ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Magneson, 2022 ABASC 101 **Date: 20220726**

Allan Robert Magneson, 1111108 Alberta Ltd. and New Wave Innovations Ltd.

Panel:	Kari Horn Steven Cohen Tom Cotter
Representation:	Carson Pillar for Commission Staff Brian A. Beresh, Q.C. for Allan Robert Magneson
Submissions Completed:	November 12, 2021
Decision:	July 26, 2022

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I. INTRODUCTION

[1] Following a six-day hearing (the **Merits Hearing**), we found that Allan Robert Magneson (**Magneson**), 1111108 Alberta Ltd. (**111 Alberta**), and New Wave Innovations Ltd. (**NWI**, and together with Magneson and 111 Alberta, the **Respondents**) contravened s. 93(b) (as it then was) of the *Securities Act* (Alberta) (the **Act**) by engaging in a course of conduct that they knew or ought to have known perpetrated a fraud on NWI's investors. Our analysis and reasons are set out in *Re Magneson*, 2021 ABASC 129 (the **Merits Decision**).

[2] After issuance of the Merits Decision, these proceedings moved into the second phase, to determine what orders (if any) ought to be made against the Respondents as a result of their misconduct. We received written submissions from both Alberta Securities Commission (**ASC**) staff (**Staff**) and Magneson. No submissions were made on behalf of 111 Alberta or NWI.

[3] Staff also submitted a summary of their investigation and enforcement costs, including supporting documentation (the **Bill of Costs**).

[4] The Respondents were given an opportunity to adduce evidence relevant to sanction, but declined to do so. None of the parties requested an oral hearing for argument on sanction, and the panel did not require such a hearing. We therefore determined sanction and cost recovery based on the record of the proceedings, our findings in the Merits Decision, the Bill of Costs, and the written submissions of the parties.

[5] For the reasons outlined below, against Magneson and 111 Alberta we are ordering permanent market-access bans and directing them to pay both disgorgement and an administrative penalty. In addition, we are issuing a cost-recovery order against Magneson and 111 Alberta. Against NWI we are ordering limited market-access bans.

II. MERITS DECISION – SUMMARY OF FACTS AND FINDINGS

[6] The salient facts, law, and our analysis of this matter are set out in the Merits Decision, which should be read together with these reasons. For ease of reference, we summarize the most significant points here.

[7] NWI and 111 Alberta are both Alberta-incorporated companies, although NWI was struck from the Alberta Corporate Registry on January 2, 2018. Magneson was NWI's founder, guiding mind, president, and sole director throughout the **Relevant Period**, June 1, 2011 to December 31, 2016. During the same period, he was also the sole director, shareholder, and guiding mind of 111 Alberta, through which he performed his work for NWI.

[8] NWI's business was to develop and market a low-decibel dental hand piece or drill with air-bearing turbine technology that would not emit the high-pitched whine of a standard dental drill (the **Drill**). Magneson was the primary inventor of the Drill technology, but he worked with other specialized manufacturing companies in its development. There was no indication that NWI ever reached the point of manufacturing or selling the Drill commercially. At the time of the Merits Hearing, the evidence was that further work and additional funding were required to get the Drill to that stage.

[9] NWI and Magneson raised money from investors by selling NWI Class A voting shares (the **Shares**). Some of the Shares sold were issued from NWI's treasury, but Magneson also sold

Shares from his personal holdings. In either case, the vast majority of investors made their payments to NWI, and Magneson told investors their funds would be used for the research and development of the Drill regardless of the source of their Shares. He did not tell them anything about his personal compensation or that he considered his compensation to be part of NWI's research and development expenses. If asked, he either denied he was taking compensation or indicated that he was taking only an insignificant amount. Similarly, he told investors who purchased Shares from his holdings that the proceeds would be used to further develop the Drill, but he instead took that money for himself. He did not tell them that NWI owed him and 111 Alberta a considerable amount of money (whether or not the loans were advanced for the ostensible purpose of Drill research and development), and that he intended to repay the debt from invested funds.

[10] Approximately $7 million was raised from the sale of NWI Shares, including approximately $4.8 million (net of redemptions) from the sale of treasury Shares from 2011 through 2016.

[11] In the Merits Decision, we found that Magneson perpetrated a fraud by knowingly making representations to investors about the intended use of their investment funds that were inconsistent with the actual use of the funds, and by failing to disclose how the funds were really spent. Based on Magneson's own records, we found that from 2011 to 2016, the majority of the invested funds were paid to Magneson either directly or through 111 Alberta as compensation and reimbursement for expenses ($2,011,250), repayment of loans he and 111 Alberta ostensibly made to NWI prior to 2011 ($1,518,830), and payment for the Shares he sold to investors from his personal holdings ($2,263,122 or, during the Relevant Period only, $2,043,122). These amounts total $5,793,202, or approximately 82% of the funds raised from investors during that time frame.

[12] Although Magneson argued that he was entitled to all of the funds he was paid, we concluded that even if we accepted that as true, it would not justify his deception, as he admitted that he did not inform NWI investors of his purported entitlements when they invested. He failed to disclose important facts and instead diverted investor funds intended for corporate use to his personal use. As we stated in the Merits Decision, "[i]t is one thing for investors to assume that Magneson was being paid something for his work and expenses during the Drill's development", but "it is another thing entirely for them to be advised that Magneson would be paid three-quarters or more of the total funds invested" (at para. 227).

[13] Ultimately, almost all of NWI's investors appear to have lost their money. A few received relatively small amounts from Share redemptions and secondary transfers. Magneson is the only one who received a significant benefit from the Drill project.

[14] We found that NWI and 111 Alberta were also liable for this misconduct, as Magneson was their sole guiding mind and his conduct and knowledge were attributable to them. He raised funds from the public through NWI, and diverted most of those funds to himself through 111 Alberta.

III. SANCTIONS

A. The Law

1. Sanctioning Rationale and Principles

[15] Under ss. 198 and 199 of the Act, ASC panels are authorized to make certain orders if they are in the public interest. Sanctions are ordered to protect the public and to prevent future misconduct, not to punish respondents or remediate the harms suffered by others as a result of a respondent's misconduct (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). This is consistent with the ASC's mandate to protect investors and foster a fair and efficient capital market in which the public can have confidence.

[16] In assessing the sanctions appropriate for meeting these goals in a particular case, a panel must consider both specific deterrence (the need to deter future misconduct by the relevant respondent), and general deterrence (the need to deter future misconduct of a similar nature by others) (see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62). However, sanctions must be both "proportionate and reasonable" in light of the overall circumstances, including the personal circumstances of the respondent (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 154 and 156).

[17] As further discussed by the panel in *Re Homerun International Inc.*, 2016 ABASC 95 (at paras. 14-15):

> The determination in a particular case of whether deterrence is required and, if so, the type and extent of sanctions appropriate for that purpose, will turn on the circumstances of the misconduct and of the particular respondent, and on an assessment of the risk posed to investors and the capital market by a particular respondent or by others who might be minded to emulate the respondent's misconduct.
>
> Pertinent to assessing the proportionality and reasonableness of a contemplated sanction is the Alberta Court of Appeal statement in *Walton* (at para. 154) that "general deterrence does not warrant imposing a crushing or unfit sanction on" a respondent. Specifically in the context of an administrative [monetary] penalty, the Court of Appeal stated (at para. 156) that it must "be proportionate to the offence, and fit and proper for the individual offender".

[18] In considering the amount of any administrative penalty, we are also guided by the Alberta Court of Appeal's pronouncements that, "penalties ought not to be so low that they amount to nothing more than another cost of doing business" (*Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 54), and that, "[i]f sanctions under [the Act] are so low as to communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence, the opposite to deterrence may result" (*Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 21).

