filed with the ASC on June 23, 2011, was rejected by the ASC. In October 2011, Prospera Mortgage agreed to discontinue distributing securities in reliance on the OM Exemption until it had filed an offering memorandum that complied with Alberta securities laws. Narayan, in his capacity as director of Prospera Mortgage, signed an undertaking (**Undertaking**) to this effect.

[15] Prospera Mortgage did not file any subsequent compliant offering memorandum with the ASC. Contrary to the Undertaking, Prospera Mortgage continued to distribute securities, purporting to rely on the OM Exemption. In so doing, Prospera Mortgage raised \$778,769 between November 2011 and January 2012.

[16] Further, in connection with the sale of the preferred shares of Prospera Mortgage, investors were provided with a "Financial Guarantee" that purported to guarantee repayment of the principal amounts advanced by investors. Attempts by at least one investor to collect on this

guarantee were futile and Narayan testified that, following his inquiries, he determined that the guarantee was "a bogus piece of paper".

[17] Since June 2010, Prospera Mortgage raised \$2,343,000 from investors, with investor money deposited into accounts controlled by Prospera Mortgage and Prospera Management. Neither Prospera Mortgage nor Narayan were registered with the ASC in any capacity throughout the relevant time. On June 1, 2012, the Executive Director issued a cease trade order pursuant to section 33.1 of the *Securities Act* (Alberta) (the Act), prohibiting the trading in or purchasing of Prospera Mortgage securities, which remains in effect. Prospera Mortgage's bank account was frozen by the ASC on June 15, 2012, with approximately \$245,000 remaining in its account. Prospera Management's bank account was frozen by the ASC on June 26, 2012, with approximately \$450,000 remaining in its account. Prospera Mortgage and Prospera Management do not have sufficient assets to repay investors' principal.

[18] The only mortgage Prospera Mortgage ever owned was a \$120,000 mortgage given by a "very disgruntled employee that was [Narayan's] business partner", to secure repayment of money that Narayan had lent her "over the years". This mortgage did not qualify as the type of mortgage investment described in Prospera Mortgage's offering memoranda.

[19] Other than the funds seized, and apart from the funds misdirected by Narayan to his own personal use, his family's use and the use of another director, the balance of the funds were, by and large, used to further the raising of money from investors. Narayan also admitted that some investors were repaid from monies raised from other investors — one aspect of the operation that constituted a Ponzi-like scheme.

[20] When questioned about why there was little to no activity to identify mortgages for investment purposes, Narayan testified:

Q What was your role at Prospera Mortgage? What were you doing? There was no mortgages, so what were you doing?

A I was recruiting, promoting the business, trying to grow the business.

Q How were you trying to do that?

A By finding salespeople, by trying to raise investor funds.

Q Were you looking for investment opportunities in mortgages?

A Yes.

Q Okay. So why were there never mortgages placed?

A Just lack of my stupidity, I guess. I was trying to grow the business, and I was spending so much money on marketing, promotions, things of that nature, that just, you know, I just — I wasn't checking what I was doing.

[21] In short Narayan devoted his time to raising money from investors to spend on either raising more money from investors or for his own personal use. He spent little, if any, time

seeking mortgage investment opportunities and invested none of the funds in mortgages. Prospera Mortgage was essentially a vehicle for Narayan to raise money from the public for his personal use.

B. Prosperity Development

[22] Beginning in the spring of 2012, Narayan began raising money for a different purpose —to develop a recreational vehicle park next to Pine Lake, Alberta. For this purpose, he used Prosperity Development.

[23] Between April 12 and May 23, 2012, Prosperity Development raised over \$3,400,000 (approximately \$2,500,000 from Alberta investors) using the offering memorandum exemption. The securities offered were unsecured bonds of Prosperity Development. Its offering memorandum explained that the money raised would be used to acquire and develop identified land in Pine Lake under a purchase agreement whereby \$5,000 was the deposit and \$845,000 was the balance of the purchase price. The \$845,000 was not to be paid until after "the Corporation [Prosperity Development] receives confirmation of re-zoning and development approval from the County of Red Deer". The development was to comprise between 150 — 200 recreational vehicle lots with services such as electricity, roads, paths, and a convenience store. The offering memorandum also provided that the purchase agreement would be terminated if Prosperity Development did not obtain rezoning of the land and a development permit.

