ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Breitkreutz, 2019 ABASC 38 **Date: 20190221**

Arnold Breitkreutz, Base Finance Ltd. and Susan Elizabeth Way

Panel:	Bradley G. Nemetz, Q.C. Ian Beddis Maryse Saint-Laurent
Representation:	Tom McCartney Janet McCready for Commission Staff Arnold Breitkreutz Susan Way self-represented
Submissions Completed:	December 6, 2018
Decision:	February 21, 2019

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I. INTRODUCTION

[1] On March 2, 2018, the panel, following an 11-day hearing, found that Arnold Breitkreutz (**Breitkreutz**), Susan Elizabeth Way (**Way**) and Base Finance Ltd. (**Base Finance**) contravened s. 93(b) of the *Securities Act* (Alberta) (the **Act**) by engaging in prohibited acts related to securities that they knew would perpetrate a fraud on investors including:

> (1) deceiving investors into thinking that they were investing in mortgages held by Base Finance rather than in a loan to an undisclosed entrepreneur involved in oil and gas developments in the US; and
> (2) operating a Ponzi scheme that recirculated investors' funds to pay purported returns to existing investors.

[2] Allegations against another respondent, Base Mortgage & Investments Ltd (**Base Mortgage**), were dismissed. The March 2, 2018 decision, cited as *Re Breitkreutz*, 2018 ABASC 37, will be referred to as the **Merits Decision**.

[3] Thereafter we established a schedule to address what sanctions and cost-recovery orders should flow from those findings.

[4] When we reconvened on June 25, 2018, Breitkreutz, on behalf of himself, Way, and Base Finance, applied to have us reconsider and vary the Merits Decision. He relied on "existing" evidence and "some new evidence" in support of that application. Breitkreutz also testified and called two witnesses, a real estate appraiser and a lawyer. Way confirmed that Breitkreutz was speaking on her behalf when seeking to vary the Merits Decision and providing evidence, although she also questioned some of the witnesses (including Breitkreutz).

[5] Alberta Securities Commission (**ASC**) staff (**Staff**) called three witnesses during the sanction phase who testified about their involvement with Breitkreutz, Way and Base Finance (the **Respondents**) and the effect that the Respondents' fraudulent scheme had on their lives, the lives of those close to them, and the lives of other investors.

[6] We subsequently received oral and written submissions addressing the Respondents' application to vary the Merits Decision and the sanctions and cost-recovery orders. Way did not attend in person to provide oral submissions, but communicated that she would not be attending given her undisclosed health issues and discussions with legal counsel, that she was not seeking an adjournment and that she had nothing more to add to what had already been stated.

[7] For the reasons set out below, we deny the application to vary the Merits Decision and we order market-access bans against all the Respondents. In addition, we impose certain monetary sanctions. With respect to Breitkreutz, we find that he is liable for an administrative penalty of $1,000,000, that he is liable for the disgorgement of funds he obtained as a result of the fraudulent scheme in the amount of $2,671,406, and that he is responsible for costs totalling $100,000. With respect to Way, we find that she is liable for an administrative penalty of $150,000, that she is liable for the disgorgement of funds she obtained as a result of the fraudulent scheme in the amount of $362,049, and that she is responsible for costs totalling $50,000.

II. BACKGROUND

[8] This decision should be read in conjunction with the Merits Decision.

[9] In the Merits Decision, we determined that investors provided funds to Base Finance over the course of many years. These payments were essentially short-term loans to Base Finance, for which investors received security in the form of an "irrevocable assignment" of a mortgage interest. These assignments were said to involve "1st mortgages" held by Base Finance, who would "direct" interest payments from "borrowers" to investors and repay them the principal balance of the loan at the end of the term.

[10] We found in the Merits Decision that some Base Finance investors generally understood that their investments were secured by mortgages on real estate located in Alberta. According to Breitkreutz, investor funds were loaned to Brian Fox (**Fox**) and companies that he controlled to allow him to acquire and develop oil and gas assets in the US. In return, Base Finance received a $30 million "deed of trust" over certain oil and gas interests in the state of Texas. Breitkreutz estimated that approximately $50 to 60 million had been forwarded to Fox and his companies for more than 30 years, including cash withdrawals from Base Finance's bank accounts. Investors were not told that their security was in oil and gas assets located in the US.

[11] We also found that there was little evidence to suggest that Base Finance was operating a legitimate mortgage-lending business. Transactions in Base Finance's bank accounts showed no significant sources of business revenue throughout the relevant time, and that investors' funds were pooled together and mostly used to make payments to other investors ostensibly as principal repayments and interest payments.

[12] Breitkreutz was Base Finance's founder, sole director and shareholder, and we found him to be the company's guiding mind at all relevant times. As such, his misconduct was attributable to Base Finance. Way was Base Finance's office manager and sole employee. In that capacity, she had signing authority for corporate bank accounts, signed the majority of company cheques and was responsible for the company's bookkeeping and banking. She also communicated with investors and signed the assignment agreements on behalf of Base Finance. Throughout the relevant time, she had an intimate knowledge and understanding of Base Finance's inner workings.

[13] Base Finance's operating bank account was subject to a freeze order in September 2015 and a receiver (the **Receiver**) was appointed over Base Finance and Base Mortgage in October 2015. According to the Receiver, Base Finance had, since August 2004, raised approximately $137 million from hundreds of investors, who were collectively owed more than $122 million at the time of Base Finance's receivership. We understand that money frozen in Base Finance's account totalling $1,084,604 has since been paid out to some of Base Finance's investors pursuant to a court order.

III. APPLICATION TO VARY

A. Evidence

[14] During the hearing concerning sanctions, Breitkreutz testified and was cross-examined by Staff. He put before us a binder of submissions and accompanying documents which we marked as Exhibit 34. It contained 27 pages of written submissions meant "to correct factual misapprehensions the Panel had in respect of the evidence before it as set out" in the Merits Decision, along with 32 tabs containing various documents. He also called his former lawyer, Mr. Smyth (**Smyth**), and an Alberta real estate appraiser, Mr. Grenkie (**Grenkie**).

[15] Generally, the evidence presented by Breitkreutz in oral evidence and in Exhibit 34, was not new evidence as most of it was already before us. Staff reviewed the documents contained in the 32 tabs of Exhibit 34 and seemed to indicate that only 13 of the tabs contained material not previously in evidence. Staff also noted that, to the extent that any of the documents or the evidence that Breitkreutz presented during this phase of the hearing was not already before us, the Respondents failed to demonstrate that the evidence was unknown or unavailable to them at the time of the merits hearing. To the extent that this "new" evidence was not before us, we admitted it and we find that the evidence presented by Breitkreutz in this phase of the hearing was not of such a nature as to lead us to change the Merits Decision.