[19] To assist in determining the appropriateness and proportionality of any contemplated sanction orders, we consider certain relevant factors and the sanctions imposed in previous decisions involving similar circumstances and misconduct (*Homerun* at paras. 16 and 20). While comparable decisions will involve circumstances that are not identical to those in this case, they are still useful in informing our conclusions on a package of sanctions that is, as mentioned, "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156).

2. Sanctioning Factors

[20] In *Homerun* (at paras. 22 *et seq*.), the panel engaged in a comprehensive examination of the factors relevant to the determination of appropriate sanctions in ASC enforcement proceedings (as later confirmed by the Alberta Court of Appeal in *Spaetgens v. Alberta (Securities Commission)*, 2018 ABCA 410 at para. 31):

(i) the seriousness of the respondent's misconduct;
(ii) the respondent's personal characteristics and history;
(iii) the benefit sought or obtained by the respondent; and
(iv) any mitigating or aggravating considerations.

[21] Without reproducing the examination in *Homerun*, we adopt it here in full and highlight certain aspects of it below. Consideration of the factors is intended to focus the analysis on the circumstances of both the contravention and the respondent and to assist in the determination of the extent of the risk of future misconduct by the respondent or others who might emulate that misconduct, and therefore the necessary deterrent measures that will mitigate the risk.

(a) Seriousness of the Misconduct

[22] Assessing the seriousness of the misconduct involves consideration of its nature, the respondent's intention (i.e., was the misconduct deliberate, reckless, or simply inadvertent?), and the harm to which it exposed identifiable investors or the capital market generally (*Homerun* at para. 22). Impact on the market is considered because the occurrence of securities-related misconduct may make it more difficult for law-abiding issuers to raise capital.

[23] Typically, "the more serious the misconduct, the greater the future risk implied and thus the greater the deterrence required" (*ibid.* at para. 26).

(b) Characteristics and History

[24] The characteristics and history of a respondent may also be pertinent to the assessment of the risk of future misconduct and therefore the necessary level of deterrence, as well as the proportionality of the proposed sanctions (*ibid.* at para. 27).

[25] Relevant personal characteristics may include a respondent's educational background, work experience, and history of participation in the capital market, as well as any disciplinary history or claimed impecuniosity (*ibid.* at para. 28). While a disciplinary history may suggest a higher risk of recurrence and therefore an elevated need for deterrence, the absence of a disciplinary history is not mitigating. This is because all market participants are expected to follow the law (*ibid.* at para. 85).

[26] According to the panel in *Homerun* (at para. 33), "it may be appropriate to attribute to a corporate respondent pertinent characteristics of its guiding individuals".

(c) Benefit Sought or Obtained

[27] If the respondent sought or obtained a personal benefit from the misconduct, it may be an indication that a greater level of deterrence is required to remove the incentive for the respondent or others to engage in similar misconduct in the future (*ibid.* at para. 37).

(d) Mitigating or Aggravating Considerations

[28] Whether mitigating or aggravating, this factor is intended to capture considerations that do not fall under any of the previous three categories (*ibid.* at para. 39). As with the other factors, mitigating and aggravating considerations may suggest that either greater deterrence is required, or that a reduced level of deterrence will suffice (*ibid.*).

[29] In *Homerun*, the panel suggested that, "[p]ersuasive indications that a respondent appreciates the wrong done, and its seriousness" or a "genuine acceptance of responsibility" may be mitigating because they suggest a reduced risk of recurrence (*ibid.* at paras. 41-42). By contrast, a "belligerent contempt for either the victims of the misconduct or the law" may be aggravating because it suggests a higher risk of recurrence (*ibid.* at para. 46).

[30] That said, while accepting responsibility may be a mitigating consideration, it is not aggravating for a respondent not to do so (*Re Rustulka*, 2021 ABASC 15 at paras. 35-36). Respondents are entitled to mount a defence and maintain their innocence (*Walton* at para. 155).

3. Types of Orders Available

[31] As will be discussed below, Staff sought market-access bans, a disgorgement order, and an administrative penalty against Magneson and 111 Alberta, and market-access bans against NWI.

(a) Market-Access Bans

[32] If we consider it to be in the public interest to do so, we may impose various orders restricting a respondent's participation in and access to the capital market, either permanently or for a specified period of time (see s. 198 of the Act).

[33] Because such orders restrict or bar a respondent from certain types of activities, they are intended to prevent future harm and protect the investing public, including by sending a message to other market participants about the consequences of market misconduct. As stated in *Re Planned Legacies Inc.*, 2011 ABASC 278 (at para. 42):

> . . . participation in the Alberta capital market is a privilege not a right. Those who exercise the privilege of access to the Alberta capital market are to adhere scrupulously to all requirements of Alberta securities laws. Those who do not do so are subject to losing that privilege and facing other consequences.

[34] Generally, ASC hearing panels will impose the specific orders that address the capacities in which a respondent acted in perpetrating the misconduct at issue.

(b) Disgorgement

[35] If we consider it to be in the public interest, we may order a respondent to disgorge – i.e., to pay to the ASC – any amounts obtained or any payments or losses avoided as a result of the respondent's non-compliance with Alberta securities laws (see s. 198(1)(i) of the Act). The intention is to remove any financial benefit of a respondent's misconduct and thus to remove the incentive for the misconduct to be repeated, whether by that respondent or by others.

[36] We adopt the discussion of the law governing disgorgement orders set out in *Re Fauth*, 2019 ABASC 102 (see paras. 76-87). The main principles from *Fauth* were summarized in *Rustulka* (at paras. 104-105; unless otherwise indicated, all included citations are to *Fauth*):

- the first step in deciding whether disgorgement should be ordered is to determine whether the respondent obtained a monetary amount arising from his or her contraventions of the law. The second step is for the trier of fact to decide whether a disgorgement order is in the public interest, which typically involves consideration of the goals of specific and general deterrence (at para. 78);

- Staff must prove the approximate amount obtained by the respondent. If the respondent believes that amount is inaccurate or unreasonable, the burden shifts to him or her to demonstrate why. Any uncertainty should be resolved against the respondent (at para. 81);

- it does not matter if the respondent has spent or otherwise dissipated some or all of the funds, as the Act speaks to "any amounts obtained" rather than any amounts retained. To find otherwise would be to reward the wrongdoer for spending ill-gotten gains quickly enough to avoid later enforcement (at para. 82);

- for the same reason, a disgorgement order can be made even where the respondent is impecunious. As the ASC panel in *Re Magee* explained (2015 ABASC 846 at para. 191), "it would seem perverse that disgorgement could be ordered against a respondent who has retained amounts illegally obtained, but not against a respondent who has squandered such amounts" (cited in *Fauth* at para. 84; see also para. 85); and

- disgorgement orders are discretionary, and it is within our discretion to order payment of all or less than the full amount obtained by a respondent as a result of his or her non-compliance with Alberta securities laws (at para. 86).

[37] To the foregoing, we would add that Staff's burden of proof of the amount obtained directly or indirectly remains the balance of probabilities. We also note that the amount obtained may include any amounts obtained by companies under an individual respondent's direction or control.

(c) Administrative Penalty

[38] Under s. 199 of the Act, notwithstanding the imposition of any other penalty or sanction, we have the authority to impose an administrative penalty against a respondent in an amount of up to $1 million per contravention of Alberta securities laws, if it is in the public interest. We may make such an order even where disgorgement is also ordered, as explained in *Re Currey*, 2018 ABASC 34 (at para. 44):

> While disgorgement is intended to remove any profit incentive behind securities misconduct and addresses the calculable financial benefit a respondent may have gained, the addition of an administrative penalty is meant to ensure that the respondent does not view a sanction as merely a cost of doing business. The panel in *Re Holtby*, 2015 ABASC 891, while noting that both are "aimed at protecting through deterrence", described the difference as follows (at para. 65): ". . . a disgorgement order is directed at ensuring that a respondent does not retain any financial benefit from breaching Alberta securities laws, whereas an administrative penalty imposes a direct financial cost on a respondent for the respondent's breach of Alberta securities laws."