[24] Contrary to the offering memorandum, the land was purchased by a numbered company owned by Narayan's brother, using \$845,000 of Prosperity Development's investors' money, at a time when no applications for zoning approval and no development approvals had been sought or obtained.

[25] At the time that the money was lent to Narayan's brother's number company, no mortgage was registered against the Pine Lake property to protect the \$845,000 advanced. In August 2012, Prosperity Development filed a caveat against the Pine Lake property, claiming an "unregistered mortgage". Subsequent to that registration, three mortgages totaling \$900,000 were registered against the title to the Pine Lake property, and Prosperity Development's caveat was postponed to each of those mortgages.

[26] In June 2012, the ASC issued freeze orders against Prosperity Development's bank accounts followed by freeze orders against Narayan and Prospera Mortgage's bank accounts. By June 26, 2012, only approximately \$1,100,000 remained in Prosperity Development's bank accounts.

[27] On June 27, 2012, an interim cease trading order was issued against Narayan and Prosperity Development.

[28] None of the investors received any return of their principal investment and it is unlikely, even with the money that remains frozen, that the investors will receive any significant return of their investment monies.

[29] Before turning to findings on violations of securities laws and our analysis and ruling on the sanctions that flow from those violations, we will address Narayan's use of the investors' money.

C. Narayan's Use of Funds

[30] As stated above, much of the money raised by Prospera Mortgage and Prosperity Development was recycled to raise more funds. However, Narayan admitted that at least \$800,000 of investor money was improperly diverted to his personal use. Staff asserted that a total of \$1,132,496 was improperly diverted and sought a disgorgement order of \$1,100,000.

[31] An appreciation of the use of funds and the lifestyle of Narayan that was supported by investor money can be gained from the following examples.

- (a) He paid his wife \$170,000 for alleged advances she made to set up Prospera Mortgage and to repay her for helping him fund a failed hotel investment in the Dominican Republic.
- (b) He purchased or rented very expensive BMW and Audi motor vehicles.
- (c) He allowed his co-director to purchase a watch which cost in excess of \$21,000.
- (d) He alone or with his wife took personal pleasure trips to such diverse locations as Texas, Las Vegas, Seattle, Paris, London, California, Italy, and Mexico.
- (e) On one day in Milan, while on a holiday with his wife, Narayan charged in excess of \$12,000 to a Visa account. On the following day he charged more than \$11,000. These were charged to Visa accounts in his name which was paid for by the companies. When totalled the expenditures on the Italian trip exceeded \$30,000.

D. Investor Evidence

[32] Narayan's lifestyle can be contrasted with the evidence from one of the families whose investment money he was spending.

[33] One investor testified about \$41,500 invested by her husband in Prospera Mortgage. These, like many of the funds raised, were RRSP funds. Her husband's funds came from his pulp and paper workers' pension, and he was investing them at a time when he was gravely ill waiting for a kidney transplant. The result of their experience with the Respondents has been upset, anguish, and a loss of confidence in the exempt market.

[34] Other investors who submitted evidence noted that they now had increased distrust of the investment market. One family now only invest in guaranteed investment certificates. Another investor submitted a witness impact statement that indicated that he had to work an additional fourteen months to make up the losses to his retirement fund.

III. FINDINGS OF CONTRAVENTION OF SECURITIES LAWS

[35] The Notice of Hearing alleged breaches of securities laws and sought orders under section 198 (Cease Trading and other Order), section 199 (Administrative Penalty), and section 202 (Costs) of the Act.

[36] As against Prospera Mortgage it alleged failing to comply with a written undertaking to the Executive Director, illegally distributing securities, acting as a dealer without registration, making prohibited representations, and engaging in a course of conduct that perpetrated a fraud. As against Prosperity Development it alleged making misleading or untrue statements and engaging in a course of conduct that perpetrated a fraud. It also alleged that Prospera Management engaged in a course of conduct that perpetrated a fraud, that Narayan engaged in a course of conduct that perpetrated a fraud, and that Narayan, as officer or director (or both), authorized, permitted or acquiesced in the breaches of Prospera Mortgage and Prosperity Development.

