ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Rustulka, 2021 ABASC 15 **Date: 20210205**

Kenton Roy Rustulka

Panel:	Kari Horn Kate Chisholm Raymond Crossley
Representation:	Adam Karbani for Commission Staff Blaire Rustulka as agent for Kenton Roy Rustulka
Submissions Completed:	September 30, 2020
Decision:	February 5, 2021

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I. INTRODUCTION

[1] On June 17, 2020, following a five-day hearing (the **Merits Hearing**) into the merits of allegations brought by Alberta Securities Commission (**ASC**) staff (**Staff**) against Kenton Roy Rustulka (**Rustulka**), this panel issued a decision cited as *Re Rustulka*, 2020 ABASC 93 (the **Merits Decision**). We found that as alleged, Rustulka:

(a) contravened ss. 13.2 and 13.3 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) by failing to comply with certain obligations applicable to registrants; and

(b) contravened s. 92(4.1) of the *Securities Act* (Alberta) (**Act**) by making misrepresentations to his investor clients that:

(i) exempt market securities were inherently low-risk, safe and secure, when in fact they were inherently high-risk, unsafe and not secure;

(ii) certain specific exempt market securities were low-risk, safe, secure, and in well-established companies, when in fact they were high-risk, illiquid, and in start-up, speculative issuers with no proven records of revenue or operations; and

(iii) the risk acknowledgement form (**RAF**) that was required to be signed by investors was procedural and the "high risk nature" warning could be disregarded, when in fact the RAF was an integral part of client protection to guard against unsuitably high-risk investments.

[2] We dismissed Staff's allegation that Rustulka also made misrepresentations by telling investor clients that securities in certain issuers were backed, protected by, vetted, or otherwise safeguarded by the government of Alberta or the ASC.

[3] Rustulka did not participate in the Merits Hearing – he was neither represented, nor appeared on his own behalf. In the Merits Decision, we noted that we were satisfied that: (i) Rustulka had been served with and acknowledged service of Staff's notice of hearing; (ii) Staff's disclosure was sent to Rustulka on January 2, 2019, and Rustulka confirmed receipt by email on January 9, 2019; and (iii) Rustulka had advised the ASC Registrar prior to the commencement of the Merits Hearing that he did not intend to participate. We also observed that while Rustulka had been given an opportunity to provide written submissions in response to Staff's written argument on the merits, he did not do so. Accordingly, we concluded that Rustulka had notice of the case against him and had been given an opportunity to be heard, test Staff's case, and make arguments in his own defence.

[4] After issuance of the Merits Decision, these proceedings then moved into the second phase, to determine what (if any) sanction or cost-recovery orders ought to be made against Rustulka as a result of his misconduct. An oral hearing was conducted on August 11, 2020 (the **Sanction Hearing**). Rustulka appeared at the Sanction Hearing along with his brother, Blaire Rustulka

(**Blaire** or **Blaire Rustulka**; Rustulka and Blaire Rustulka are referred to collectively as the **Rustulkas**), who assisted Rustulka as agent. Both testified and presented documents that were entered into evidence.

[5] Staff did not call any witnesses at the Sanction Hearing, but they cross-examined the Rustulkas. Staff's bill of costs (the **Bill of Costs**) was also entered into evidence. The Bill of Costs summarized Staff's claim for costs related to their investigation and the Merits Hearing, and provided supporting documentation.

[6] Following the Sanction Hearing, the parties submitted written closing arguments: Staff's on September 4, 2020, and Rustulka's on September 23, 2020 (the **Rustulka Submissions**). Staff also submitted a brief reply to the Rustulka Submissions on September 30, 2020.

[7] For the reasons outlined below, we are issuing orders permanently banning Rustulka from participating in the Alberta capital market in various capacities, and directing him to pay both disgorgement and an administrative penalty. In addition, we are issuing a cost-recovery order against him.

II. MERITS DECISION – SUMMARY OF FACTS AND FINDINGS

[8] As the Merits Decision contains the detailed summary and analysis of the facts and law that led to our findings, it should be read together with these reasons. However, for ease of reference, we summarize the most significant points here. Quotations are either from the Merits Decision or the evidence cited therein, unless indicated otherwise.

[9] At the time relevant to the allegations (January 2013 through June 2016), Rustulka was registered as an exempt market dealing representative (**Dealing Representative**) in Alberta, British Columbia, and Saskatchewan, and was under contract with WealthTerra Capital Management Inc. (**WealthTerra**), an exempt market dealer firm (**EMD**) operating in Alberta. He had been a registered Dealing Representative with other EMDs prior to joining WealthTerra in late 2012. Some time prior to that, he worked as an Edmonton city police officer and as a pastor.