[39] In other words, while disgorgement orders and administrative penalties are both financial sanctions, they have different purposes. We agree with the panel in *Rustulka* that (at para. 112):

> [w]ithout the addition of an administrative penalty, a respondent [subject to a disgorgement order who has been] found to have contravened Alberta securities laws would only face the prospect of having to repay the financial benefit obtained. This would have an insufficient deterrent effect in itself, as the respondent would at worst "break even" – that is, he or she would be no worse off

> financially than if he or she had not broken the law in the first place (see *Walton* at para. 156). An administrative penalty ensures that there is also a direct financial consequence to the offender, to send the message to both that offender and others that there is a serious risk in choosing not to comply with legislative and regulatory requirements.

[40] While administrative penalties – like all other sanction orders – must be proportionate to the offence and the circumstances of the offender (*Walton* at para. 156), they should still have a sufficient deterrent effect. The panel in *Homerun* noted that (at para. 18), "a monetary sanction almost inevitably involves . . . a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all."

[41] However, as against certain respondents – in particular, corporate issuers – a panel may decide not to impose an administrative penalty if it would negatively impact the investors' prospects of recovering their funds (*ibid.* at para. 34).

B. Positions of the Parties

1. Staff

[42] Since Magneson guided and directed both NWI and 111 Alberta, Staff's argument focused on the application of the *Homerun* factors to Magneson's personal circumstances and misconduct.

[43] Staff acknowledged that developing and marketing the Drill was a legitimate business purpose. However, they emphasized that by not disclosing the use of investor funds, the Respondents "perpetrated a multimillion dollar fraud on NWI investors". Noting that fraud is one of the most serious forms of market misconduct, Staff pointed out that Magneson's deceit was deliberate and resulted in actual financial harm to investors. Some of those investors testified at the Merits Hearing and said that if they had known how Magneson planned to use their money, they would not have invested.

[44] Noting the significant losses suffered by two of the investor witnesses in particular – more than $3 million between them – Staff submitted that the harm undermined the integrity of the Alberta capital market. They argued that that harm was exemplified by Merits Hearing witness DL, who described his loss of confidence in the market in these terms:

> I can say without a word of a lie, without a doubt, that if I am ever, ever offered the chance, and I don't care if it's somebody who's invented an engine that runs on water, I will not invest a single penny in a venture like this again . . .

[45] Staff acknowledged that Magneson does not appear to have a history of securities misconduct, and that at his current age (83 at the time these reasons were prepared), it is less likely that he will engage in future misconduct. He probably has a limited ability to earn an income in the future, which could impact his ability to pay any financial sanctions. In Staff's view, these facts may lessen the need for specific deterrence, but do not necessarily attenuate the need for significant sanctions.

[46] Staff emphasized the large financial benefit Magneson both sought and obtained, having diverted to his own use $5,793,202 of the $7,023,344 NWI raised between 2011 and 2016. Even if one were to allow that he deserved to be paid for his work developing and marketing the Drill,

Staff argued, Magneson still diverted over $3.5 million to his own use. In Staff's submission, the large benefit realized weighs in favour of significant deterrent sanctions.

[47] Staff did not identify any additional mitigating or aggravating considerations. They observed that the involvement of a legitimate business enterprise (as opposed to a "pure scam" such as a Ponzi scheme) has been considered a mitigating factor in some but not all prior ASC panel decisions. Since capital market participants should be expected to conduct legitimate businesses, Staff submitted that it should not be a mitigating factor here. Instead, it is merely a neutral consideration.

[48] Staff cited four prior sanction decisions that they contended are comparable to the facts and circumstances in this matter and help provide a range for the type and quantum of sanctions that would be reasonable and appropriate against these Respondents: *Re Schmidt*, 2013 ABASC 320; *Re Calmusky*, 2016 ABASC 9; *Fauth*; and *Re Kitts*, 2019 ABASC 173. We consider these decisions in detail in our analysis below.

[49] Following their analysis of the *Homerun* factors, Staff argued that permanent market access prohibitions against Magneson are necessary to protect Alberta investors and the Alberta market, and to send the message that deliberate deceit and fraudulent behaviour in the pursuit of personal gain are unacceptable. They therefore submitted that it is in the public interest for us to order that Magneson be permanently prohibited from:

(i) trading in or purchasing securities;

(ii) using any and all exemptions contained in Alberta securities laws;

(iii) engaging in investor relations activities;

(iv) becoming or acting as a director or officer (or both) of any issuer, registrant, or investment fund manager; and

(v) acting in a management or consultative capacity in connection with activities in the securities market.

[50] In light of the fact that 111 Alberta did not appear to have a legitimate business purpose, Staff submitted that it should be permanently banned from all access to the capital market so that it cannot be used in furtherance of any future fraudulent activity.

[51] By contrast, Staff argued that because NWI had a legitimate business purpose and could easily be revived on the Alberta Corporate Registry for the benefit of its shareholders, it should not be denied access to the capital market – as long as Magneson is not involved. However, it should be required to file a prospectus with the ASC containing full disclosure before it is permitted to raise funds from the public. Staff therefore recommended that until both a preliminary prospectus and a prospectus are filed with and receipted by the Executive Director of the ASC (the **Executive Director**), we should order that:

(a) all trading in or purchasing NWI securities must cease;

(b) NWI must cease trading in or purchasing securities; and

(c) NWI may not use any of the exemptions contained in Alberta securities laws.

[52] As to financial sanctions, Staff submitted that to achieve specific and general deterrence and remove the financial benefit Magneson and 111 Alberta received as a result of the misconduct, it would be in the public interest for them to be ordered to disgorge $3,561,952 on a joint and several basis. This represents the undisclosed amount Magneson and 111 Alberta took as repayment of their purported loans to NWI, as well as the undisclosed amount Magneson took as payment for the Shares sold from his personal holdings during the Relevant Period, contrary to his representations that all invested funds would go toward the Drill project. Staff did not include the $2,011,250 Magneson and 111 Alberta took as compensation and reimbursement for expenses because of the evidence at the Merits Hearing that some investor witnesses understood or assumed Magneson would be paid something for his efforts. Staff described this as a "significant concession", given that $2,011,250 is more than 25 percent of the funds raised and it was deliberately concealed from investors.

[53] In addition to disgorgement, Staff submitted that to have the desired deterrent effect, Magneson and 111 Alberta should also be ordered to pay a $300,000 administrative penalty on a joint and several basis. Staff's rationale was that $300,000 is approximately the mid range of the administrative penalties imposed in the comparable decisions they cited, and reflects both the seriousness of the misconduct and Magneson's personal circumstances. 111 Alberta was included because it had no legitimate business purpose and was the vehicle used to divert funds to Magneson and his family.

[54] Staff did not seek either a disgorgement order or an administrative penalty against NWI. In their view, such orders would reduce the funds available for any future *bona fide* efforts to bring the Drill to market, which would only further harm NWI investors.

2. Magneson

[55] Primarily, Magneson's submissions did not focus on sanction at all, but instead simply reiterated his position on some of the issues he raised during the merits phase of these proceedings, including his contentions that:

(i) there was an apprehension of bias throughout the investigation and the Merits Hearing;

(ii) this panel failed to consider all relevant evidence – in particular, certain financial information prior to 2011;

(iii) he was unable to exercise his right to a full answer and defence; and

(iv) he invested over $700,000 of his own money in the Drill between 1995 and 2003, and he was entitled to sell NWI Shares from his personal holdings, some of the proceeds of which he loaned to NWI in the form of shareholder loans.