[37] At the outset of the hearing, we received into evidence a Statement of Admissions, signed by each of the Respondents, containing numerous admissions in relation to the allegations. We also received into evidence a copy of the Notice of Hearing, which had been signed by Narayan on behalf of himself and the Corporate Respondents, that admitted "all of the allegations contained" in the Notice of Hearing. Counsel for the Respondents took no issue with the Respondents' liability for securities laws violations as alleged and admitted.

[38] On the basis of the evidence presented to us and the admissions, we find:

(a) Prospera Mortgage breached:

(i) section 75(1) of the Act by acting as a dealer without the required registration;

(ii) section 92(1) of the Act by making prohibited representations to investors;

(iii) section 93.2 of the Act by failing to comply with a written undertaking given to the Executive Director;

(iv) section 110(1) of the Act by engaging in the distribution of securities without having filed a preliminary prospectus or a prospectus with the Executive Director and receiving a receipt for same, and without an exemption from this requirement;

(b) Prospera Mortgage, Narayan, and Prospera Management breached section 93(b) by engaging or participating in an act, practice or course of conduct relating to Prospera Mortgage securities that they knew or ought to have known perpetrated a fraud on Prospera Mortgage investors;

(c) Prosperity Development breached section 92(4.1) by making statements to investors that it knew or reasonably ought to have known, in material respects,

were misleading or untrue, or did not state facts that were required to be stated or necessary to make the statements not misleading;

- (d) prosperity Development and Narayan breached section 93(b) by engaging or participating in an act, practice or course of conduct relating to Prosperity Development securities that they knew or ought to have known perpetrated a fraud on Prosperity Development investors; and;
- (e) Narayan in his capacity as director, officer, or both, of Prospera Mortgage and Prosperity Development authorized, permitted or acquiesced to the breaches of the Act by those entities.

IV. ANALYSIS AND FINDINGS ON ORDERS FOR SANCTION AND COSTS

[39] We received evidence addressing sanctions, followed by submissions from Staff and counsel for the Respondents.

[40] In their submissions, Staff sought permanent market access bans against Narayan, Prospera Mortgage, and Prosperity Development. Staff also sought against Narayan an administrative penalty of \$350,000, a "disgorgement" order of \$1,100,000, and a cost-recovery order of \$109,161.68. Staff referred the panel to five decisions: *Re Schmidt*, 2013 ABASC 320, *Re Zeiben*, 2014 ABASC 412, *Re Ontario Ltd.*, 2015 LNONOSC 108, *Re Cloutier*, 2014 ABASC 170, and *Re Reeves*, 2011 ABASC 107.

[41] Counsel for the Respondents agreed that the applicable law was set out in the cases cited by Staff but submitted that the panel should only impose bans against Narayan of ten years, limit the disgorgement order to \$800,000, and limit the administrative penalty between \$100,000 and \$200,000. He also submitted that costs be significantly less than the amount sought by Staff

V. SANCTIONS — APPLICATION OF PRINCIPLES AND FACTORS

[42] From the cases it can be seen that the ASC's powers under sections 198 and 199 of the Act are to be exercised prospectively in the public interest, with a view to protecting investors and the capital market from future harm.

[43] Staff referred to a non-exclusive list of factors to be considered by the panel taken from *Zeiben*. They are as follows:

- (a) the seriousness of the findings against the respondents and the respondents' recognition of that seriousness;
- (b) characteristics of the respondents, including capital market experience and activity and any prior sanctions;
- (c) any benefits received by the respondents and any harm to which investors or the capital market generally were exposed by the misconduct found;

- (d) the risk to investors and the capital market if the respondents were to continue to operate unimpeded in the capital market or if others were to emulate the respondents' conduct;
- (e) decisions or outcomes in other matters; and
- (f) any mitigating considerations.

(a) The seriousness of the findings against the respondents and the respondents' recognition of that seriousness

[44] The Respondents' conduct has resulted in serious findings against the Respondents. Narayan and the Corporate Respondents admit and we find that they engaged in misrepresentation in raising the money and fraud in the use of the money raised. Narayan's actions, as the directing mind of the Corporate Respondents, are attributable to them. He signed an undertaking on behalf of Prospera Mortgage to stop soliciting funds which was promptly breached. The Respondents spent much of the money raised from investors to either raise more money or support Narayan's lavish lifestyle. Narayan provided no substantive evidence that either he or Prospera Mortgage took any substantive steps to seek out or apply investors' money for the purpose for which it was raised, investing in mortgages. Seemingly, the efforts of the Respondents were principally focused on raising the initial money, raising more money, and spending what was left on Narayan and his family. In making this statement, we include the forwarding of \$845,000 to his brother's numbered company in clear violation of the representations made to investors that those funds would be advanced only after it was re-zoned and developmental approvals had been obtained. Even then the funds were to be used to acquire the land, not to lend money to his brother's numbered company to allow that company to acquire the land.