[16] Staff objected to Smyth providing opinion evidence, particularly in relation to whether a deed of trust secures oil and gas assets in Texas. After Smyth was questioned as to his qualifications, (in which he acknowledged that he was not qualified to offer opinion evidence "on security on Texas real estate"), we heard his evidence subject to our assessment as to the appropriate weight to be afforded his testimony. Smyth testified that, in his opinion, the deed of trust over oil and gas leases in Texas constituted a first mortgage as described in the assignments of mortgages used by Base Finance to raise funds. Smyth's opinion is in turn based upon evidence already before us in the form of letters from two Texas lawyers.

[17] Grenkie testified that, shortly before the ASC froze Base Finance's bank account, he was asked by Breitkreutz to conduct an appraisal on a property located in the City of Calgary. This evidence Breitkreutz submitted in connection with a transaction described in part at para. 42 of the Merits Decision which involved attempts to get an investor to advance $500,000 on a six-month mortgage. In fact the $500,000 was advanced by this investor on September 23, 2015 and constituted the last transaction in Base Finance's account before the ASC froze the account. However, the evidence also showed that Breitkreutz transferred title to this property from himself to a numbered company owned by him alone on October 1, 2015 and the title of that property was subject to a bank mortgage in the stated original principal amount of $495,000 registered June 18, 2009. No explanation is given why a transfer of that property to a numbered company would be in furtherance of any legitimate attempt to secure funding from an investor nor how the investor would be reasonably secured given the first mortgage registered against the property.

[18] Breitkreutz testified in support of the variation application. His evidence was principally directed at contesting findings of fact made in the Merits Decision by repeating evidence he gave, which was mainly rejected for the reasons set out in the Merits Decision.

[19] He also sought to impugn the credibility of another investor witness (Way's cousin), suggesting that the witness lied or that his evidence was not believable. We gave no weight to these aspects of Breitkreutz's submissions, as the panel found this witness to be credible despite Breitkreutz's cross-examination in the merits hearing.

[20] Way advised that she had no other evidence to give.

B. Law

[21] The Act provides, in s. 214(1), that:

> The Commission may, if the Commission considers that it would not be prejudicial to the public interest to do so, make an order revoking or varying any decisions made by the Commission under this Act or the regulations or any former *Securities Act* or regulations.

[22] We were referred to one decision under s. 214 of the Act, *Re Kostelecky*, 2017 ABASC 44 which confirmed this jurisdiction but warned that it "is typically used in circumstances where new facts emerge or a new law is enacted that compels a change to an existing order" and warned that "[t]he provision should be used sparingly, and not resorted to as an alternative to an appeal or to retry a case where there is disagreement with the result". The application of these principles guard against serial litigation by an unsuccessful party.

[23] While the Act does not address the issue of presenting evidence following a decision of the ASC, especially if that evidence is called in support of an application to vary a prior decision, we accept that the ASC has the power to allow such evidence in a proper case.

C. Discussion and Decision

[24] As mentioned above, most of the evidence presented by Breitkreutz on behalf of the Respondents is not new and was known and available. To the extent that some of the evidence on the variation application may have been new, we considered such evidence to merely reiterate facts previously established in the merits hearing.

[25] In Breitkreutz's refutation of the panel's decision, he referred to certain findings made by the panel in paragraph 84 of the Merits Decision and asserted that one of the transactions discussed there reflected a typical mortgage arrangement. As discussed in the Merits Decision, the evidence before us clearly demonstrated that the mortgage in question was not held for the benefit of investors but that Base Finance acted as a conduit for the advance and repayment of funds and was, according to Breitkreutz, administered "as a favour".

[26] Other mortgages referenced by Breitkreutz were taken out in the mid- to late-2000s. In the case of one of those mortgages, the Receiver noted that while the mortgage appeared to be in the name of Base Finance, repayments could not be traced back to Base Finance.

[27] Another example of evidence given during the most recent case of this hearing by Breitkreutz which is unhelpful to him and underlines his willingness to participate in deceptive schemes, relates to a $30 million deed of trust for a loan to a Fox company. When asked why the face value of the deed of trust was $30 million rather than the actual amount of money he claimed to be outstanding to Fox, he stated that the $30 million number was used at the request of Fox as it was a "number that he [Fox] wanted to use to entice the Chinese group, I guess, to invest their [$]50 million".

[28] Evidence from witnesses in the sanctions hearing, who testified on behalf of Staff, also confirmed our findings that the Respondents misled investors as to the security underlying their investments, with some investors clearly of the understanding that their funds would be invested in Alberta-based mortgages. As discussed below, one investor witness testified in the sanctions hearing that she and her daughter were told by Breitkreutz that investment funds would be used

for properties in Alberta, "probably the Calgary area". Two other investor witnesses also testified that they understood their funds were to be secured by mortgages on properties in Alberta, with one of those witnesses stating that he and his wife (along with another investor) "were in absolute shock and dismay" to learn that they could not foreclose on their security and that their funds had been invested "in oil and gas".

[29] With or without the "new" evidence, we deny the Respondents' application to vary the findings of the Merits Decision that the Respondents were operating a Ponzi scheme and deceiving investors. We do this on the ground that the application is, in essence, an attempt to reargue the Respondents' original case that they had done nothing wrong. Their current application is, to use the words of the ASC panel in *Kostelecky*, an attempt to "appeal or to retry a case where there is disagreement with the result".

[30] In December, while this decision was under reserve, Breitkreutz submitted additional materials to the ASC, being a copy of a draft application by a Base Finance creditor seeking to remove the Receiver's counsel due to an alleged conflict of interest. Breitkreutz asserted that this application should lead us to reject the evidence given by the Receiver. This material does not cause us to vary our decision. The Receiver testified before us and was cross-examined. We accept his evidence as an unbiased description of his investigation. That the Receiver's counsel might have been in conflict does not undermine the evidence of the Receiver, nor is it relevant to the Respondents' deception of Base Finance investors, their running of a Ponzi scheme and their failure to repay their investors.

[31] The recent evidence of Messrs. Smith and Grenkie, as outlined above, and Breitkreutz's recent testimony, is little more than a repetition of his earlier position that he was operating a legitimate business, that he was candid with investors, that his relationship with Fox and his companies merely represented lending to a bona fide borrower. Further, he basically reiterated that everything would have worked out if only the bank, the Receiver, and the ASC had left him alone to carry on as he had for many years.

[32] With or without the "new" evidence, we deny the Respondents' application to vary the findings in the Merits Decision. We do this on the grounds that the application to vary, and the evidence called in support of it is, in essence, a re-argument of the Respondents' original case that they did nothing wrong. Their current application is, to use the words of the ASC panel in *Kostelecky*, an attempt to "appeal or to retry a case where there is disagreement with the result".