[10] Nadine Wellwood (**Wellwood**) was the owner, ultimate designated person and chief compliance officer of WealthTerra at the relevant time. She testified at the Merits Hearing and stated that WealthTerra terminated Rustulka "with cause" in June 2016 for reasons related to the conduct at issue in these proceedings. This accorded with National Registration Database records in evidence that cited "Dismissal for Cause" as the reason for Rustulka's termination.

[11] During his tenure at WealthTerra, Rustulka sold over $6.5 million in exempt market securities to members of the public, and received approximately $463,000 in commissions on those sales.

[12] In the Merits Decision, we described some of the legal and regulatory obligations registered Dealing Representatives owe to their clients – specifically, their obligation to "know" their clients, and their obligation to ensure that any investments they recommend to their clients are suitable for

them. These obligations are set out in ss. 13.2 and 13.3 of NI 31-103, which governs registrant standards of conduct.

[13] In this regard, we cited the ASC's decision in *Re Lamoureux* (2001 LNABASC 433, aff'd. 2002 ABCA 253 [***Lamoureux* (Merits)**]). The panel described the "know your client" (or **KYC**) obligation as "the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance" (at p. 10). We summarized the evidence given by the eight Rustulka clients who testified at the Merits Hearing, and found that there were numerous inaccuracies in the KYC forms Rustulka completed for those individuals. While we observed that the extent of the inaccuracies varied, we found that in almost all cases the investors testified that:

- their available financial resources (income, assets, or both) had been overstated. In at least one instance, Rustulka knowingly and purposely inflated his client's information so that the client would fit within the financial requirements to make the investments Rustulka recommended;

- their investment knowledge – especially with respect to the exempt market – had been overstated. They were generally unsophisticated investors, with little prior knowledge or experience investing beyond conservative, conventional products. They were therefore highly reliant on Rustulka's advice and recommendations, and several reported that they had increased trust in him because he told them or they were otherwise aware of his past as a police officer and a pastor;

- their investment time horizons had been overstated, most egregiously where the investors were at or near retirement with an imminent need for liquidity and a limited amount of time to recover from any financial losses; and

- their risk tolerance was misrepresented as "high" when they had actually wanted low-risk investments because they did not wish to or could not afford to lose their money. To Rustulka's knowledge, in some cases the funds they were using to invest represented a substantial portion – if not virtually all – of their retirement savings.

[14] We therefore found that Rustulka contravened s. 13.2 of NI 31-103 and breached his KYC obligation to these clients. The KYC forms he completed for them either did not reflect adequate due diligence regarding their circumstances, or deliberately misrepresented those circumstances. Instead of recording accurate information, we concluded that he recorded such information as was necessary to ensure that the transaction would be approved and he would make sales, thereby advancing his own interests in preference to theirs.

[15] In the Merits Decision, we also described the relationship between a Dealing Representative's KYC obligation and his or her suitability obligation, as Dealing Representatives are to use the information they gather during the KYC process to assess the suitability of a particular investment product for a particular investor. We again cited *Lamoureux* (Merits), in which the panel held that an investment is suitable only if "'it will achieve the investment objectives

of the client while keeping [within] the level of risk determined by the client's comfort level and overall circumstances'" (at p. 16, citing the British Columbia Securities Commission in *Re Foerster*, 1997 LNBCSC 26).

[16] We therefore observed that the KYC information collected by a registrant about his or her client is essential to a proper suitability analysis. In part as a result of our findings as to the extent and nature of the misinformation contained in the investor witnesses' KYC forms, we found that Rustulka also breached his suitability obligations to those clients. In apparent disregard for their actual personal and financial circumstances, he recommended the same speculative, high-risk, illiquid exempt market products and the same high-risk investment strategies to virtually all of them. In some cases, this included recommending that they borrow (such as by remortgaging their homes), liquidate lower-risk investments (such as pensions), or both, so that they could invest more in WealthTerra products. In addition, he failed to warn his clients about the enhanced risk presented by their over-concentration in certain products or in the exempt market itself.

[17] Accordingly, we concluded that like the KYC forms, the Suitability Assessment Forms Rustulka prepared for these clients served less as a reflection of the reality of their actual circumstances and more as a poor attempt to justify his unsuitable investment advice. We therefore found that he had also contravened s. 13.3 of NI 31-103.

[18] As cited in the Merits Decision, the panel in *Lamoureux* (Merits) described the registrant's task of comparing the risk of an investment product with the risk tolerance of an investor as "probably the most critical element in the registrant's suitability obligation" (at p. 17). We found that Rustulka not only failed to perform this task accurately, he also actively subverted the protections otherwise afforded to his clients by the mandatory risk warnings contained in documents such as offering memoranda and RAFs. The investor witnesses who testified at the Merits Hearing were consistent in their evidence that:

- despite the risk warnings clearly displayed in the investment documentation, including the RAFs they signed, Rustulka variously described the investments they were making and the exempt market in general as "safe" and "secure", with either no risk or a "very, very low risk" of losing any money;

- Rustulka assured them that the companies they were investing in were unlikely to "go under" because they were "stable" and "solid", had "longevity, great track records, accountability, and much more" – yet would pay high returns in short time frames;

- Rustulka downplayed, glossed over, and dismissed the risk warnings on the investment documentation as a mere regulatory formality, or as "red tape" they simply had to go through to complete the transaction. He spent little time reviewing the warnings with them and did not explain the actual risks of the products or strategies he recommended; and

- these assurances had a significant influence on their investment decisions and their willingness to follow Rustulka's recommendations.