[45] As for Narayan's recognition of the seriousness of his behaviour, we observed, contrary to the assertion of his counsel, little if any contrition, apology, recognition of the harm that he caused to investors or recognition for the damages caused to the capital market.

(b) Characteristics of the respondents, including capital market experience and activity and any prior sanctions

[46] Narayan had experience selling life insurance and was registered for a short period of time as a mutual fund salesman. From this we gather that he conceived that he could make money raising funds from the public and this led to his incorporation and use of Prospera Mortgage and Prosperity Development. We have no evidence that he had any expertise in mortgage investments or in property development.

[47] He was sanctioned for misleading individuals in the sale of life insurance products. As we have found, he carried this lack of candour into the sale of securities.

(c) Benefits received by the respondents and any harm to which investors or the capital market generally were exposed by the misconduct found

[48] The loss to the public is clear. Narayan raised over \$5,800,000 from the public of which approximately \$1,800,000 was seized, leaving a shortfall of approximately \$4,000,000.

[49] One investor was sold the investment by members of her church and this has led to her distancing herself from her church. Another investor had to work an additional fourteen months to top up his retirement savings. A third investor lost his union pension at a time when he was gravely ill. All had their confidence in the exempt market undermined. We are certain that other vulnerable investors had similar experiences.

[50] As to the benefit received by Narayan, his companies, and his family, the evidence demonstrates a lavish lifestyle with little effort expended beyond raising more money from the public to support his lifestyle. Narayan admitted that at least \$800,000 of the money raised went to his personal use. Evidence supported this admission including Prospera Mortgage banking records indicating that a significant portion of the \$2,300,000 raised went to Narayan and his wife. Prospera Mortgage's investors will recover little, if any, of their money.

[51] With respect to Prosperity Development, banking records show that, out of nearly \$3,500,000 raised \$845,000 was advanced to purchase the Pine Lake property which was subsequently mortgaged. Approximately \$1,100,000 was frozen by the ASC leaving over \$1,500,000 of investor money unaccounted for. This is a large amount, especially given that Prosperity Development did not start raising money until April 2012 and its bank accounts were frozen in June of 2012.

(d) Risk to investors and the capital market if the respondents were to continue to operate unimpeded in the capital market or if others were to emulate the respondents' conduct

[52] Given Narayan's dishonesty in raising and spending investors' money, his prior sanction by another regulator for his dishonesty, and his breach of the written undertaking, we are of the opinion that he has little, if any, regard for truth when it comes to separating people from their money. There is nothing more fundamental to the protection of the investor public than telling the truth when raising funds.

(e) Decisions or outcomes in other matters

[53] In the cases cited to us, the administrative penalties range from \$200,000 in *Schmidt*, through \$250,000 in both *Zeiben* and *Ontario*, \$650,000 in *Reeves*, to \$1,000,000 in *Cloutier*.

[54] Staff suggested an administrative penalty of \$350,000. Counsel for the Respondent argued for an administrative penalty in the range of \$100,000 and \$200,000 based upon *Schmidt*.

[55] The respondents in *Schmidt* raised \$5,000,000 of which \$700,000 was used for improper purposes. He was 77 years old and had a prior history of violating securities laws. He was found to have made misleading statements in the documents used to raise money for oil and gas drilling but, unlike our case, the company in *Schmidt* had oil and gas operations. Further, as the company had oil and gas assets, the loss to investors was not known.

[56] We view the Respondents' behaviour as more egregious. Prospera Mortgage and Narayan did not pursue Prospera Mortgage's business objectives. Narayan, through Prospera Mortgage, knowingly violated the management agreement, diverted money to himself and breached a written undertaking given to the Executive Director to cease raising money on behalf

of Prospera Mortgage. With respect to Prosperity Development, Narayan authorized the advance of \$845,000 to his brother's numbered company, in clear violation of the offering memorandum.