[56] Magneson denied that any investors suffered financial harm as a result of his actions, and contested this panel's findings concerning his representations to investors. As he had during the

Merits Hearing, he characterized this proceeding as having arisen because of allegations made by "a very small number of unhappy investors who had a vested interest in attempting to gain control over the technology and the patent [for the Drill]" and who had "a specific agenda". He argued that the ASC was to blame for the investor losses, including his own, because the freeze orders and the interim cease trade order that were issued "crippled" his ability to complete the project. In addition, Magneson alleged that ASC Staff "tailored" their investigation in an effort to assist the "dissident" investors, who acted "at the cost of the majority".

[57] Where Magneson touched briefly on the matter of sanction, he argued that Staff's position was excessive and that this panel should either decline to impose any monetary sanctions against him or order only a modest amount. He pointed out his advanced age, claimed that "he has been gainfully employed his entire life", and stressed that he has no disciplinary history or criminal record. He did not address market-access bans, but said that he has "no intention of engaging in the public market sector in the future".

[58] Magneson also set out some factual information about his education and employment history, as well as some brief information concerning his volunteer activities in his community. He indicated that he had no training or experience in the area of securities prior to his activities in support of the Drill, and listed the firms and consultants with which he worked on the Drill. He further noted that certain corporate documents including the Personal Services Agreement described in the Merits Decision were drafted by a lawyer in Edmonton, on whose representation that "all of the documentation was properly done and in accordance with accepted practices" he said he relied.

C. Analysis

1. Magneson's Submissions

[59] Before turning to our analysis of the *Homerun* factors, we first comment on Magneson's written submissions.

[60] As mentioned, Magneson focused primarily on issues and arguments that he raised at the Merits Hearing, and which were dealt with at length in the Merits Decision. Concerning his allegations of bias and insistence that Vice-Chair Cotter should not have been on the Merits Hearing panel, for example, see paragraphs 30-45 of the Merits Decision. Concerning his allegation that he was denied the opportunity to present a full answer and defence, his complaints about the investors witnesses who testified, his complaints about Staff, and his argument that he was entitled to all the funds he received, see paragraphs 8-29 and 165-236 of the Merits Decision.

[61] Since this phase of the proceeding is concerned exclusively with the matter of sanction, it is inappropriate for Magneson to raise these issues and attempt to re-litigate them here. Although he treated many of our findings in the Merits Decision as if they were simply allegations and arguments by Staff that were still open to dispute, the Merits Decision is this panel's full and final determination of the allegations set out in Staff's Notice of Hearing. It is the Alberta Court of Appeal that will hear Magneson's appeal from those findings (we understand that the appeal has already been filed), and his arguments on appeal should not be presented to us in the guise of sanction submissions.

[62] Moreover, the submissions contained a number of factual assertions unsupported by the evidence before us. Some were uncontroversial, such as those concerning Magneson's employment

history and lack of a criminal record. Others were, as Staff pointed out in their brief reply submissions, "contentious and unsupported by evidence" – such as Magneson's reference to his purported reliance on legal advice, which was actually contrary to some of the evidence he gave during his investigative interview by Staff. As noted at the outset of these reasons, Magneson had an opportunity to provide evidence relevant to sanction. It is improper and inappropriate for him to attempt to adduce evidence by way of unsworn written argument now, as his legal counsel is no doubt aware.

[63] Of primary importance at this phase of the proceedings, however, is Magneson's failure to address why the sanctions sought by Staff would not be in the public interest, and what he believes the appropriate sanctions might be *in light of the findings in the Merits Decision*. He may not agree with those findings, but that is the purpose of his appeal. Here, what little he said on the subject of sanctions amounted to a proposal that no or very limited sanctions should be imposed. In reply, Staff argued that such a proposal is inadequate and would not deter future misconduct. Instead, it could encourage such behaviour and further undermine confidence in the Alberta capital market.

2. Application of *Homerun* Factors

[64] We now consider the application of the *Homerun* factors to the circumstances of this case.

[65] Where relevant and non-contentious information was provided in Magneson's submissions, we consider it below. We have given contentious factual assertions unsupported by evidence no weight, and otherwise decline to make further comment about issues we have already decided and discussed in the Merits Decision.

(a) Seriousness of the Misconduct

[66] As Staff observed, fraud is typically considered to be among the most serious types of capital-market misconduct, and we consider it very serious in this case.

[67] Here, the fraud involved active deceit that induced members of the public to entrust their money – in some instances, very large sums of money – to NWI in reliance on Magneson's assurances that the funds would be used for a specified purpose. Contrary to those assurances and without disclosing his intentions or his claimed entitlements, Magneson diverted the vast majority of the funds intended for NWI to himself, at the expense of NWI investors and the Drill project.

[68] Magneson deliberately concealed the truth. He did not just stand by and say nothing about his personal compensation. Instead, when certain investors asked about his compensation, he either told them that he was not taking anything, or he told them that he was taking only a nominal amount.

[69] Similarly, Magneson did not just remain silent while investors purchased Shares from his personal holdings and he collected the proceeds. He purposely told them that no matter the source of the Shares, all funds would be directed to the ongoing research and development of the Drill, and he obfuscated the truth further by having them make their payments to NWI. At the Merits Hearing, Magneson claimed that full financial disclosure was given in NWI's unaudited financial statements, but if an investor requested financial statements or other disclosure, he concealed the truth by refusing the request.

[70] At the Merits Hearing, Magneson also maintained that NWI was never without funds when it needed them for the project. However, as we noted in the Merits Decision, there was evidence that on more than one occasion, he approached an investor to plead for additional funds on an urgent basis so that he could pay NWI's bills and ensure that the project would not "die". If NWI did not need the funds urgently, he lied by representing that it did. If it did need the funds urgently, he lied when he said that diverting its funds to himself did not compromise the project because NWI was never without funds when needed. Moreover, he deceived investors by making his pleas for money without telling them that the reason NWI was short of funds was that he had already taken so much for himself.

[71] The fraud here was on a comparatively large scale. NWI raised approximately $7 million, but Magneson paid the vast majority of that sum to himself, whether directly or indirectly through 111 Alberta. While there was a legitimate business, that business had the benefit of only a relatively small proportion of the total funds invested by the public. The presence of a legitimate business may distinguish this case from pure scams and Ponzi schemes, but it does not excuse the misconduct that occurred or mitigate the harm that was caused (see *Re Mandyland Inc.*, 2013 ABASC 69 at para. 46, and *Re Cloutier*, 2014 ABASC 170 at para. 33).

[72] Magneson's deceit was confirmed by his own evidence. In his investigative interview with Staff, he claimed that he considered his compensation and expenses part of the total cost of research and development of the Drill, but admitted that he did not explain that to the investors, nor tell them how much he intended to take. Even if some investors assumed he was drawing some kind of compensation, they had no idea how much or, more importantly, the proportion of the funds raised that his compensation would represent. Magneson also admitted that he never told investors that he was going to take the proceeds from the sale of the Shares that came from his personal holdings.

[73] Magneson defended his conduct with the assertion that he was entitled to all of the amounts taken, whether as compensation, payment for his Shares, or repayment of purported shareholder loans. As mentioned, however, even if that were true, it misses the fundamental point that he did not disclose his claimed entitlements to NWI's investors. His actions deprived the investors of important information they needed to make fully-informed investment decisions. We agree with the panel in *Re Aitkens*, 2018 ABASC 27 (at para. 216): "Candour around self-dealing is important to investors in assessing the integrity of an issuer's management – determining whether those managing the business will act in the best interests of the issuer and its security holders, or will prefer their own interests."

[74] In addition to the aggravating effect of Magneson's deliberate deceit, the seriousness of the misconduct in this case is further elevated by the fact that to the prejudice of NWI and all of its investors – and directly contrary to what he told TD – Magneson ensured that he was paid first. As discussed in the Merits Decision, he and 111 Alberta were ostensibly owed $1,520,288 in shareholder or related-party loans by year-end 2010. Magneson ensured that all but $1458 of that sum was repaid by the end of the Relevant Period, even though the purported loans were non-interest bearing and had no set terms for repayment. He also paid himself in full for the Shares sold from his personal holdings and took a generous salary.