[19] However, contrary to Rustulka's assurances, the reality is that the exempt market is inherently risky, and the exempt market securities Rustulka sold to these investors were, in the language of Staff's notice of hearing, in "start-up, speculative issuers with no proven records of revenue or operations". Most of the investor witnesses reported receiving little to no payment of the promised returns or repayment of their principal. While the ultimate outcome of some of the investments was unclear at the time of the Merits Hearing, some were already a total loss.

[20] Thus, we concluded that Rustulka made misrepresentations to his clients with respect to the risk of certain specific products and of the exempt market in general. He also misrepresented the purpose of the RAFs that they signed.

[21] Since we further concluded that Rustulka knew or reasonably ought to have known that these statements were untrue and that they would reasonably be expected to have a significant effect on his clients' willingness to make the investments they did, we found that Rustulka had breached s. 92(4.1) of the Act. He misled these clients by focusing on (and over-estimating) the rates of return their investments would produce, and subverted whatever cautionary effect discussion of the risks involved may have had by minimizing the written warnings and assuring them that the actual risk was negligible.

III. SANCTION

A. The Law

[22] In *Re Homerun International Inc.* (2016 ABASC 95), an ASC hearing panel described the principles and factors relevant to the determination of appropriate sanctions in ASC enforcement proceedings. Without citing it in its entirety, we adopt that discussion here, and summarize the most significant points below.

1. General Principles

[23] The ASC's mandate is to protect investors and foster a fair and efficient capital market. Its sanctioning powers under ss. 198 and 199 of the Act are intended to be exercised in the public interest, and with that mandate in mind. Sanctions are imposed to protect the public and to prevent future misconduct. They are not intended to punish a respondent or remediate the wrongs done, as that is the role of civil and criminal courts (see *Homerun* at para. 12, citing *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45).

[24] In formulating the package of sanction orders that will best achieve these goals in a particular case, a panel must consider the need to deter future misconduct both by the specific respondent currently before the panel (specific deterrence), and future misconduct by others who might consider acting in a similar fashion (general deterrence). However, sanctions must be both "proportionate and reasonable" in light of the overall circumstances, including the personal circumstances of the respondent (see *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154, cited in *Homerun* at para. 13).

[25] The panel in *Homerun* explained (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 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".

[26] At the same time, we are mindful of the Alberta Court of Appeal's caution 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).

2. Sanctioning Factors

[27] To assist in setting appropriate sanctions, ASC panels typically apply a set of factors intended to guide the determination by focusing the analysis on the specific misconduct and circumstances of the respondent (see *Homerun* at paras. 20-46). The panel in *Homerun* explained the relevant factors as follows:

- *Seriousness of the Misconduct* – We should assess "the nature of the misconduct; intention (whether the misconduct was planned and deliberate, not deliberate but attributable to recklessness, or simply inadvertent); and the harm to which the misconduct exposed identifiable investors or the capital market generally" (at para. 22). Usually, the more serious the misconduct, the greater the future risk of harm presented and the greater the need for deterrent measures (at para. 26);

- *Respondent's Characteristics and History* – These "may be important indicators of the degree of risk posed and, in turn, the extent of deterrence required", and "may also be relevant to assessing the proportionality of sanctions under consideration" (at para. 27). Relevant personal characteristics may include a respondent's educational background, work experience, registration or other history of participation in the capital market, as well as any history of past discipline. Each of these elements may be indicative of the extent to which the respondent was or should have been aware of the requirements of the regulated securities industry. This in turn may be indicative of the extent to which the misconduct was deliberate rather than inadvertent, and of the risk of recurrence (see paras. 28-29). Under this factor, we must also consider any claim of impecuniosity made by the respondent, as that may be relevant to the proportionality of any financial sanctions (see para. 28);

- *Benefit Sought or Obtained* – According to *Homerun*, we should assess whether the respondent sought or obtained a personal benefit from the misconduct (whether financial or otherwise), as "[t]his can present an obvious incentive for, and therefore a risk of, similar misconduct in future, by the respondent or by others" (at para. 37); and

- *Mitigating or Aggravating Considerations* – The *Homerun* panel (at para. 39) described these as considerations that may not fall within any of the preceding categories, but which suggest that either the risk is reduced (and therefore that less severe sanctions will be sufficient), or that the risk is enhanced (and therefore that more severe sanctions are necessary). Mitigating considerations may include "[p]ersuasive indications that a respondent appreciates the wrong done, and its seriousness", and "a genuine acceptance of responsibility" (at paras. 40-42). Aggravating considerations may include "a respondent displaying a belligerent contempt for either the victims of the misconduct or the law", which may indicate an increased risk of future misconduct (at para. 46).