IV. SANCTION

A. Evidence

[33] This sanctioning decision should be read in conjunction with the Merits Decision, which sets out the nature, duration and scope of the fraud perpetrated by the Respondents. This fraud was conducted over many years, involved hundreds of investors and millions of dollars. The investors who testified during the merits phase of the hearing generally spoke to the negative effect losing their funds had on them and their confidence in the Alberta capital market.

[34] The evidence at the merits hearing showed that most of the investors' funds were taken by Breitkreutz and Way and circulated back to investors, with some money paid to Fox or companies controlled by him. Breitkreutz asserted that 80% of the $122 million raised by Base Finance was

circulated back to investors. By the time the scheme collapsed, most of the investors recovered little, if anything.

[35] Before Breitkreutz commenced calling evidence in the most recent phase of the hearing, he and Way were warned that the evidence they were proposing to call might, if it didn't persuade us to vary the Merits Decision, show that the Respondents failed to appreciate the impropriety and the gravity of their conduct. They were advised that this might count against them in sanctioning as one aspect of sanctioning relates to wrongdoers' appreciation of and insight into their actions, and the character of those actions. Despite this warning, the Respondents chose to persist in making the submissions. In particular, when given this warning, Way told the panel "we don't believe, from the bottom of our heart, that it was a fraud or a Ponzi scheme".

[36] During the sanctioning phase, Staff called three investors who provided evidence of their interactions with the Respondents and the impact that those interactions had on their lives. We will briefly summarize their evidence.

[37] One of Staff's witnesses was a 68-year-old retired businessman. He and his wife established and operated an office-staffing business. They worked long hours for over 40 years to support themselves and to build up the business. They sold the business with plans to retire and travel. They invested $3.2 million with Base Finance and, together with family and friends, invested more than $10 million in Base Finance. After the collapse of the Ponzi scheme, to support themselves, they had to sell two of their properties and are now considering going back into business to try, in the three to five years that they think they might still be able to work, to build something up for their retirement. He testified that Breitkreutz and Way "took away our retirement and a big piece of our lives". The witness related that his brother had a workplace injury and invested his award with Base Finance and lost it. He testified that he does not trust the stock market and has little trust for most agencies involved with the stock market. He said if he had any money left he would "buy real estate and invest in property because [he] would have something that was real and was [his]".

[38] This investor also became a spokesperson for a group of Base Finance investors and in that capacity he obtained comments from those investors on the hardships they experienced and how Base Finance had "impacted their lives". The comments he received revealed that many elderly people put their retirement savings in the hands of the Respondents only to lose those hard-earned savings. The comments also revealed serious impacts on their lives, the lives of those around them and their trust in the capital market.

[39] A second witness, also retired, had been a writer, a dance teacher, a convenience store owner and a legal secretary. She invested not only the capital that she had saved during her lifetime but also compensation she received from a personal injury award. When she first invested with Base Finance in 2008, she and her daughter met Breitkreutz, who told them that he would be investing her money in real estate, specifically "[i]n the Alberta area; in the Calgary area probably".

[40] She intended to use some of the money invested with Base Finance to acquire a house suitable for her disability. She is no longer able to make such a purchase, and she now subsists on government pension payments.

[41] The third witness testified about his and his wife's losses. They are both in their 80's. They immigrated to Canada and he, building on his blacksmith training, developed a manufacturing business involving farm equipment. He sold his business in 1998, at which point the couple felt they were financially independent and able to look after themselves and their family in their retirement. He described his relatively large family, including his brother, a medical doctor who worked in Africa, who could always find use for "a little extra money for people that were in his care". In retirement, as in his working life, he was active in many community and charitable organizations and helped raise funds for those organizations.

[42] He was referred to Breitkreutz and Base Finance by his accountant. He met Breitkreutz who explained the Base Finance business model. Breitkreutz told him he had an appraiser who would go out and appraise the properties and a lawyer who handled the mortgages "and register them in Alberta". He gave the witness his lawyer's business card.

[43] As a result of their involvement with the Respondents, he and his wife lost $1.4 million, which they had acquired "from 56 years of hard work". This loss required them to limit their spending and to reduce any risk in their other investments. It also led him to scale back on his "public life", in part from being "too embarrassed to say to the general public . . . what happened to us". He and his wife are now approximately $3,000 a month short of being able to afford living in a reasonable local retirement facility as they had previously expected.

[44] This evidence, in conjunction with the evidence given during the merits proceeding, showed that the Respondents' misconduct had a very significant effect on a large number of investors. It is clear that the harm done by the Respondents' misconduct goes beyond the direct impact on the investors, many of whom put much of their life savings with Base Finance, and encompassed the spouses, children, and grandchildren of those investors. It also provided direct evidence of Breitkreutz misleading investors into believing that the underlying mortgages were against real estate located in Alberta.

[45] Many investors testified that their experiences caused them to lose confidence in the Alberta securities market and we readily infer that their unease would have, in turn, been shared by their friends and relatives.

[46] Breitkreutz's evidence during the sanctioning phase makes it clear that neither he nor Way acknowledges the impropriety of their actions. Both the evidence and the submissions of the Respondents, led through Breitkreutz, represented merely a continued denial of reality, responsibility, and accountability for their actions and the harm caused by their misconduct.

B. Parties' Positions

[47] Staff sought permanent bans against Breitkreutz's participation in the capital market as well as the maximum administrative penalty of $1,000,000, disgorgement of $4,145,350, and costs of $112,500. As for Way, Staff sought 20-year, market-access bans, an administrative penalty of $150,000, disgorgement of $902,646, and costs of $50,000.

[48] The Respondents' did not specifically address Staff's proposed orders. Rather, their submissions were almost exclusively directed to asserting that they were not operating a fraud or a Ponzi scheme, that they were engaged in a proper investment business and that, but for the

unfortunate actions of the bank, the Receiver and the ASC, it all would have worked out for the investors, themselves included. Breitkreutz chose to portray himself as a victim, injured by the unreasonable action of others. When asked what he had to say about the specific sanction orders being requested by Staff, he noted that the *Walton* decision (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273) indicated that "monetary penalties levied must be proportionate" and asserted that he had lost everything, his assets, his livelihood, and his good name, and the failure of this business venture. He also suggested that there is a difference between a respondent who "perpetrates a fraud knowingly and willingly and gains from it" and "someone who inadvertently breaks the law by not being properly registered".

C. Law

[49] The ASC's public interest sanctioning powers under ss. 198 and 199 of the Act are protective and preventative in nature, not punitive or remedial. They are available to provide both specific deterrence (discouraging repetition of misconduct by a respondent) and general deterrence (discouraging similar misconduct by others) (*Re Global Social Capital Partners, Inc.*, 2016 ABASC 97 at para. 11).