[75] As we concluded in the Merits Decision and alluded to above, in the end, Magneson was virtually the only one to realize a benefit from the Drill project, and that benefit was significant.

[76] Just as his purported entitlement to the funds is no excuse for Magneson's deceit, neither is his claim that only a few NWI investors complained. Even if true, it would not excuse his deceit and deliberate obfuscation of the truth. In addition, some of the investors who complained were those who testified at the Merits Hearing. Between them, they invested over $3,650,000 and owned nearly 40% of NWI's Shares. They cannot simply be dismissed as a small contingent of dissident shareholders.

[77] At the Merits Hearing, the investor witnesses testified about their losses and the other harm they experienced as a result of Magneson's misconduct. ME, a retired farmer, described the loss of his approximately $500,000 investment as "devastating", as was his misplaced faith in Magneson. He said he believed that he and the other NWI investors had been misled – lied to – and clearly felt remorse about getting some of his friends and family members involved, including his parents and his friend, MD. In ME's view, Magneson committed an "outright theft".

[78] DL, a retired RCMP officer, pointed out that when he was still working, it would have taken him two and a half years to earn the $125,000 that he invested with NWI and believes has been lost. As he described it, even worse than the financial loss has been the personal toll these events have taken on him and his spouse. He said he is angry at himself as well as Magneson, feels embarrassed, and regrets that he brought other friends into the investment who also lost their money, as he has to live with the fact that he was the one who got them involved. He was prompted to keep investing by Magneson's claims that NWI was running out of money, and noted that Magneson also lied to him by continually claiming that the Drill was almost complete.

[79] DL's general loss of confidence in the Alberta capital market was exemplified by the statement cited in Staff's submissions and set out above. As a result of this experience, he will never invest in this type of venture again.

[80] MD and TD similarly testified that they felt they had been lied to, because Magneson also told them that the Drill was almost complete, and had approached them for additional investments with the claim that if NWI did not receive further funding, the project would fail. MD, who together with his brother invested $1,625,000, said that he thought he and Magneson had been "good friends", and expressed guilt for having encouraged his children to invest as well. TD, who invested roughly $1,500,000, had been led to believe that he was NWI's last and main investor, and indicated that he felt as though Magneson had stolen from him.

[81] In short, the nature of the deliberate wrongdoing and deceit in this matter – fraud – the length of time over which it occurred, the amount of money raised and misappropriated, and the harm caused to NWI's investors lead us to conclude that Magneson's misconduct was very serious. He risked not only investors' pecuniary interests, but also NWI's, by diverting funds that could have been used to advance the Drill project. In addition, he tarnished the reputation of Alberta's capital market and undermined the public's confidence in the fairness of that market.

[82] All of this goes to the heart of the ASC's public interest mandate, and suggests a need for significant sanctions that will achieve specific and general deterrence commensurate with the gravity of the misconduct. As noted in *Planned Legacies,* deceit typically indicates a greater need for deterrent measures (at para. 41). Both Magneson and other capital market participants "must

appreciate that findings of fraud will attract the most severe consequences" (*Re Reeves*, 2011 ABASC 107 at para. 20).

[83] While in part a victim of Magneson's contraventions, NWI was the vehicle used to perpetrate the fraud. With Magneson, 111 Alberta was the conduit for the diversion of invested funds. As we noted in the Merits Decision, because Magneson was "the guiding mind and sole decision-maker of both corporate Respondents", his "knowledge and activities are attributable to them" (at para. 237). Accordingly, they are also liable for the serious misconduct in this case, which calls for significant deterrent sanctions.

(b) Characteristics and History

[84] Magneson is an educated, sophisticated individual, but he did not have specific education, experience, or training in capital markets or the investment industry. He does not have a history of regulatory misconduct or sanctions.

[85] We consider these neutral considerations, however, as "one does not require training to know that misrepresenting the facts to one's clients is wrong in any profession or industry" (*Rustulka* at para. 74; see also *Homerun* at para. 31). We would say the same about converting a large proportion of the funds raised for corporate purposes to personal use. Since all market participants are expected to obey the law, the absence of a disciplinary history is not mitigating (*Homerun* at para. 85).

[86] Magneson did not claim impecuniosity. We are nonetheless mindful of his age, and as a consequence, the probable limits on his ability to earn an income or find the resources needed to pay monetary orders. This calls for some moderation in assessing any administrative penalty against him.

[87] Magneson's age is also relevant to our consideration of the extent to which he poses a risk of future capital-market misconduct, as is his proclaimed intention never to participate in the market again. These two facts suggest a somewhat reduced risk, and therefore a somewhat reduced need for specific deterrence. That said, Magneson's statement about his current intentions does not protect the public or the capital market if he should he change his mind (*Mandyland* at para. 40), and it does not alleviate the need for strong general deterrence to dissuade others from fraudulent and deceptive behaviour for personal gain.

[88] Relevant to our assessment of the risk posed by the corporate Respondents, we note that while Magneson remains a significant shareholder of NWI, he is no longer an officer or director. NWI has also been struck from the Alberta Corporate Registry. At present, NWI therefore presents a reduced risk of future harm. Because that can change, however, there is still a need for protective measures against it.

[89] At the time of the Merits Hearing, 111 Alberta remained under Magneson's control. It had no apparent business purpose other than to receive the majority of the funds Magneson diverted to his own use. Accordingly, we are of the view that significant sanctions directed at preventing its future use as a vehicle for wrongdoing are required in the public interest.

(c) Benefit Sought or Obtained

[90] Magneson asserted that he invested $700,000 of his own money in the Drill. However, as Staff pointed out, even if that were true, he was repaid that amount many times over, contrary to the representations he made to investors regarding the use of their invested funds. In addition, he paid himself what is by most standards a very generous salary of at least $300,000 per year (whether directly or indirectly through 111 Alberta), plus expenses. In fact, the amounts Magneson took from NWI were so generous that he was able to make regular gifts to his three adult daughters totalling $1,274,934 – or $212,489 per year – from 2011 to 2016.

[91] In other words, Magneson – and through him, 111 Alberta – both sought and obtained a significant benefit from the fraud perpetrated against NWI's investors: by his own admission, nearly $5.8 million. He clearly considered all funds invested in NWI to be his for the taking regardless of its needs, as illustrated by the fact that he arranged the banking so that overdrafts in 111 Alberta's account from his personal spending were automatically covered by NWI's account.

[92] This factor argues for significant sanctions to remove the financial benefits Magneson – and 111 Alberta – realized from the fraud, and to deter them and others enticed by the prospect of such substantial personal gain.

[93] NWI received some benefit from Magneson's deceit in that members of the public were persuaded by that deceit to invest in the company, and it was able to use a portion of the invested funds to develop the Drill. However, this was the benefit NWI investors expected, and it is thus not in the same category as the benefits realized by Magneson and 111 Alberta. As a result, this factor does not militate in favour of significant sanctions against NWI.

(d) Mitigating and Aggravating Considerations

[94] Other than those already described in our discussion of the first three *Homerun* factors, we do not discern any additional mitigating or aggravating considerations. While Magneson made certain admissions concerning the funds he diverted to himself and the lack of disclosure to NWI's investors, he has maintained that he was entitled to conduct himself in that manner. We recognize that it is his right to maintain that position, and therefore consider this a neutral factor.

[95] As for the fact that NWI was a legitimate business that was developing what may have been viable technology and was not a "pure scam" or a Ponzi scheme, we agree with Staff that this is also a neutral consideration. Capital market participants are expected to conduct legitimate businesses, and need not be rewarded for doing so.