[57] We are also of the opinion that Narayan's behaviour is, in some respects, worse than the behaviour found in *Zeiben*. *Zeiben* received only modest sums from his improper activities. He, in fact, tried to acquire businesses in furtherance of the purposes for which the money was raised. *Zeiben* did not sell his stock to make a quick profit, but instead sought business opportunities for his company. *Zeiben* also believed that Alberta securities laws did not apply to his company, a Nevada public company trading on the Frankfurt exchange.

[58] Narayan, and the Corporate Respondents through him, knew the securities laws that applied to them. He made no attempt to carry out Prospera Mortgage's business plan and instead improperly used investor money for his personal benefit, in clear violation of the terms under which the money was raised. He authorized Prospera Mortgage's violation of a written undertaking given to the Executive Director.

[59] We will not further discuss the cases cited to us beyond observing that they demonstrate a wide range of administrative penalties that vary according to the specific contraventions of securities laws, the severity of the conduct, the benefit to the respondents and the harm to the capital market. The administrative penalty we assign in this case falls within the range of sanctions in other cases.

Mitigating considerations

[60] The Respondents admitted to the various breaches of the Act, co-operated with the investigation, and assisted in the presentation of the case by agreeing to numerous exhibits. These are mitigating factors that count in their favour. Narayan also agreed that at least \$800,000 improperly went to his own use, placing a lower limit on the money misappropriated for which Staff sought repayment.

[61] Contrary to the submissions of his counsel, we find little else in the Respondents' behaviour that counts as mitigation. Beyond the admissions made, Narayan showed no contrition or empathy for the investors whose money he took. He did not apologize for his conduct and its impact on investors and the capital market. At best, he said that he hoped to make a success of Prosperity Development so that he could repay investors for Prospera Mortgage's complete failure.

VI. CONCLUSION — SANCTIONS

A. Capital Market Bans

[62] First addressing capital market bans against Prospera Mortgage and Prosperity Development, Staff requested permanent bans under sections 198(1)(a), 198(1)(b), 198(1)(c), and 198(1)(c.1) of the Act. Counsel for the Respondents did not oppose those requests. We find that permanent orders under those sections are appropriate to prevent the companies from further accessing the capital market.

[63] Turning to Narayan, Staff sought a permanent ban on his participation in the capital market, including his participation as a director or officer. Counsel for Narayan submitted that

ten-year bans would be a sufficiently lengthy term, yet allow Narayan an opportunity to rehabilitate himself. The panel raised the prospect of allowing Narayan to avail himself of an opportunity to invest his own money using an RRSP.

[64] The panel notes Narayan's training and education, his background as a life insurance and mutual fund salesman, including his sanction for misrepresentation, his egregious behaviour in the raising of investment money for Prospera Mortgage and Prosperity Development, his misappropriating that money, and his lack of remorse for his actions. We conclude that a permanent ban, subject to a limited relaxation to allow for personal investment, is necessary to prevent Narayan from repeating his behaviour.

B. Administrative Penalty

[65] As to the administrative penalty, we focus on the public interest by protecting investors and the capital market from future harm. We consider both specific and general deterrence. Having banned Narayan permanently from participating in the capital market, the focus of the administrative penalty is primarily its general deterrent value.

[66] In considering the general deterrence, we take into account the fact that we will be making an order that Narayan is liable for payment of a large amount of the money that he improperly applied to his lifestyle and paid to family members. However, the return of misappropriated money is not a sufficient deterrent to prevent others from raising money by breaking securities laws. If promoters who raise money by breaches of securities laws only risk returning money taken, there is little downside to taking that risk.

[67] Given the extensive violations of securities laws present in this case, the amount of money raised and lost, and the degree of deliberation and planning associated with Narayan's raising of investor money, the panel is of the opinion that a significant administrative penalty is required to send a message that such violations of securities laws are serious and will result in serious personal and financial consequences.

[68] In these circumstances, the panel is of the opinion, that an administrative penalty of \$300,000 will meet the needs of a general deterrent by sending a warning to others planning to raise money from the public about the dangers and consequences of fraud, misrepresentation, and failure to follow Alberta securities laws.