[50] Factors to be considered when assessing appropriate sanctions include the following:

- the seriousness of the respondent's misconduct and the respondent's recognition of that;
- the respondent's characteristics and history, such as capital-market experience and any prior sanctions;
- any benefit sought or obtained by the respondent, and any harm to which the capital market generally or investors were exposed by the misconduct;
- the risk to investors and the capital market if the respondent were to go unsanctioned or if others were to emulate the respondent's misconduct; and
- any mitigating or aggravating considerations.

[51] Our attention was also drawn to the following quote from the Alberta Court of Appeal in *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54:

> By relating the sanctions to the magnitude of the misconduct and by referring to the need to send a message, the Commission approached the case from the perspective of serving the larger objectives inherent in its oversight role. We see no error in this approach. Any penalty may well be regarded, from the perspective of the person on whom it is imposed, as "punitive". This is understandable. However, simply because sanctions may have a punitive effect on the wrongdoer does not mean that they do not also serve a valid regulatory or administrative purpose. Unless the *Act's* penalty section is found to be constitutionally infirm (and here there has been no constitutional challenge), the Commission's power to determine the quantum of sanction should not be fettered by a court-made rule limiting the Commission's scope of sanction on the basis that the penalties that might be imposed are perceived to be punitive. The Legislature has conferred on the Commission jurisdiction for administrative penalties up to $1,000,000.00. This increase in the maximum amount of administrative penalty reflects a legislative intent that these penalties ought not to be so low that they amount to nothing more than another cost of doing business. It also signals the Legislature's

> intent that the Commission should fit the sanction to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities.

[52] We also acknowledge, from the *Walton* decision, the need to consider proportionality as it relates to the misconduct and the Respondents' personal circumstances.

[53] The above principles guide our consideration of sanction and we will discuss sanctions in the context of those principles. The law concerning disgorgement will be addressed separately.

D. Sanction Discussion

1. The Seriousness of Misconduct

(a) Breitkreutz

[54] The findings against Breitkreutz place his misconduct among the most egregious known to the capital market. The fraud he orchestrated occurred over many years, during which time he raised more than $137 million and left hundreds of investors with little or no recovery.

[55] Rather than address the issue of potential sanctions and cost-recovery orders, Breitkreutz attempted to re-argue our findings in the Merits Decision. He was cautioned that such an attempt might also reflect a refusal to acknowledge and accept the seriousness of his misconduct. He portrayed himself as a victim of circumstance and submitted that he and his investors would have been kept whole if his scheme had been permitted to continue – especially if the passage of time had allowed the purported Chinese investors to invest in the US operations, which would have allowed him to pay off most Base Finance investors. In portraying himself as a victim, Breitkreutz seemingly minimized the losses to Base Finance investors. He asserted that he "lost everything" – not merely "a holiday home" or a million dollars from a portion of his investment portfolio. While Breitkreutz paid lip service to the losses experienced by Base Finance investors, he clearly considered his own losses to have eclipsed that of others.

[56] Breitkreutz acknowledged his responsibility for the failure to register Base Finance with the ASC. However, he maintained his denial in respect of the findings in the Merits Decision. We find Breitkreutz's lack of insight into the seriousness of his actions and the harm caused to his investors to be shallow, disingenuous and overshadowed by self-pity. He still believes he did nothing wrong and that he is the victim of the bank, the Receiver, and the ASC. At no point did he acknowledge nor accept that he may have been the author of his own fate.

(b) Way

[57] Throughout the many years that Base Finance operated its fraudulent scheme, Way, as Base Finance's administrator and sole bookkeeper, had intimate knowledge of the scheme, including the amounts being put at risk by hundreds of investors. Though one could say that she had a lesser role in the fraud perpetrated against Base Finance's investors – she was Breitkreutz's right hand in the operation of this fraudulent scheme and had "extensive knowledge of the nature of Base Finance's business" at all material times. She was privy to Breitkreutz's email communications and she often spoke directly with investors over the telephone or in person. She was also responsible for Base Finance's banking and bookkeeping. In other words, she was well aware of the deceit Base Finance was perpetrating on investors. Way also withdrew extraordinarily large amounts of cash from corporate accounts that were dissipated without any

records. It is striking that she did not warn her own cousin about the fraud, as he invested money on behalf of himself and his wife, and on behalf of his father to help with his "financial difficulties".

[58] Way also showed no insight into, or acknowledgement of, the fraudulent nature of the scheme. Indeed, as noted above, she advised us that the Respondents did not "believe, from the bottom of our heart, that it was a fraud or a Ponzi scheme".

2. Respondent's Characteristics and History

(a) Breitkreutz

[59] Breitkreutz had no prior capital market experience and no evidence was put before us of any prior sanctions or convictions, although he was registered for many years in Alberta as a mortgage broker. He is not facing allegations of illegal distribution or some technical violation of Alberta securities laws. The allegations involve fraud. One does not have to have prior capital market experience to appreciate that running a Ponzi scheme and deceiving investors is wrong. The fact that he did not have any prior sanctions or convictions was merely a function of him not being caught sooner.

(b) Way

[60] Way had no prior capital market experience, no prior sanctioning history and, indeed, did not even have mortgage broker certification, however she was intimately involved in the fraud being perpetrated on investors over an extended period of time. Her culpability is not diminished by her personal circumstances, lack of prior convictions, sanctions, or capital market experience.

3. Benefits Sought or Obtained

(a) Breitkreutz

[61] Breitkreutz, through all phases of the hearing, made much of the fact that he did not profit from a purported Ponzi scheme that generated over $100,000,000. However, for a number of years, he lived off of the funds put into the scheme by investors, participated in cash withdrawals from corporate bank accounts and the dissipation of that cash without records, acquired a number of properties and generally portrayed himself as a successful businessman worthy of investor confidence. Details of some of the funds taken by him personally from the operation are discussed below in the disgorgement analysis. It is clear that the scheme resulted in enormous amounts of investor funds being misappropriated and lost, and that this misappropriation impacted not only the lives of the investors but the lives of many relatives and dependents of those investors. It also shook the confidence of these investors in the Alberta capital market but also weakened the confidence of those investors' friends and family in the Alberta capital market.

(b) Way

[62] The above comments generally apply to Way. She made the cash withdrawals from Base Finance accounts, and offered no explanation for the Receiver's finding of substantial deposits into her personal bank account that were not commensurate with the income she claimed on her tax filings (and that such deposits ceased once Base Finance's account was frozen). She also benefitted from a loan using Base Finance funds, which enabled her to acquire her personal residence. She made an assignment into bankruptcy and we understand that her residence has since been sold.