(e) Outcomes in Other Proceedings

[96] Magneson did not point us to any comparable decisions.

[97] We carefully reviewed the decisions cited by Staff, which we found were sufficiently comparable to the facts of this case to be of assistance. They confirm that typically, fraud and misuse of investor funds are met with very significant sanctions including both market-access bans and monetary penalties. They also provide a general range for the orders that have previously been considered in the public interest for cases involving fraud, which assisted us in assessing proportionality.

[98] The cases cited by Staff are summarized here:

- *Schmidt*: The individual respondent, who was 77 years old at the time, signed a Statement of Admissions in which he and the company of which he was the directing mind admitted to illegally trading and distributing securities, making misrepresentations, and perpetrating a fraud that raised approximately $5 million from 50 investors, all of whom appeared to have lost their money. The underlying business was legitimate, but the individual respondent provided misleading financial information to investors and converted approximately $700,000 in investment funds to his own use. In addition, Schmidt had a prior disciplinary history, having previously entered into two agreements with ASC Staff settling past allegations of misconduct. ASC Staff had also warned him about the conduct at issue.

  The panel took into account Schmidt's age and admissions and considered his claim of impecuniosity, but in the interest of deterrence (especially general deterrence – the decision was pre-*Walton*), ordered him to disgorge the $700,000 and pay a $200,000 administrative penalty. It also imposed permanent market-access bans against him and imposed a cease-trade order on the securities of the corporate respondent until it filed a prospectus and obtained a prospectus receipt from the Executive Director.

- *Calmusky*: In an agreed Statement of Admissions and Joint Submission on Sanction, the respondent admitted to perpetrating a fraud. He raised approximately $1.1 million from investors to help fund a $1.75 million loan to a developer, but when the loan was repaid, he transferred over $798,000 to his personal line of credit and $370,000 to his relatives. He had no prior sanction history. When the underlying corporation went into receivership, Calmusky cooperated by entering into a consent order pursuant to which he agreed to pay nearly $1 million to the receiver.

  The parties jointly proposed – and the panel accepted – sanctions that included permanent market-access bans and a $100,000 administrative penalty. Because of the consent order with the receiver, the panel did not find it necessary to order disgorgement. Calmusky was impecunious at the time of sanctioning, and the hearing panel noted that its decision was influenced by his admissions and the joint proposal as to sanction. It also took into account Calmusky's cooperation with both Staff's investigation and the receivership proceedings, which it found indicative of a reduced need for specific deterrence.

- *Fauth*: Fauth was found liable for acting as a dealer without registration or an exemption from that requirement, making misrepresentations, and perpetrating a fraud. He represented to investors that the investment at issue was safe and secure, and that the funds would be invested in real estate and mortgages. While Fauth raised over $15.5 million in approximately 10 years, most of the funds were invested in or loaned to Fauth, members of his family, and related corporations. Some funds were used to repay other investors in the manner of a Ponzi scheme. He had once been a registrant under the Act but had no prior sanction history.

Fauth was made subject to permanent market-access bans, ordered to pay disgorgement of $2,585,415, and ordered to pay a $400,000 administrative penalty. His age (71) and the evidence concerning his limited financial circumstances were specifically taken into account by the panel in setting a lower administrative penalty than that sought by Staff.

- *Kitts*: The respondents (an individual and a corporation for which the individual was the guiding mind) were found to have perpetrated a fraud of approximately $6.7 million. The fraud included misrepresenting to investors that funds invested with the corporate respondent would be used to provide short-term financing to real estate industry participants, and misappropriating those funds for other undisclosed purposes – including the personal use of the individual respondent and his spouse and the repayment of principal and imaginary profits to some investors in the manner of a Ponzi scheme. No legitimate business was involved. The individual respondent was found to have authorized and permitted the misconduct of the corporate respondent, and his knowledge and misconduct as its guiding mind were attributed to the corporate respondent.

  The individual respondent's misconduct took place while he was a fugitive from criminal proceedings arising from a securities fraud in the United States.

  The panel imposed permanent market access bans against both respondents, and ordered them to pay an administrative penalty of $600,000 and disgorgement of $1,960,457 on a joint and several basis (the disgorgement amount was based on the sum misappropriated from certain identifiable investors).

[99] From these decisions, we conclude that whether or not there was a legitimate business, misconduct including fraud has resulted in permanent market-access bans against the individual respondent who was the directing mind of the corporation involved. In *Schmidt*, where the corporate respondent had a legitimate business, its cease-trade order would end once it filed a prospectus and obtained a receipt. By contrast, in *Kitts*, the corporate respondent had no legitimate business, and was therefore made subject to permanent market-access bans that were akin to those against the individual respondent.

[100] In each of these decisions except *Calmusky*, disgorgement was ordered in the approximate amount of the funds the hearing panel found had been misappropriated or directed to uses undisclosed to and unauthorized by the investors. The panel did not order disgorgement against Calmusky because he had already agreed to pay the same amount to a receiver. The disgorgement orders ranged from $700,000 to approximately $2.58 million, but were clearly dependent on the specific sums involved. In *Kitts*, where the business was not legitimate and the panel found that the individual and corporate respondents "were functionally indistinguishable as it related to the contraventions found" (at para. 63), the corporate respondent was made jointly and severally responsible for the disgorgement order.

[101] In each of these decisions, administrative penalties ranging from $100,000 (*Calmusky*) to $600,000 (*Kitts*) were imposed, and the corporate respondent in *Kitts* was made jointly and

severally responsible for the order. The administrative penalties on the lower end of the range were ordered in cases where the individual respondents admitted the misconduct and satisfied the panel that they were impecunious, and where the sums raised and misappropriated by the respondents were comparatively less (*Schmidt* and *Calmusky*). In the cases involving larger sums of money (*Fauth* and *Kitts*), the administrative penalties were near or at the higher end of the range, although the panel in *Fauth* took the respondent's age and financial circumstances into account in ordering an administrative penalty lower than it might otherwise have imposed.

[102] In our view, the facts and circumstances in *Fauth* and *Kitts* are arguably more egregious than those in this case. As Staff noted, Fauth was found liable for additional breaches of the Act and raised more money over a longer period of time, causing more financial harm to the subject investors. Kitts engaged in a pure Ponzi scheme and was already a wanted fugitive in the United States, suggesting that he was an obvious future threat to the integrity of the capital market.

[103] By contrast, we consider the facts and circumstances in this case to be more egregious than those in *Schmidt* and *Calmusky*. Magneson's misconduct was more serious than either Schmidt's or Calmusky's – he raised more money and took more of it for himself. In addition, Schmidt and Calmusky formally admitted their misconduct.

[104] On the scale represented by these four cases, we find that Magneson's misconduct falls somewhere in the middle to high end of the range.

3. Conclusions on Sanction

[105] Having considered the *Homerun* factors and the comparable decisions cited, we are satisfied that it is in the public interest to impose significant sanction orders against Magneson and 111 Alberta as, respectively, the architect and a vehicle of the fraud. The orders must be sufficient to provide strong measures of both specific and general deterrence, although we recognize a somewhat reduced need for specific deterrence in light of Magneson's age and professed intention not to participate in the capital market again. Consistent with prior decisions involving similar misconduct, those orders should include market-access bans and monetary penalties including orders for disgorgement and an administrative penalty.

[106] We acknowledge that NWI's position and degree of culpability are distinguishable from Magneson's and 111 Alberta's, but we are of the view that it must be deterred from again being used as an instrument for securities regulatory misconduct. At the same time, if it is possible for NWI to return to its business and complete the Drill for the benefit of its shareholders, we do not wish to encumber it with sanctions that will only further prejudice investors.

[107] We find that in the circumstances, the sanctions sought by Staff are fair and appropriate, if not bordering on lenient. Despite our concerns in one respect discussed below, we accept their recommendations.