C. Disgorgement

[69] If a person or company has not complied with Alberta securities laws, an ASC panel may order that the person or company pay to the ASC "any amounts obtained or payments or losses avoided as a result of the non-compliance". Such an order is commonly referred to as a disgorgement order. Staff have the initial burden of proving, on a balance of probabilities, the amounts obtained by a respondent as a result of non-compliance with the Act, with the burden then shifting to the respondent, whose non-compliance resulted in money being wrongfully obtained, to disprove the reasonableness of those amounts (*Re Planned Legacies Ltd.*, 2011 ABASC 278 at para.72; and *Re Arbour Energy Inc.*, 2012 ABASC 416 at para. 37).

[70] Staff sought a disgorgement order against Narayan based on the conversion of Prospera Mortgage investor money from the Prospera Mortgage and Prospera Management accounts to Narayan's personal use. The gist of the fraud allegation against Narayan, and his admission of fraudulent conduct, was the conversion of Prospera Mortgage investor money to his personal use. Narayan's counsel conceded that Staff had "established the evidentiary basis for a disgorgement order". We consider a disgorgement order against Narayan to be appropriate in the circumstances.

[71] At issue is the amount of such disgorgement order. Staff sought disgorgement of \$1,100,000. Narayan's counsel pointed to the admission that "at least \$800,000 of the monies raised . . . went to Narayan's own personal use", submitting that we "should not impose an amount greater than the number that was used for the purpose of the . . . settlement agreement". In our view, that admission, referencing "at least" \$800,000, acknowledges a floor, not a ceiling, on the amount of investor money converted to Narayan's personal use.

[72] Staff categorized amounts alleged to have been obtained by Narayan and others as follows: (a) amounts transferred directly to Narayan's personal bank account; (b) payments made on Narayan's personal credit cards; (c) payments made to Narayan's spouse; (d) payments relating to properties owned by Narayan or his spouse; (e) cash withdrawals and Interac payments; and (f) payments related to vehicles.

[73] Narayan's counsel generally objected to several items included in Staffs calculations. He submitted that the evidence indicated "many expenses" — on Narayan's personal credit cards and otherwise — may not have been appropriate expenditures but were not for Narayan's personal use or benefit. Narayan's counsel also submitted that, in deciding an appropriate disgorgement amount, the economic impact on Narayan of all monetary orders made against him should be considered.

[74] Turning to Staffs categories, Staffs evidence indicated transfers totalling \$366,845 to Narayan's personal bank account from the Prospera Mortgage and Prospera Management accounts holding Prospera Mortgage investor money. Staff also indicated but did not quantify, commingling of Prosperity Development investor money with Prospera Mortgage investor money in the Prospera Management account, commencing, we are satisfied, in April 2012. In our view, transfers of Prospera Mortgage investor money to Narayan's personal bank account were, on their face given the account type, for his personal use. We find the amount of those transfers proved by Staff to the requisite standard to be \$349,645 (\$366,845 less transfers after commingling of money). Narayan testified about some of those transfers to his personal bank account, but we heard nothing from him disproving the reasonableness of the amount proved by Staff. Indeed, certain of Narayan's testimony supported our conclusion that transfers to his personal bank account were for his personal use. For instance, he characterized some of the money he took as salary, but admitted that he "shouldn't have done" so. He also explained that he "borrowed" money from Prospera Mortgage but did not repay it, and that he took a separate shareholder loan from Prospera Management "to pay some bills". Therefore, concerning transfers of Prospera Mortgage investor money to Narayan's personal bank account, we find that \$349,645 was obtained by Narayan as a result of his non-compliance with Alberta securities laws.

[75] Staffs evidence indicated that the Prospera Management account holding Prospera Mortgage investor money made payments totalling at least \$379,150 on Narayan's five personal credit cards, at least \$336,850 of this paid prior to the commingling of Prosperity Development investor money with Prospera Mortgage investor money. In our view, charges on personal credit cards are, on their face given the card type, personal expenditures, with payments on those cards being to the cardholder's personal benefit. That said, Staff conceded that the statements for two of Narayan's personal credit cards were "much more indicative of business charges", indicating that they were not seeking disgorgement of Prospera Management account payments on those cards. Such payments (prior to commingling of investor money) totalled \$51,600. We thus are satisfied that Staff have proved on a balance of probabilities that Prospera Mortgage investor money was used to pay charges totalling at least \$285,250 (\$336,850 less \$51,600) on three of Narayan's personal credit cards, and that these charges were personal expenditures. Narayan testified about credit card charges, sometimes in general terms, but we heard nothing from him sufficing to disprove the reasonableness of the amount proved by Staff. Indeed, he admitted that numerous credit card charges were personal expenditures (including charges for the previously-mentioned trips for himself and his spouse). Therefore, concerning Prospera Management account payment on Narayan's personal credit cards, we find that at least \$285,250 was obtained by Narayan as a result of his non-compliance with Alberta securities laws.