4. Future Risk

[63] It is clear that neither Breitkreutz nor Way understands or acknowledges that they engaged in a fraudulent scheme that had no substantive business associated with it. They withdrew significant amounts of cash, being investor funds, without records and they did not view such activities as having any overtones of impropriety. If these Respondents were to go unsanctioned, or lightly sanctioned, it would send a clear message to the Respondents and others that this type of activity can be conducted over a long period of time with minor repercussions to those involved in the scheme. These schemes are particularly pernicious in the current climate of low interest rates and an aging population looking to set aside money to secure their retirement. Impactful sanctions are warranted to provide both specific and general deterrence and ensure that others do not see these sanctions as a mere cost of doing business.

5. Mitigating Considerations

[64] The respondents are not young. Way has gone bankrupt. Breitkreutz has, through Base Finance's receivership, lost most, if not all, of the properties he was known to have acquired over the years. However, evidence before us at the Merits Hearing showed large sums of cash withdrawn by Breitkreutz and Way, that, except for the explanation provided by Breitkreutz that the cash was used to pay Fox's employees, remains generally unaccounted for. We do not find the Respondents' explanation – that they merely handed over this cash to Fox to be credible.

[65] In Breitkreutz's case we find that any possible mitigating considerations are overwhelmed by the seriousness of his actions and the harm caused to investors and the capital market. His claim of impecuniosity (which was not substantiated by other evidence) does not in our view mitigate against the seriousness of his actions. He was in fact the author of his fate. Further, his current financial situation does not necessarily dictate his future financial situation. In the case of Way, we find that her lesser role in the misconduct, her age, her bankruptcy, and the smaller amount of money that was directly traceable to her, justifies a reduced sanction.

E. Administrative Penalty

[66] Section 199(1) of the Act provides that the ASC may order a respondent "to pay an administrative penalty of not more than $1,000,000 for each contravention or failure to comply". Staff sought an administrative penalty against Breitkreutz of $1,000,000 and an administrative penalty against Way of $150,000.

[67] Staff submitted that Breitkreutz "should be ordered to pay the maximum allowable administrative penalty" permitted by the Act, and suggested that the Respondents' misconduct arguably constituted multiple contraventions of the Act. The implication seemingly was that we might impose an administrative penalty in excess of the $1,000,000 ceiling provided for in this section of the Act. Staff relied on an extensive list of cases in which an array of administrative penalties were ordered for fraud-related violations of security laws. We have considered those decisions in assessing the administrative penalties in this case and consider that the administrative penalties we order against the individual respondents fall within the range established by these decisions.

[68] The amounts taken from investors by Breitkreutz and Way, the extended period of time over which they were taken, the number of investors affected by the Respondents' misconduct, and the Respondents' continued assertions that there was nothing wrong with their conduct apart from

not being registered with the ASC put this case among the worst frauds perpetrated in Alberta. As such, this case warrants a significant administrative penalty to be proportionate to the harm caused to Alberta investors and capital market.

[69] Taking into account the overall circumstances, applicable law, and the submissions of the parties, we find that the administrative penalty of $1,000,000 is appropriate and in the public interest as regards Breitkreutz and is so ordered.

[70] With respect to Way, it is our view that the nature of this scheme and Way's role in it, even after considering any mitigating factors justifies an administrative penalty in excess of $150,000. As this is all Staff requested, and since Way did not attend to make oral submissions (due to ill health and discussions with her lawyer) we are not prepared to order a more significant administrative penalty against Way. We order that Way pay an administrative penalty of $150,000.

F. Disgorgement

1. Law

[71] Section 198(1)(i) of the Act allows the ASC to order a respondent who has not complied with Alberta securities laws to pay to the ASC any amounts obtained or payments or losses avoided as a result of the respondent's non-compliance. This type of order is typically referred to as a "disgorgement order". Relevant principles applicable to disgorgement orders were discussed in *Re Planned Legacies Inc.*, 2011 ABASC 278 at paras. 71-75, and include the following:

- A disgorgement order may be used to achieve both specific and general deterrence by removing from a respondent all money unlawfully obtained by the respondent to ensure there is no financial benefit from non-compliance with Alberta securities laws.

- The initial burden is on Staff to prove, on a balance of probabilities, the amount obtained by the respondent as a result of the respondent's non-compliance with Alberta securities laws. The burden then shifts to the respondent, whose non-compliance resulted in funds being wrongfully obtained, to disprove the reasonableness of the amount.

- The reference to "amounts obtained" is not limited to the profit obtained by a respondent but applies to all money obtained as a result of the non-compliance.

2. Parties' Position

[72] Staff sought a disgorgement order against Breitkreutz in the amount of $4,145,350 and against Way in the amount of $902,646. Staff contended these were the amounts Breitkreutz and Way obtained as a result of their non-compliance with Alberta securities laws. No such order was sought against Base Finance.

[73] Breitkreutz and Way did not specifically address Staff's request for disgorgement orders other than to question the quality of the evidence relied on by Staff. Breitkreutz and Way generally took the position that they did not engage in any fraud or personally benefit at the expense of Base Finance investors.

3. Conclusion

[74] In our view, disgorgement orders should be made against both Breitkreutz and Way to achieve both specific and general deterrence. By engaging in fraudulent activities – deceiving Base Finance investors and operating a Ponzi scheme – they committed serious capital market misconduct that resulted in extensive, permanent harm to Base Finance investors. In doing so, they obtained significant amounts from their misconduct. Based on the available evidence, we are prepared to make a disgorgement order against Breitkreutz in the amount of $2,671,406 and against Way in the amount of $362,049.

4. Calculation of Disgorgement Order

[75] In respect of Breitkreutz, Staff's proposed disgorgement order of $4,145,350 was based on: (1) his employment compensation and expense reimbursements paid from August 2006 to October 2015; (2) a $50,000 certified cheque paid to Breitkreutz; (3) more than $18,000 in sporting tickets and more than $13,000 in golf membership and related expenses; (4) cash withdrawals and other unexplained withdrawals from corporate accounts; (5) the transfer of $61,940 from Base Finance to a Breitkreutz-controlled numbered company; and (6) rent payments made to Breitkreutz's wife from August 2006 to October 2015. Although Breitkreutz (and family members) also acquired several real estate properties ostensibly using Base Finance's funds, Staff made "no recommendations" as to the tracing of benefits purportedly obtained from these transactions given the "absence of clear, convincing and cogent evidence".

[76] Staff's proposed disgorgement order of $902,646 against Way was based on: (1) amounts she received from Base Finance and Base Mortgage from August 2006 to October 2015, less payments she made to the companies; and (2) the balance of an unpaid loan she received from Base Finance in relation to the purchase of her principal residence.