(a) Market-Access Bans

[108] In view of the seriousness of his misconduct, the personal benefit obtained, and the consequent harm to NWI investors and the integrity of the Alberta capital market, it is clear that Magneson cannot be trusted to comply with Alberta securities laws in the future. Despite his self-declared intention not to participate in the capital market again, intentions can change, and we are of the view that he must be prohibited from such participation in the interest of preventing future

harm and protecting the public. It must also be made clear to other capital-market participants that fraud and misappropriation of investment funds will be met with severe measures, including the loss of market-access privileges.

[109] In perpetrating his misconduct, Magneson traded in NWI securities, was responsible for all interactions with investors, was NWI's sole director and officer, and managed all of NWI's affairs. He was also 111 Alberta's sole director and officer, and managed all of its affairs including the receipt and subsequent disbursement of NWI investor funds. It is appropriate that he be permanently banned from acting in all of these capacities in the future.

[110] We are therefore ordering that Magneson: (i) must resign from all positions he currently holds as a director or officer (or both) of certain specified types of entities; (ii) is permanently prohibited from acting as a director or officer (or both) of the same types of entities; (iii) is permanently prohibited from trading in or purchasing any security or derivative and from relying on any exemptions available under Alberta securities laws; and (iv) is permanently prohibited from engaging in investor relations activities or acting in a management or consultative capacity in the securities market.

[111] Other than acting as the conduit for the funds Magneson appropriated from NWI, 111 Alberta did not have an active business during the Relevant Period. To protect the public from it being used in furtherance of fraudulent activity in the future, we agree with Staff that it should be permanently banned from access to the capital market. We are ordering that 111 Alberta is permanently banned from trading in or purchasing any security or derivative, and from relying on any exemptions available under Alberta securities laws.

[112] As mentioned, NWI is in a different position. Potentially, NWI's interest in the Drill is a valuable asset, but additional capital is probably required to advance the Drill project to commercialization. Since NWI was the issuer used to raise the money and therefore perpetrate the fraud, we are of the view it is in the public interest for cease-trade orders to be imposed against NWI. However, we are also of the view that there should be a path forward for the benefit of NWI shareholders if the company's management can be reconstituted without Magneson and the Drill project pursued. We agree with the reasoning of the panel in *Mandyland* (at para. 52):

> The Blue Sky Companies were controlled by the Individual Respondents, who were ultimately responsible for – authorized, permitted or acquiesced in – the companies' capital-market misconduct. The Blue Sky Companies were founded for a legitimate business purpose, they have securityholders, and, by virtue of sanction orders made herein, the Individual Respondents will no longer be their guiding minds. Thus, in our opinion, if a prospectus were to be filed by and receipted for any such company, there would be no reason to deny such company access to our capital market.

[113] Imposing the cease-trade order sought by Staff is consistent with past ASC decisions involving a legitimate business used to perpetrate a fraud on its shareholders (in addition to *Mandyland*, see, for example, *Schmidt* at para. 60 and *Cloutier* at para. 40). It has a deterrent effect in sending the message that securities fraud will typically result in strong protective orders, but it does not unfairly penalize existing investors by permanently foreclosing future financing necessary to bring the project to fruition. At the same time, it protects prospective investors from making an investment in NWI with anything less than full disclosure of all material facts. Moreover, NWI or any of its shareholders may apply at any time for a variation or revocation of the relevant market-access ban under s. 214(1) of the Act if there are compelling reasons for doing so.

[114] In the result, until such time, if ever, that the Executive Director issues a final receipt for a prospectus filed by NWI, we are cease-trading NWI securities and prohibiting NWI from trading in or purchasing any security or derivative, and from relying on any exemptions available under Alberta securities laws.

(b) Monetary Sanctions

[115] Given the magnitude and seriousness of the fraud in this case, we are satisfied that market-access bans alone are insufficient to achieve the necessary specific and general deterrence. As against Magneson and 111 Alberta, we are also imposing monetary orders for the reasons discussed below.

[116] We do not consider it necessary to impose monetary orders against NWI. It was the passive instrument of the fraud orchestrated by Magneson and carried out in part through 111 Alberta, and rather than benefit from the fraud, NWI had the majority of its funds systematically depleted. Sufficient deterrence for NWI's smaller role can be achieved through the cease-trade orders imposed.

[117] In addition, the evidence at the Merits Hearing made it clear that NWI is currently in a negative financial position (see Merits Decision at para. 78). Any monetary orders against it would only further harm NWI investors and prejudice their chances for recovery.

(i) Disgorgement

[118] We are satisfied that Magneson and 111 Alberta received a monetary amount arising from their contraventions of Alberta securities laws and that ordering them to disgorge their ill-gotten gains is in the public interest. Removing the financial benefit realized is necessary for specific deterrence to remove any incentive these two Respondents may have to repeat their misconduct. It is especially necessary for general deterrence, making it clear to like-minded others that a finding of fraud will result in significant monetary sanctions. Since both Magneson and 111 Alberta received NWI investor funds in breach of the Act and are "functionally indistinguishable" in that regard, it is appropriate that they are both made liable for the sum to be disgorged.

[119] As mentioned, Staff submitted that a disgorgement order should be issued in the amount of $3,561,952, which is the undisclosed amount Magneson and 111 Alberta took as repayment of their purported loans to NWI, plus the amount Magneson took as payment for the Shares sold from his personal holdings during the Relevant Period, all contrary to Magneson's representations regarding his intended use of investors' funds. Staff did not include the remaining $2,011,250 Magneson and 111 Alberta took as compensation because at least some investor witnesses testified that they understood or assumed Magneson would be paid some amount for his work on the Drill.

[120] In the Merits Decision, we found that based on Magneson's own records, he and 111 Alberta misappropriated $5,793,202. Magneson represented to investors that their funds would be used to further develop the Drill. We included the $2,011,250 in the total amount misappropriated because he paid himself that amount out of investor funds contrary to his representations and without having disclosed his compensation or the existence of his "Personal Services Contract" to NWI investors. As we are not bound by Staff's sanction submissions (see *Maitland* at para. 19), we were therefore inclined to include the $2,011,250 in our disgorgement order.

[121] However, we recognize that there was some investor witness evidence at the Merits Hearing indicating that at least some investors assumed Magneson was getting paid something for his efforts and acknowledged that business expenses would be reimbursed. The difficulty is that there was no evidence as to the amount they thought he was – or deserved to be – paid, nor evidence of a reasonable salary for the head and sole employee or contractor of a start-up dental equipment business at this stage of development. We doubt that many would consider $2,011,250 over six years – over $335,000 per year and more than 25 percent of the total funds raised – reasonable in these circumstances, but we have no evidence on which to determine an alternative amount.

[122] As a result – but with some reluctance – we have decided to accept Staff's submissions and their rationale for not seeking disgorgement of the additional $2,011,250.

[123] Accordingly, we are ordering that Magneson and 111 Alberta must disgorge $3,561,952 on a joint and several basis. Staff proved that this amount was obtained by these Respondents in breach of the Act, and neither Magneson nor 111 Alberta demonstrated that it is inaccurate or unreasonable, other than to re-argue the same entitlement to those funds that we rejected in the Merits Decision.

[124] It may be that Magneson and 111 Alberta have spent or otherwise dissipated that money, but as we have already explained, that does not affect whether a disgorgement order is appropriate or necessary in the circumstances. If fraud is to be effectively deterred, those who engage in securities fraud must not be permitted to retain the benefit therefrom.

(ii) Administrative Penalty

[125] Largely for the reasons set out in other sanction decisions involving fraud, we find that to achieve sufficient deterrence, it is in the public interest that we order Magneson and 111 Alberta to pay an administrative penalty in addition to disgorgement. Were we not to do so, there would be no direct financial cost for their misconduct. After satisfying the disgorgement order, they would "break even" and be no worse off financially than if they had not been found liable for fraud. That would provide insufficient deterrence from repeating the misconduct, by the Respondents or others.