[76] Staffs evidence showed Narayan's spouse received payments totalling \$186,000 from the Prospera Mortgage and Prospera Management accounts. This total excludes payments made after Prosperity Development investor money was commingled with Prospera Mortgage investor money in the Prospera Management account. Narayan testified that \$172,000 of this total constituted repayment of money lent to him by his spouse; the associated cheques in evidence were signed by Narayan. About the balance, Narayan testified that the electronic transfers to his spouse from Prospera Management were for "money that I was going to take for myself personally, and I was just giving it to her", apparently in an attempt to shield money from tax authorities. The evidence was, and we find, that Prospera Mortgage investor money totalling \$186,000 was paid to Narayan's spouse. Narayan's testimony that money lent by his spouse was for business purposes was not, in itself, persuasive, given that the \$172,000 was lent to him, not the businesses in question. We are also satisfied, and thus find, that the conversion of the \$186,000 was to Narayan's personal use, albeit indirectly. We therefore find that that \$186,000 was obtained by Narayan as a result of his non-compliance with Alberta securities laws.

[77] Staffs evidence showed that payments totalling \$23,655 relating to properties owned by Narayan or his spouse were made from the Prospera Management account holding Prospera Mortgage investor money. We accept Narayan's testimony that a condominium unit owned by his spouse was used by the Corporate Respondents for office space, and it follows that payments relating to that unit were not to Narayan's personal benefit. However, concerning three payments totalling \$11,859 relating to a condominium unit owned by Narayan, no business purpose for that unit was claimed or proved; we accordingly find that those payments of Prospera Mortgage investor money were to his personal benefit. We therefore find that that \$11,859 was obtained by Narayan as a result of his non-compliance with Alberta securities laws.

[78] Staffs evidence indicated cash withdrawals totalling \$100,609 from the Prospera Mortgage and Prospera Management accounts. We note that certain of the withdrawals occurred after Prosperity Development investor money was commingled with Prospera Mortgage investor money in the Prospera Management account. In any event, with one exception, we received no specifics about the withdrawals, and are therefore unable to determine whether the Prospera Mortgage investor money withdrawn was converted to Narayan's personal use. The referenced exception involves a certified cheque used by a Prospera Mortgage director to purchase an expensive watch. Although we find disconcerting the use to which that withdrawn money was put, particularly given Narayan's admission that he "agreed to" it, we cannot consider that money to have been converted to Narayan's personal use.

[79] Concerning Interac purchases on the Prospera Management account prior to the commingling of Prosperity Development investor money with Prospera Mortgage investor money, Narayan testified that "possibly a few" of those were "personal purchases" but suggested that the "big amounts" were for company events. The evidence overall does not suffice to prove that any such purchases were for Narayan's personal use.

[80] Finally, Staffs evidence showed that payments totalling \$99,622 relating to vehicles used by Narayan and other personnel were made from the Prospera Mortgage and Prospera Management accounts holding Prospera Mortgage investor money. Narayan testified that those vehicles were used for business purposes, which we accept for all but the leased luxury vehicle exclusively used by Narayan. For the excepted vehicle, we find that lease payments beginning in August 2010 totalling \$48,197 were to Narayan's personal benefit. This total excludes payments made after Prosperity Development investor money was commingled with Prospera Mortgage investor money in the Prospera Management account. That \$48,197 of Prospera Mortgage investor money was, we find, converted to Narayan's personal use, and thus obtained by Narayan as a result of his non-compliance with Alberta securities laws.

[81] In summary, we conclude, our findings having been constrained, necessarily, by the pleadings, admissions, submissions and evidence, that \$880,951 was obtained by Narayan as a result of his non-compliance with Alberta laws. We therefore conclude that an order under section 198(1)(i) of the Act should be made against Narayan in the amount of \$880,951.