[77] Staff largely relied on the Receiver's analysis of Base Finance's and Base Mortgage's banking records in attempting to quantify the amounts sought for disgorgement. In particular, Staff referred to the "Third Report of the Receiver" dated May 9, 2016. Staff suggested that we might also consider the evidence from Staff's investigative analyst, who analyzed the source and use of funds from two of Base Finance's bank accounts from January 2011 to September 2015. Breitkreutz (on his own behalf and presumably that of Way) questioned the Receiver's analysis, arguing that it was only "a partial analysis", that the Receiver inappropriately drew certain assumptions, and that other evidence showed that Breitkreutz did not personally benefit from the alleged Ponzi scheme.

[78] Much of the Receiver's analysis was not particularly well-suited to the task of discerning whether Breitkreutz or Way personally benefitted from their respective non-compliance with Alberta securities laws. This was due in part to the time period reviewed by the Receiver, some of which predated the time period for the misconduct identified in the Merits Decision (which dated back to August 1, 2006). The Receiver also aggregated amounts from Base Finance's and Base Mortgage's banking records, although in some instances the Receiver's additional commentary clarified whether amounts derived from one company or the other. Aside from such commentary, and because we were not provided the documentation relied on by the Receiver to calculate the amounts in its analysis, we were unable to distinguish whether particular amounts derived from Base Finance's or Base Mortgage's accounts. This was important in attempting to

quantify a disgorgement order, given that Base Mortgage was not found to have contravened Alberta securities laws.

[79] Accordingly, we were unable to include in a disgorgement order any of the amounts paid by Base Mortgage for Breitkreutz's and Way's employment compensation, the "sporting event tickets and related expenses" and "golf membership dues and related expenses", or the rental payments to Breitkreutz's wife. As these amounts were paid by Base Mortgage (and at undetermined dates), Staff have not met their initial burden of establishing that such payments were obtained by Breitkreutz or Way as a result of their non-compliance with Alberta securities laws.

[80] The Receiver's report also referred to a payment made to Breitkreutz by way of a certified cheque in the amount of $50,000. We were not provided any details regarding this payment, including whether it derived from Base Finance or Base Mortgage. Accordingly, this amount was not proven to have derived from Breitkreutz's non-compliance with Alberta securities laws.

[81] We were able to identify from other evidence, notably from Staff's investigative analyst, numerous transfers totalling $991,821 from Base Finance to two Breitkreutz-controlled companies. These transactions all occurred between January 1, 2011 and September 24, 2015. In particular, transfers were made from Base Finance to a numbered company controlled by Breitkreutz in the amount of $69,940 from May to October 2012. The remaining transfers, totalling $921,881, were made to Base Mortgage. In light of the evidence that Base Mortgage was no longer brokering mortgages after April 2010 and the lack of evidence that it had other sources of income, we considered payments made to Base Mortgage after April 2010 to have derived from Base Finance's fraudulent activities. We conclude that Breitkreutz indirectly obtained the amounts transferred from Base Finance to the numbered company and Base Mortgage (companies in which he was the guiding mind at all relevant times) as a result of his non-compliance with Alberta securities laws.

[82] Staff's investigative analyst also identified transfers from Base Finance to Way totalling $177,049, all occurring from May 2014 to September 2015. We consider this amount to have been obtained by Way as a result of her non-compliance with Alberta securities laws.

[83] Base Finance also transferred a property to Way on July 28, 2010 for $385,000, for which she paid $200,000 to Base Finance. We find that the balance of $185,000 was advanced to Way in the form of a loan from Base Finance, which she has not repaid. In particular, Breitkreutz testified that Way "paid back [$]200,000 immediately", that he "agreed to carry the balance for [Way] until such time that we had expected that we would be wrapping up . . . Base Finance", and that she had not paid back the $185,000 to Base Finance at the time of its receivership. Way's bankruptcy documents, which cited a promissory note payable to Breitkreutz as creditor, confirmed to us that Way obtained this benefit and it remained outstanding at the time of her bankruptcy. In the circumstances, we find that the $185,000 amount was obtained by Way, or that it constituted a payment or loss avoided by her, as a result of her non-compliance with Alberta securities laws, and we include this amount in the disgorgement order against her.

[84] The Receiver also identified numerous cash withdrawals made from Base Finance's accounts, which could not be traced once withdrawn from the accounts. Cash in the amount of

$1,478,519 was withdrawn from one of Base Finance's accounts from August 1, 2006 to June 17, 2014, and cash in the amount of $201,066 was withdrawn from a second Base Finance account from May 2014 to September 2015. This total was $1,679,585. (The Receiver also identified an additional cash withdrawal of US$8,307 from a third Base Finance account, but because the timeframe was from August 1, 2004 to July 2011, we were unable to determine whether these amounts derived from non-compliance with Alberta securities laws during the relevant time.)

[85] Breitkreutz denied that he (or Way) personally benefitted from these cash withdrawals. He told us that Way would periodically withdraw cash from Base Finance's accounts, and that these funds would be provided to Fox (and his companies). As we understand the evidence, the rationale for these cash payments was to allow Fox to pay US employees (and perhaps other expenses), and that cash payments were preferable to Canadian cheques that were subject to lengthy hold periods by US banks.

[86] Breitkreutz or Way did not apparently track cash payments made to Fox or his companies, nor did they receive receipts for such payments. Rather, Breitkreutz said that he would, from time to time, have Fox sign promissory notes confirming the debt owed from the cash payments. In evidence were four promissory notes signed by Fox. One was dated May 1, 2006 in the amount of $1,500,000, and another was dated November 24, 2008 in the amount of $275,000. The remaining two promissory notes were undated, with the amounts left blank. As Fox did not testify, we do not have his evidence regarding these promissory notes or the cash payments generally.

[87] Other evidence indicated that both Breitkreutz (and Way) made significant, unexplained deposits into their personal bank accounts between January 2009 and January 2016. In particular, the Receiver found "many untraceable deposits . . . in round numbers" into Breitkreutz's personal bank account that "ranged from the tens of thousands to the hundreds of thousands". According to Breitkreutz's evidence in the merits hearing, his average income in the past ten years was $36,000 per year.

[88] We do not accept Breitkreutz's explanation for the undocumented cash withdrawals, as it defies logic and business sense and is unsupported by the evidence. The veracity of Breitkreutz's explanation for the cash withdrawals is dependent upon a series of separately incredible circumstances. First, that Fox needed cash to pay US oilfield workers and suppliers. Second, that he did not have or could not open bank accounts in the US from which he could withdraw cash. Third, that Canadian cash would serve Fox's needs. Fourth, that Fox would take briefcases of cash into the United States when individuals are generally required to declare and subject themselves to scrutiny by the US border agency concerning the importation of large sums of cash. Finally, that Breitkreutz and Way would provide large amounts of cash to Fox without obtaining a receipt or other documentation for such amounts.