[126] We are satisfied that the administrative penalty proposed by Staff – in combination with the market-access bans and disgorgement order – would have the desired deterrent effect, and achieve the necessary level of protection against future fraudulent behaviour. It is reasonable and proportionate for these Respondents in these circumstances, where a serious fraud and misappropriation of funds has occurred and there is no claim of impecuniosity, but the individual Respondent is of an advanced age. At the same time, it is still sufficient to have a deterrent effect, as it is neither too lenient nor too severe when considered in the light of the results in the comparable decisions discussed above.

[127] Staff's proposal of $300,000 is in all likelihood lower than the administrative penalty that would be imposed in these circumstances if disgorgement were not ordered. However, sanctions must be considered as a package, with each constituent part serving a different purpose in furthering the ASC's mandate to protect investors and the integrity of the Alberta capital market. As the panel reasoned in *Fauth* (at para. 109):

> A lower administrative penalty in combination with a disgorgement order recognizes the deterrent effect of the latter, which attenuates the magnitude of the administrative penalty required to achieve the necessary levels of specific and general deterrence – especially when further combined with market-access bans.

[128] Accordingly, we are ordering Magneson and 111 Alberta to pay a $300,000 administrative penalty on a joint and several basis. A higher amount is not necessary to address the risk of recurrence in light of Magneson's personal circumstances and our other orders, while a lower amount would not give sufficient regard to the gravity and magnitude of this fraud. A lower amount could undermine public confidence in Alberta's capital market.

[129] Given their complementary roles in carrying out the fraud and diverting most of the investment funds to Magneson, it is appropriate that Magneson and 111 Alberta share responsibility for this penalty as well as the disgorgement order.

IV. COSTS

A. The Law

[130] ASC hearing panels may impose cost-recovery orders against respondents found to have contravened Alberta securities laws (see s. 202 of the Act). Staff are permitted to claim certain types of costs, including time and expenses incurred during both the investigation and the prosecution (see s. 20, *Alberta Securities Commission Rules (General)* (the **Rules**)).

[131] Cost-recovery orders are not sanctions, as they are not intended to have a preventive and protective effect. Instead, they are a means by which the ASC may recover costs from a wrongdoer that would otherwise have to be borne by other market participants whose fees fund ASC operations (see *Fauth* at para. 115). Any contributions by a respondent to the efficient resolution of the proceedings (for example, entering into a statement of agreed facts) may be taken into account, as may any factors that suggest a deduction from the costs claimed by Staff should be made (for example, costs associated with allegations that were not proved) (*Rustulka* at para. 119; see also *Re Capital Alternatives Inc.*, 2007 ABASC 482 at para. 113, aff'd. *Brost*, *supra*). A respondent's impecuniosity is not generally a relevant factor in the assessment (*Rustulka* at para. 120; see also *Fauth* at para. 117).

[132] When determining the amount of an appropriate costs order, a panel must "make an allocation of recoverable costs based on its assessment of which respondents should bear responsibility, and in what respective proportions" (*Homerun* at para. 51). Costs orders are discretionary, and we may reduce the amount or decline to impose a cost-recovery order where such an order "could diminish prospects of recovery for investor victims" (*ibid.* at para. 53).

[133] Joint and several orders are fitting "where . . . the conduct of respondents relevant to an investigation and hearing was sufficiently similar" (*Mandyland* at para. 67).

B. Positions of the Parties

1. Staff

[134] Staff sought a $70,000 costs order against Magneson and 111 Alberta on a joint and several basis. Staff's Bill of Costs indicated that actual costs totalled $99,379.91, comprised of $10,600 in investigation time, $75,857.50 in litigation time, and $12,922.41 in disbursements.

[135] Staff argued that costs should be ordered because they proved the allegations in the Notice of Hearing and Magneson brought several unsuccessful applications that contributed to increased costs and hearing delay. They sought less than the total costs incurred on the basis that Magneson was somewhat cooperative during the investigation and that there was some duplication of effort by Staff litigation counsel.

[136] Staff did not seek costs against NWI.

2. Magneson

[137] Magneson did not make any submissions specifically relating to costs, other than to include costs with his briefly-stated position on sanction: i.e., that Staff's proposal is excessive, and we should either decline to impose any monetary orders against him or order only a modest amount.

C. Analysis and Conclusions on Costs

[138] We have considered Staff's Bill of Costs and the supporting information carefully. We are satisfied that all of the claimed costs are recoverable under the Rules, and that they are reasonable and appropriate. In fact, Staff's actual costs are no doubt higher than the amount claimed, as the Bill of Costs does not appear to include any costs related to the sanction phase of these proceedings.

[139] We find that it is also reasonable and appropriate to order Magneson and 111 Alberta to pay the amount sought by Staff. Staff proved all of their allegations against the Respondents, and have suggested that we discount their Bill of Costs by $29,379.91 to account for any duplication of time and effort and Magneson's cooperation during the investigation.

[140] Magneson brought several unsuccessful applications that lengthened these proceedings and increased their cost. He was entitled to do so as part of his defense, but as the panel stated in *Re Kilimanjaro Capital Ltd.*, 2021 ABASC 131, "he is responsible for the cost consequences of his actions" (at para. 84). Other than his apparent cooperation during Staff's investigation, Magneson did not make any particular contribution toward the efficient resolution of the allegations against him. For example, he made no formal admissions that could have shortened the hearing, even as to non-controversial matters.

[141] Given their respective roles in the fraud, Magneson's position as 111 Alberta's sole guiding mind, and the fact that Magneson and 111 Alberta effectively acted as one in diverting invested funds from NWI, we find that it is appropriate that they bear responsibility for our costs order on a joint and several basis.

[142] While NWI's non-participation in the Merits Hearing did not further the efficiency of the hearing process, we consider it to be in the public interest not to order costs against it for the same reasons expressed above for our decision not to make it subject to any monetary sanctions.

[143] We are therefore ordering that Magneson and 111 Alberta pay costs of $70,000 on a joint and several basis.

V. CONCLUSION AND ORDERS

[144] For the reasons given, we make the orders set out below.

[145] Against Magneson, we order that:

- under s. 198(1)(d) of the Act, he must immediately resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- with permanent effect:

    - under ss. 198(1)(b) and (c) of the Act, 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)(c.1), he is prohibited from engaging in investor relations activities;

    - 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, designated rating organization or designated benchmark administrator; 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, jointly and severally with 111 Alberta, $3,561,952 obtained as a result of his non-compliance with Alberta securities laws;

- under s. 199, he must pay to the ASC, jointly and severally with 111 Alberta, an administrative penalty of $300,000; and

- under s. 202(1), he must pay to the ASC, jointly and severally with 111 Alberta, $70,000 of the costs of the investigation and hearing.

[146] Against 111 Alberta, we order that:

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

- under s. 198(1)(i), it must pay to the ASC, jointly and severally with Magneson, $3,561,952 obtained as a result of its non-compliance with Alberta securities laws;

- under s. 199, it must pay to the ASC, jointly and severally with Magneson, an administrative penalty of $300,000; and

- under s. 202(1), it must pay to the ASC, jointly and severally with Magneson, $70,000 of the costs of the investigation and hearing.

[147] Against NWI, until both a preliminary prospectus and prospectus are filed with and receipted by the Executive Director, we order that:

- under s. 198(1)(a) of the Act, all trading in or purchasing of securities or derivatives of NWI must cease; and

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

[148] By its terms, the interim cease trade order in this matter issued on November 10, 2017 and cited as 2017 ABASC 172 ceases to have effect with the issuance of these reasons.

[149] These proceedings are now concluded.

July 26, 2022

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Steven Cohen

"original signed by"
Tom Cotter