VII. COSTS

[82] Cost recovery orders can be made against any respondent who contravened Alberta securities laws, largely to ensure that at least some expenses associated with an enforcement proceeding are not indirectly borne by the industry at large who abide by the rules. Such orders also provide the ASC with a means of encouraging procedural efficiencies in enforcement proceedings.

[83] Staff submitted a bill of costs totaling \$109,161.68, which included recovery of time spent by investigation staff in the amount of \$22,662.50, recovery of time for legal staff in the amount of \$64,537.50, and disbursements of \$21,961.68. It should be noted that these amounts do not cover all of the ASC expenses such as overhead, use of space, and compensation for ASC members participating in the hearing process.

[84] Counsel for the Respondents submitted that, in civil proceedings, only approximately 25 per cent of the real costs are typically awarded to the successful party. In addition, he took exception to some amounts claimed on the bill of costs such as \$.25 a page for photocopying and some travel costs.

[85] Costs recoverable in civil proceedings have no bearing upon costs recoverable in ASC proceedings. Costs in civil proceedings are set in part to reflect a policy decision that it is contrary to the administration of justice to saddle the unsuccessful party with all of the costs incurred by the successful party. That policy is founded upon the principle that there should not be too high a barrier to submitting civil disputes to court for resolution and on the fear that placing too high a cost would benefit wealthy litigants to the detriment of litigants of more modest means.

[86] Staff provided us the *Reeves* decision. We note in *Reeves* that some credit was given the respondent for cooperation in the process beyond the direct savings to the respondent by not causing Staff to incur more expenses which they could in turn claim back against the respondent. In this regard, we note that the Respondents cooperated with the investigation and entered into various admissions (including the facts set out in the Notice of Hearing, agreeing to the entry of exhibits, which in the case of the victim impact statements eliminated the need for those investors to testify).

[87] In all the circumstances, we set the cost award at \$95,000.

VIII. ORDERS

[88] As against Narayan, we order:

- (a) under sections 198(1)(b) and (c) of the Act, he cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him, permanently, except that these orders do not preclude him from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in:
 - (i) registered retirement savings plans, registered retirement income funds, or tax-free savings accounts (as defined in the *Income Tax Act* (Canada)) or locked-in retirement accounts for Narayan's benefit;
 - (ii) one other account for Narayan's benefit; or
 - (iii) both, provided that:
 - (A) the securities are listed and posted for trading on the Toronto Stock Exchange, the New York Stock Exchange, or NASDAQ (or their successor exchanges) or are issued by a mutual fund that is a reporting issuer and;

(B) Narayan does not own legally or beneficially more than 1% of the outstanding securities of the class or series of the class in question;

(b) under section 198(1)(c.1), he is prohibited from engaging in investor relations activities, permanently;

(c) under sections 198(1)(d) and (e), he resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system, permanently;

(d) under section 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter, permanently;

(e) under section 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently;

(f) under section 198(1)(i), he pay to the ASC \$880,951 obtained as a result of his non-compliance with Alberta securities laws;

(g) under section 199, he pay an administrative penalty of \$300,000; and

(h) under section 202, he pay \$95,000 of the costs of the investigation and hearing.

[89] In respect of Prospera Mortgage, we order that, with permanent effect:

(a) under section 198(1)(a) of the Act, all trading in or purchasing of securities of Prospera Mortgage cease;

(b) under section 198(1)(b), Prospera Mortgage cease trading in or purchasing securities or derivatives;

(c) under section 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to Prospera Mortgage; and

(d) under section 198(1)(c.1), Prospera Mortgage is prohibited from engaging in investor relations activities.

[90] In respect of Prosperity Development, we order that, with permanent effect:

- (a) under section 198(1)(a) of the Act, all trading in or purchasing of securities of Prosperity Development cease;
- (b) under section 198(1)(a), Prosperity Development cease trading in or purchasing securities or derivatives;
- (c) under section 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to Prosperity Development; and
- (d) under section 198(1)(c.1), Prosperity Development is prohibited from engaging in investor relations activities.

[91] According to its terms, the interim cease trading order expires with the issuance of this decision.

[92] This proceeding is concluded.

August 11, 2016

For the Commission:

"original signed by"
Bradley G. Nemetz, QC

"original signed by"
Dr. Ian Beddis

"original signed by"
Fred Snell, FCA