[28] Finally, in considering the appropriateness and proportionality of any sanction orders under contemplation, we are to refer to previous decisions and settlements involving similar misconduct and similar circumstances (*Homerun* at para. 16). As is often noted in ASC sanction decisions, the circumstances in other cases are never identical to those in the case at bar, but they are still useful in informing our conclusions as to the package of sanctions which is "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156).

B. Positions of the Parties

1. Staff

[29] Staff's argument largely focused on the application of sanctioning factors to the circumstances of this case. Although they cited an earlier iteration of the factors, that iteration is generally the same as that articulated in *Homerun* and discussed above.

[30] First, Staff emphasized the seriousness of Rustulka's misconduct. They pointed out that he breached key obligations that he owed to his investor clients, including obligations that are intended to protect investors and foster a fair and efficient capital market. He did so deliberately, and made misrepresentations to clients who were reliant on him for advice and information. Staff further emphasized that he downplayed the risk of investing in the exempt market and ignored the risk of over-concentration, even with clients who could not afford to lose funds they specifically required for their retirement. He did so, they contended, in order to "maximize his commissions".

[31] Staff made specific reference to the significant harm Rustulka caused to the investor witnesses, based on the evidence the witnesses gave at the Merits Hearing. This included the loss of all or a significant portion of some investors' retirement savings, exacerbated where those investors leveraged other assets or liquidated more secure holdings to make their WealthTerra investments. Rustulka exposed some to potential and actual financial disaster despite knowing they were risk-averse and could not afford to lose the limited funds they had. Moreover, most of the

witnesses spoke of their reluctance or inability to invest in the Alberta capital market ever again – especially the exempt market.

[32] Second, with respect to Rustulka's personal characteristics and history, Staff highlighted the fact that he passed the exempt market products examination in October 2010, and that he had a number of years' experience as a registrant working for EMDs prior to engaging in the misconduct at issue in these proceedings. They observed that he had no disciplinary history, but also that he had been terminated with cause by WealthTerra for his failure "to follow the rules".

[33] Staff acknowledged that the Rustulkas both gave evidence at the Sanction Hearing to the effect that Rustulka has been suffering from various mental and physical health issues, and recently experienced some stressful life events, including a divorce and the deaths of some friends and family members. While Staff indicated that they took no issue with these claims or the Rustulkas' claims that Rustulka is unemployed and impecunious (though not formally bankrupt), they emphasized that he intended to and did benefit financially from his misconduct. According to the evidence led at the Merits Hearing and confirmed by Rustulka at the Sanction Hearing, Rustulka was paid $101,946.12 in commissions on over $1.5 million in sales of exempt market securities he made to the investors and the children of the investors who testified at the Merits Hearing.

[34] Third, Staff took the position that there are no mitigating factors in this case, but argued that there are several significant aggravating factors. They submitted that the latter include:

- the personal benefit Rustulka realized from his misconduct by way of the commissions he received, which showed that he "put his own financial self-interest ahead of the interests of his clients";

- that Rustulka encouraged clients to leverage their assets in order to make further exempt market investments;

- Rustulka's failure to address the risk presented by his clients' over-concentration in the exempt market; and

- the fact that Rustulka used his past as a police officer and a pastor to gain additional trust, which he exploited to get vulnerable and unsophisticated investors to make investments based on his unsuitable recommendations.

[35] Staff also argued that Rustulka "has demonstrated little, if any, remorse", acceptance of responsibility for his actions, or recognition of the seriousness of his misconduct. Instead, Staff contended that the majority of the evidence the Rustulkas gave at the Sanction Hearing was focused on "blaming WealthTerra for not properly training or supervising" Rustulka, "blaming Staff" for not calling witnesses at the Merits Hearing who might have spoken favourably of him, and "blaming clients for not taking responsibility for the financial losses [they] suffered".

[36] However, Staff correctly acknowledged that while taking such a position is not a mitigating factor in assessing sanction, the law indicates that it is not aggravating, either.

[37] Finally, by way of comparable cases, Staff summarized eight past decisions issued by the ASC and by the administrative tribunals of the Investment Industry Regulatory Organization of Canada (**IIROC**) and the Mutual Fund Dealers Association of Canada (**MFDA**), two self-regulatory organizations with jurisdiction over certain registrants. They argued that these decisions illustrate the types and scope of sanctions imposed in circumstances comparable to this case, and show that misconduct involving misrepresentations and breaches of a registrant's KYC and suitability obligations is typically met with significant sanctions of the kind proposed by Staff.