[89] We find that the cash withdrawn from Base Finance's accounts were converted to Breitkreutz's own use and we therefore attribute the cash withdrawals to him. We also find that these amounts were obtained by Breitkreutz as a result of his non-compliance with Alberta securities laws.

[90] The Receiver's report also identified numerous, unidentified transactions in Base Finance's accounts. The Receiver's evidence provided little detail in respect of these transactions, other than they resulted in a net loss of $1,207,743 from Base Finance's accounts. Breitkreutz addressed these unidentified transactions in an affidavit sworn in July 2016. There, Breitkreutz attested to his belief that "the vast majority" of the unidentified transactions were advanced to Fox and his companies at Fox's request. Accompanying his affidavit was a transaction summary prepared by the Receiver in respect of the unidentified transactions. This summary also had "hand written comments" apparently made by Way to explain many of the transactions. Her comments suggested that numerous transactions involved payments designated to Fox or were payments made to, or received from, Base Finance investors. We also heard some discussion during the Sanctions Hearing that some of the cheques in the Receiver's transaction summary may have been additional cash withdrawals. We were not pointed to any supporting documentation to provide details as to the transactions in issue.

[91] In the circumstances, Staff have not met their initial burden of proving, on a balance of probabilities, that the unexplained transactions benefitted Breitkreutz as a result of his non-compliance with Alberta securities laws. We therefore do not include these amounts in our disgorgement assessment.

[92] We also make no disgorgement order in relation to the properties acquired by Breitkreutz, his family or companies he controlled. Staff failed to provide clear evidence showing that these properties were obtained by Breitkreutz as a result of his non-compliance with Alberta securities laws, and it is unclear if all properties have been sold, or are in the process of being sold, through receivership proceedings to satisfy the corporate creditors (where they may be of some potential benefit to Base Finance investors).

[93] To summarize, Staff established that Breitkreutz indirectly obtained $2,671,406 through transfers from Base Finance to companies he controlled and from cash withdrawals obtained from Base Finance's accounts during the relevant time. Staff also established that Way obtained $362,049 directly from Base Finance. We consider these amounts to have been obtained as a result of their respective non-compliance with Alberta securities laws.

[94] Breitkreutz and Way did not disprove the reasonableness of these amounts.

[95] Accordingly, we find that disgorgement orders should be made requiring payment to the ASC by Breitkreutz in the amount of $2,671,406, and by Way in the amount of ASC $362,049.

G. Market Exclusion Orders

[96] Staff requested an array of orders under s. 198 of the Act that would effectively limit the Respondents' future participation in the capital market. Given our findings as to their fraudulent misconduct and their lack of insight into, or acknowledgement of, the impropriety of their activities, and their failure to recognize the harm, we agree that extensive bans are required to protect investors and the Alberta capital market. We consider that the orders sought by Staff are appropriate and we so order.

V. COSTS

[97] Pursuant to s. 202 of the Act, cost recovery orders can be made against any person or company found to have contravened Alberta's securities laws. The purpose of these orders is to make those found to have violated Alberta's securities laws reimburse some of the costs expended by the ASC, which is in turn funded by the industry in general which abide by the rules.

[98] Staff submitted a list of costs totalling $180,722.88, of which $155,558.50 represented fees for the estimated time of Staff and expenses paid of $25,164.38. Staff requested a cost order totalling $162,500, the reduction being attributed to the use of two senior counsel where a portion of that work could have been performed by a more junior counsel at less expense. As between the Respondents, Staff suggested that Breitkreutz pay $112,500 and Way $50,000.

[99] We find that Breitkreutz and Way should be liable for these costs, and order that Breitkreutz pay $100,000 and that Way pay $50,000.

VI. CONCLUSIONS

[100] As against Breitkreutz, we order:

- under s. 198(1)(d) of the Act, he must 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;

- with permanent effect:

    - under ss. 198(1)(b) and (c), he must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him;

    - under s. 198(1)(e), 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;

    - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;

    - under s. 198(1)(e.1), he is prohibited from advising in securities or derivatives;

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

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

- under s. 198(1)(i), he must pay to the ASC $2,671,406 obtained as a result of his non-compliance with Alberta securities laws;

- under s. 199, he must pay an administrative penalty of $1,000,000; and

- under s. 202, he must pay $100,000 of the costs of the investigation and hearing.

[101] As against Way, we order:

- under s. 198(1)(d), she must resign all positions she 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;

- until the later of 20 years from the date of this decision and the date on which the monetary orders under ss. 198(1)(i), 199 and 202, made against her have been paid in full to the ASC:

  - under ss. 198(1)(b) and (c), she cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to her;

  - under s. 198(1)(e), she 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;

  - under s. 198(1)(c.1), she is prohibited from engaging in investor relations activities;

  - under s. 198(1)(e.1), she is prohibited from advising in securities or derivatives;

  - under s. 198(1)(e.2), she is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

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

- under s. 198(1)(i), she must pay to the ASC $362,049 obtained as a result of her non-compliance with Alberta securities laws;

- under s. 199, she must pay an administrative penalty of $150,000; and

- under s. 202, she must pay $50,000of the costs of the investigation and hearing.

[102] As against Base Finance, we order:

- under ss. 198(1)(a), (b) and (c), all trading in or purchasing of securities or derivatives of Base Finance must cease, Base Finance must cease trading in or purchasing securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to Base Finance, permanently;

- under s. 198(1)(c.1), Base Finance is prohibited from engaging in investor relations activities, permanently;

- under s. 198(1)(e.1), Base Finance is prohibited from advising in securities or derivatives, permanently;

- under s. 198(1)(e.2), Base Finance is prohibited from becoming or acting as a registrant, investment fund manager or promoter, permanently; and

- under s. 198(1)(e.3), Base Finance is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently.

[103] According to its terms, the interim cease trade order issued in relation to this proceeding expires with the issuance of this decision.

[104] This proceeding is concluded.

February 21, 2019

For the Commission:

"original signed by"
Ian Beddis

"original signed by"
Maryse Saint-Laurent

The Concurring Decision of Bradley G. Nemetz, Q.C.

[105] I concur with the majority's sanction decision. This concurring opinion addresses the administrative penalty against Breitkreutz[1] and provides additional reasons that lead me to endorse this aspect of the panel's sanctions.

[106] The $1,000,000 administrative penalty is the maximum provided under the Act. In this case we are assessing that maximum.

[107] Of particular importance to my decision is the passage from the Alberta Court of Appeal's decision in *Alberta Securities Commission v. Brost*, 2008 ABCA 326 as quoted in para 51 of the sanction decision.

[108] In *Brost*, at para 54, the Court of Appeal endorsed the Commission's position that sanctions were to be set by reference to "the magnitude of the conduct and by referring to the need to send a message".