[38] Staff concluded that in light of all of the foregoing, it is in the public interest for us to make the following orders against Rustulka to address the seriousness of the misconduct and achieve both specific and general deterrence:

- an administrative penalty of $250,000;
- disgorgement of "at least" $101,946.12; and
- various permanent market-access bans, including but not limited to bans on his ability to trade in or purchase securities, hold positions as an officer or director of certain types of entities, advise in securities, or act as a registrant.

[39] With respect to the disgorgement figure of "at least" $101,946.12, Staff described this as a "conservative" figure that addresses only the commissions Rustulka was paid on the investments made by the witnesses who testified at the Merits Hearing, their spouses, and their children. However, they argued that it was open to us to order a larger amount given our discretion and the fact that Rustulka was paid a total of $463,159.12 in commissions over the full period he was employed at WealthTerra. The suggestion was that Rustulka demonstrated a pattern of misconduct such that there is a likelihood some of his other clients were similarly affected, even though they were not called as witnesses in these proceedings.

[40] Staff justified their submission in favour of permanent market-access bans by arguing that Rustulka's conduct suggests that he poses an ongoing threat to the investing public and should not be given the opportunity to take advantage of another client in the future.

2. Rustulka

(a) Sanction Hearing Evidence

[41] Although Rustulka did not participate in the Merits Hearing, the Merits Decision was served on him shortly after its issuance.

[42] It was apparent at the Sanction Hearing that the Rustulkas both took issue with many of the findings we made in the Merits Decision, and attempted to address those findings during their testimony and in the documents they provided to the panel. At several points, we attempted to explain the purpose of the sanction phase of the proceedings, and that it was not an opportunity to relitigate the allegations or to question findings we already made. While we indicated that for the sake of expediency – and in the absence of an objection by Staff – we would allow all of the

Rustulkas' documents to be entered into evidence (including copies of the written statements each of them read into the record as part of their oral testimony), we also advised that any evidence we later found to be irrelevant to sanction would be given no weight.

[43] Having now reviewed those documents carefully, we have concluded that apart from certain portions of the Rustulkas' written statements, all of them relate solely to the merits of the allegations. In fact, portions of some of Blaire Rustulka's documents were already in evidence as part of Staff's case on the merits.

[44] For example, Blaire's documents included communications sent by WealthTerra management to its Dealing Representatives (including compliance memoranda that, if anything, further support the findings in the Merits Decision), excerpts of a WealthTerra policy and procedures manual (**PPM**), and excerpts from the notes of a Staff investigator recording conversations with witnesses who spoke favourably of Rustulka. Documents submitted by Rustulka include some that appear to relate to his practices when meeting with clients, notes of WealthTerra meetings, and copies of emails he received from Wellwood.

[45] Blaire Rustulka's oral testimony and written statement were similarly directed in large part toward the merits of Staff's allegations. He spoke to his personal experience as a WealthTerra investor and Rustulka client, and to his personal investment philosophies, including his perspective that an investor should accept responsibility for his or her own decisions and financial losses and not blame the Dealing Representative. He asserted that Rustulka "did not act alone", and that not only WealthTerra but also the ASC were to blame.

[46] In particular, Blaire expressed his frustration that, as far as he is aware, WealthTerra and its management were not investigated for their role in approving unsuitable transactions and failing to train his brother properly. Similarly, he expressed his frustration that despite his brother's choice not to participate in the Merits Hearing, no one presented any evidence that would have been favourable to him.

[47] That said, there were portions of Blaire Rustulka's testimony and written statement that were relevant to sanction. This included the following:

- asserting that Rustulka would not want to hurt other people, as demonstrated by his past careers helping others as a police officer and a pastor (which we construed as a character reference);

- advising that Rustulka is currently unemployed, has limited future job prospects, has no source of income, no savings, no pension, and no home of his own, but faces numerous financial obligations, including taxes and expenses relating to the breakdown of his marriage;

- pointing out that to his knowledge, there were no complaints to the ASC made by Rustulka's clients, and that these proceedings arose from a compliance review of WealthTerra; and

- indicating that Rustulka accepts that he is likely to be barred from participation in the capital market as a result of these proceedings.

[48] Similarly, the bulk of Rustulka's testimony was irrelevant to sanction. Although he acknowledged that he had "forfeited" his opportunity to do so, he nonetheless gave evidence contradicting the evidence given by the investor witnesses and the findings made in the Merits Decision.

[49] For example, Rustulka denied that he had given his clients investment advice, and claimed that he simply gave them information on which they were to base their own decisions, as he told them to do their own due diligence on the products he presented. He also claimed that he always advised his clients of all of the risks involved in the investments he presented to them, and warned them that they could lose some or all of their money. If the investor witnesses who testified at the Merits Hearing remembered differently, he suggested that their memories were incorrect, or that they had misunderstood what he told them, and now they were simply looking for someone to blame for their losses. He also directed blame at WealthTerra, claiming that they had not trained or supervised him properly, and that he had relied on them to make sure he was doing everything correctly.

[50] However, like Blaire, Rustulka did give some evidence relevant to sanction. He expressed his remorse, and his regret for what he described as his part in the "mess" that led to his clients' financial losses. While he continued to direct some of the blame to WealthTerra and claim that he, too, has suffered, the clearest expression of his regret was as follows:

> If there was a way to give all the investment funds back to my clients, I would give it all away. What can I say except to say how sorry I am that I hurt so many people, and possibly contributed in damaging their lives and retirement plans. I try not to think about it, but it always catches up with me and I am left in despair and great sadness. I am so sorry!

[51] In addition, Rustulka confirmed that he is now unemployed, has few assets left, is 61 years old and without prospects for another job or career, and is facing bankruptcy – although he clarified on cross-examination that while he has spoken to a bankruptcy trustee, he has not taken any further steps toward formal bankruptcy.

(b) Rustulka Submissions

[52] Generally, the Rustulka Submissions included content that was very similar to the testimony the Rustulkas gave at the Sanction Hearing. The submissions opened with an expression of Rustulka's remorse and his assertion that he takes this matter very seriously, including the fact that his family, friends, and clients have experienced personal and financial losses. He then set out the ways in which he claims he has also been affected, having lost his marriage, family, friends, and mental and physical health. In addition, he indicated that like his clients, he suffered heavy losses in his investment portfolio.

[53] Rustulka went on to explain that he never intended to mislead his clients, downplay the risk factors, prepare inaccurate KYC forms, or perpetrate misconduct of any kind. He stated that

he was only following the policies and procedures set out by WealthTerra, and that he had always given a "balanced presentation" to clients with respect to risks and rewards. He further indicated that WealthTerra had checks and balances in place, and its management team was legally obligated to ensure all transactions were being conducted properly.

[54] In the next section of the Rustulka Submissions, Rustulka criticized Staff for their conduct of the investigation and the Merits Hearing. He complained that Staff laid all the "blame" upon him, and failed to question WealthTerra's management about their responsibility to ensure safeguards were in place "for the Respondent [i.e., Rustulka] and clients". Moreover, he complained that Staff failed to investigate WealthTerra's management, including with respect to their personal involvement in two of the failed investment products on the WealthTerra shelf.

[55] Rustulka further argued that he "did not gain great wealth" from his time with WealthTerra. Instead, he stated, "he lost far more financially, mentally, physically, and emotionally", and does not expect ever to be in a financial position that will allow him to retire. While acknowledging the suffering of his clients, he also pointed out that he "will carry an emotional and physical burden, for the rest of his life".

[56] The Rustulka Submissions then stated that Rustulka had been unemployed or underemployed since departing from WealthTerra. He had to take personal loans from family and friends. He was thrown into what he described as a "tailspin" after his marriage broke down and two friends and a family member passed away. He currently lives in his brother's basement, has few possessions, and many debts. He indicated that his only income at this time is from employment insurance.

[57] Rustulka did not set out a position on the sanctions that he considers appropriate in this case, but concluded his submissions by asking us to take into account his charitable donations and his employment of both a summer student and "a gentleman that could not find any other work". He indicated that he understands and accepts that there will be market-access bans imposed against him, but asserted that he does not intend to return to any role involving investments. He also asked that we factor $32,000 he paid to Wellwood in 2016 into our assessment of any monetary penalties.

C. Analysis

[58] With the benefit of the foregoing submissions, we now consider the application of the *Homerun* factors to the circumstances of this case.

1. Seriousness of the Misconduct

[59] In the Merits Decision (at para. 165), we observed that Canadian Securities Administrators Staff Notice 31-336 *Guidance for Portfolio Managers, Exempt Market Dealers and Other Registrants on the Know-Your-Client, Know-Your-Product and Suitability Obligations* dated January 9, 2014 (**CSA Notice 31-336**) indicates that a registrant's KYC and suitability obligations "are among the most fundamental obligations owed by registrants to their clients and are cornerstones of our investor protection regime" (at p. 1). Therefore, CSA Notice 31-336 concludes that a registrant's failure to comply with those obligations "is an extremely serious matter" (at p. 2).