[109] The Court went on to indicate that while sanctions might have a punitive effect on the wrongdoer, they serve a valid regulatory purpose. It noted that "the Commission's power to determine a question of sanction should not be fettered by a court-made rule limiting the Commission's scope of sanction on the basis that the penalties that might be imposed are perceived to be punitive." The Court stated that the legislative intention in increasing the administrative penalty to $1,000,000 signaled its intent that "the Commission should fit the sanctions to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities."

[110] The question posed by our case is whether, in all the circumstances, the imposition of the maximum administrative penalty as against Breitkreutz, together with the disgorgement of those investor funds that we were able to trace to him, is appropriate. Of particular importance, in the protection of the capital market, is a concern that the administrative penalty levied not be reduced to such a level that it would be seen by the public and people involved in the securities industry as a modest (when compared with the gain) cost of doing business.

[111] The seriousness of Breitkreutz's fraud, his character, his history, the benefits he sought and those that he obtained, and the future risk (if those involved in the securities industry see a paltry penalty for a massive fraud) place this case well into the group of cases that warrant the maximum $1,000,000 administrative penalty. Breitkreutz's professed impecuniosity cannot remove this case from that category and result in a reduction from the maximum.

[112] Breitkreutz told the Receiver's counsel, under oath, that he had been funding Fox for 35 years which included, from time to time, funding Fox's living expenses. The money raised from investors was used to fund Breitkreutz's lifestyle, to see that Way received funds greatly in excess of her supposed income, to fund Fox's oil and gas endeavours, and for Fox's personal expenses. The balance was recirculated to investors under the guise of interest or principal repayments of investor funds advanced under mortgages.

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[1] Unless otherwise noted, this decision uses the defined terms from the sanctioning decision.

[113] When the Ponzi scheme collapsed it had over 200 investors who were owed in excess of over $100,000,000. In these circumstances, even a $1,000,000 administrative penalty is a modest cost of doing business, but it is the most we can impose.

[114] Further exacerbating Breitkreutz's misconduct is the fact that he was a fiduciary of the funds that investors placed with him. This is a case of fraud by a fiduciary against vulnerable individuals. That Breitkreutz was a fiduciary is evident from the terms of the Assignment of Mortgage under which he raised the funds. The document made it clear that the funds advanced would be used to fund mortgages, that investors' security was a partial assignment of those mortgages, and that repayments of principal and interest under the mortgages would be passed through Base Finance to the investors. The assignments also make it clear that Base Finance accepted no responsibility for the loss of the investors' money and that the investors' sole recourse was to pursue recovery under the mortgages. Thus, the investors' funds were not loaned to Base Finance. Rather, Base Finance undertook to use the investors' money for a specific purpose. This places Base Finance (and by extension its controlling mind – Breitkreutz) in a classic fiduciary role and aggravates the misconduct as this is a fraud perpetrated by a fiduciary against beneficiaries.

[115] Also, Breitkreutz and Base Finance, in handling investors' funds, had little regard for creating paperwork that would allow investors to understand where their money went and, if that money was not repaid, how they could recover it. As a result it was very difficult for the Receiver to trace the funds and there was a significant dispute between Fox and Breitkreutz as to the amounts owed by Fox and his companies. As has been shown, large amounts were withdrawn by Breitkreutz and Way in cash such that they could not be traced. We disbelieve Breitkreutz's evidence that the funds were turned over in cash to Fox, but if they were, the absence of any meaningful receipt or acknowledgement by Fox of the amounts advanced is startling. The disgorgement order does not encompass all the funds likely diverted by Breitkreutz and therefore does not fully address his misappropriation and use of investor funds.

[116] Another result of Breitkreutz's lack of proper accounting and records, together with the massive withdrawals, is that it is difficult, and in many cases impossible, to ascertain what Breitkreutz did with the funds and whether his assertion that the Receiver had been able to locate and recover all of his assets is true.

[117] While disbelieving Breitkreutz's assertions that he has no assets does not lead to a conclusion that he in fact has assets, it undermines his protestations of impecuniosity and leads to a reluctance to reduce the otherwise appropriate administrative penalty.

[118] The individual circumstance of the offender, including age, can serve to reduce what is an otherwise appropriate sanction. The fact that he was able to run this scheme for 35 years, being able to induce enough new investors to cover payouts to old investors, accounts for a good bit of his current age. We also have evidence that he lived a good life, had numerous cars, homes and a golf membership. As a result of the scheme, he was, for decades, able to live a comfortable life and see to Fox's needs. Also to be noted is that portion of the Receiver's report which points out that one of Breitkreutz's personal bank accounts, into which

investor money from Base Finance flowed, had frequent cash withdrawals at a casino, leading to a reasonable inference that he was using investors' funds for gambling.

[119] The ASC should be given the opportunity to inquire into his alleged impecuniosity by pursuing normal civil remedies to determine the true facts surrounding Breitkreutz's financial situation, what he did with misappropriated funds, and potentially recover the appropriate sanctions.

[120] Another mitigating factor in assessing administrative penalties is the Respondent's insight into the misconduct. As noted in the decision sanction, the Respondents continued to deny that they did anything wrong, continued to portray themselves as the biggest victims in this piece, and blame others for the collapse of the scheme. In these circumstances the Respondents get no credit for insight.

[121] In this case, a reduction from the maximum $1,000,000 administrative penalty authorized by the Legislature would thwart the intention of the Legislature when it increased the maximum administrative penalties. In authorizing a $1,000,000 maximum, the Legislature was seeking to send a signal to those who would benefit from participation in the capital market that there are significant consequences for breaches of securities law. To diminish an otherwise appropriate sentence in the circumstances of this case and this fraud on the basis of alleged impecuniosity would send a signal to those who would take advantage of the public that they can obtain a reduction in an otherwise appropriate sanction by living a high life but keeping a low balance in their chequing accounts.

[122] I am of the opinion that a global $1,000,000 administrative penalty, coupled with the cost of the disgorgement order made against Breitkreutz, are appropriate sanctions having regard to the conduct, the victims, and all mitigating and aggravating circumstances, including Breitkreutz's age and potential inability to pay.

[123] Before concluding, I wish to address the administrative penalty ordered against Way. Staff requested only a $150,000 administrative penalty. Way, faced with this position, did not appear for argument at the conclusion of the sanctioning hearing. The extent and duration of her participation in the fraud would, in my opinion, have warranted an administrative penalty in excess of $150,000. However, given that she abstained herself from the conclusion of the hearing and therefore did not have an opportunity to address the possibility of a higher administrative penalty, I am not prepared to assess against her an administrative penalty in excess of that sought by Staff.

February 21, 2019

"original signed by"

Bradley G. Nemetz