[60] We agree. By failing to "know" his clients and recommend investments suitable for them in light of their personal and financial circumstances, Rustulka completely failed to execute his KYC and suitability obligations. This deprived his clients of the protection they were entitled to expect from the securities regulatory system, and led them to suffer the significant negative consequences that system is meant to help them avoid. As noted in *Re Lamoureux* ((2002), ABSECCOM REA-901950.1 at para. 16 [***Lamoureux* (Sanction)**], aff'd. 2002 ABCA 253), registrants occupy a "special role" within the system. The panel went on to explain (at para. 17):

> Salespersons registered under the Act are required to satisfy educational requirements and to conduct business in accordance with a comprehensive set of rules, and they are subject to regulatory scrutiny. This regulatory registration system is intended to ensure that the investing public receives appropriate advice from competent and ethical people. Public investors rightly expect full regulatory compliance by registrants. The importance of compliance by registrants was discussed by the [ASC] in [*In the Matter of*] *Morrison Williams* [*Investment Management Ltd.* (2000), 9 ASCS 2888 . . . at p. 2900]:
>
> > It is incumbent on participants in the securities industry, which is largely a self-regulatory system, to ensure that they have complied with all regulatory requirements. . . .

[61] Rustulka exacerbated the damage done by his failure to fulfill his KYC and suitability obligations by encouraging most of the investor witnesses to leverage and liquidate their other assets in order to make additional investments. Given the greatly enhanced risk presented by this strategy, especially for those of limited financial means, Rustulka should have "exercise[d] the greatest of prudence" before recommending it: *Re Karas* (2015 CanLII 92080 (CA MFDAC) at para. 21). He failed to do so, and the results for certain clients were catastrophic.

[62] In the Merits Decision, we commented briefly on the role played by WealthTerra in these events – specifically, the questionable quality of its compliance review (see para. 205). However, WealthTerra is not before us in these proceedings, and we do not agree with Rustulka's suggestion that any failures on its part somehow attenuate the seriousness or blameworthiness of his own misconduct. He was a registrant, and was independently trained and educated to act in that capacity even before he went to work with WealthTerra. As held by an IIROC hearing panel in *Re Gareau* (2011 IIROC 72 at para. 18), "[t]he Respondent was the direct perpetrator solely responsible for his misconduct. Of course, his firm must share the responsibility for allowing the investments to have occurred but this does not diminish his own responsibility" (see also *Re Phillips*, 2011 IIROC 60 at para. 30). In other words, even if WealthTerra had been named as a respondent in these proceedings and been found liable, Rustulka's level of responsibility would remain unchanged.

[63] Moreover, in the Merits Decision, we found that Rustulka deliberately obfuscated and misrepresented the investor witnesses' circumstances in the KYC forms and Suitability Assessment Forms he submitted to WealthTerra. Not only does the deliberate nature of this misconduct enhance its seriousness, it hampered WealthTerra's ability to supervise his transactions.

[64] The seriousness of Rustulka's misconduct was worsened by his deliberate misrepresentation of the risks involved in the exempt market, and in the specific investments he

recommended. It was clear from their evidence at the Merits Hearing that the witnesses were not sophisticated investors and lacked the knowledge and experience that would allow them to independently assess the merits and risks of the investments Rustulka presented. The witnesses were also clear that they trusted Rustulka and relied on his explanation of those elements. Their vulnerability heightened his responsibility to ensure the investments were suitable. However, while he encouraged their trust in him, he failed to caution them about the risks they were facing. Instead, he deliberately and falsely led them to believe the risks were minimal.

[65] As Rustulka was or should have been aware, one of the defining aspects of the exempt market is that even where offering memoranda are issued, the ASC does not review or approve them. Accordingly, suitability assessments regarding exempt market products are all the more important. It is even more so where the investors are totally reliant on the registrant (*Gareau* at para. 15). In any event, even if the investors in this case had done their own due diligence and carefully read and understood the documentation associated with the investments Rustulka presented, he actively subverted that information and the warnings it contained so his clients would be more likely to accept his recommendations.

[66] The suggestion that the investor witnesses should share the blame or that Rustulka was only acting in accordance with their directions also obfuscates the fundamental point that the responsibility for assessing the suitability of the investments for each client remained with Rustulka. In the Merits Decision, we agreed with the statement of the panel in *Lamoureux* (Merits) that, "no amount of disclosure to the investor, or acknowledgement by the investor, can convert an unsuitable investment into a suitable investment" (at p. 28) or displace a registrant's obligation to conduct a proper suitability assessment (at p. 16). This was perhaps best explained in the following passage from the Ontario Securities Commission (**OSC**) decision in *Re Daubney* (2008 LNONOSC 338 at paras. 201, 210), which we set out again here for ease of reference:

> While we recognize that clients have responsibilities to understand the potential risks and returns on their investments, this does not relieve [the registrant] of his duty . . . to make certain that they have this understanding and to make appropriate recommendations, especially in circumstances where he is dealing with investors who have relatively little investment experience.
>
> . . .
>
> While investors are well[-]advised to be cautious in choosing investments, the Act places the duty of care on the registrant, who is better placed to understand the risks and benefits of any particular investment product. **That duty cannot be transferred to the client.** [emphasis added]

[67] Unfortunately, Rustulka's clients bore the brunt of his failure to meet basic KYC and suitability obligations and to act in accordance with the high degree of trust they placed in him. We have already noted that the investor witnesses at the Merits Hearing generally reported that they received little, if anything, in the way of returns on the investments they made through Rustulka, or repayment of their principal. They described the negative impacts on their lives and finances as a consequence of their losses, which typically represented a significant portion of their assets that they could not afford to lose. These impacts ranged from having to delay the adoption of another child to delayed retirement – and some investors wondered if they would ever be able

to retire at all. It was also apparent that the loss of their financial security had had a significant negative impact on their mental and emotional well-being.

[68] In addition, harm was caused to the Alberta capital market itself. The investor witnesses testified as to their loss of confidence in the market and their reluctance to invest in it ever again, especially the exempt market. Some pointed out that they no longer have the money to do so in any event. Further, the confidence of other investors who were not involved in this matter but who may learn of it may also be shaken. This affects the ability of law-abiding participants in the securities industry to raise funds for their endeavours or to earn a living providing proper and accurate investment advice.

[69] In summary, we are of the view that Rustulka's misconduct was very serious. It extended over a three-and-a-half-year period, involved a number of investors and a significant amount of their money, and caused substantial harm to those investors and to the market itself. The misconduct was especially egregious, as Rustulka deliberately failed to tell the truth and execute the core responsibilities of his position as a registrant. Moreover, he betrayed the trust placed in him by his clients, and exhibited a blatant disregard for their financial well-being.

[70] We conclude that the seriousness of this misconduct argues in favour of significant sanctions.

2. Rustulka's Characteristics and History

[71] Rustulka has never previously been sanctioned for capital market misconduct. According to *Homerun*, this is therefore a neutral consideration in assessing appropriate sanctions (see para. 85).

[72] However, at the time relevant to our findings in the Merits Decision, Rustulka had several years of direct experience working in the exempt market. He completed the exempt market products exam in October 2010, and worked for other EMDs prior to joining WealthTerra in late 2012.

[73] During his testimony at the Sanction Hearing, Rustulka confirmed that in the course of his employment at WealthTerra, he received and reviewed certain information concerning regulatory requirements that we described in the Merits Decision. This material set out and explained various registrant obligations, including the standard of care, KYC, and suitability. It included two versions of WealthTerra's PPM, and several emails from WealthTerra to its Dealing Representatives that attached memoranda and information such as CSA Notice 31-336 and OSC Staff Notice 33-740 *Report on the results of the 2012 targeted review of portfolio managers and exempt market dealers to assess compliance with the know-your-client, know-your-product and suitability obligations* dated May 30, 2013. In addition, in the Merits Decision, we described Wellwood's testimony with respect to the ongoing training WealthTerra provided its Dealing Representatives, "including annual training on such things as new securities regulations or other changes in the applicable law, and periodic internal communications notifying Dealing Representatives of various regulatory issues" (at para. 25).

[74] While Rustulka demurred with respect to whether he was adequately trained or understood what he read when he received these kinds of materials, we are satisfied that the information was available to him and that for the reasons discussed in the previous section of this decision, it was his obligation to read and understand it, and to ask questions if he did not. Accordingly, we conclude that Rustulka had adequate experience and training to have known better than to have conducted himself as he did, including recommending securities purchases and investment strategies that were patently unsuitable for his clients. Moreover, we are of the view that one does not require training to know that misrepresenting the facts to one's clients is wrong in any profession or industry.

[75] Generally, these characteristics suggest an increased need for sanctions that would effect a high degree of specific deterrence. However, as mentioned, Rustulka indicated in his written submissions that he expects and accepts that market-access bans are likely to be imposed against him, and "he has no intentions on returning back to any type of role that might involve investments". This offsets the risk of recurrence of misconduct by Rustulka.

[76] We have already noted that at the Sanction Hearing, Rustulka testified to his limited finances and future prospects. However, he did not substantiate his claims of impecuniosity with independent evidence that would confirm his financial circumstances.

[77] In view of all of the foregoing, it is our view that Rustulka's characteristics and history argue in favour of more moderate sanctions that will effect a moderate level of specific deterrence. However, the need for general deterrence remains high – in particular, for other registrants. It must be made very clear to those occupying that special place in the market that this type of misconduct will not be tolerated.

3. Benefit Sought or Obtained by Rustulka

[78] Staff calculated that Rustulka sold a total of $1,547,433.30 in exempt market securities to the eight Merits Hearing investor witnesses (and, in some cases, their spouses). He was paid $99,242.37 in commissions on those sales. While it is therefore apparent that Rustulka sought and received a benefit from his misconduct by way of commissions, it is also apparent that it was a modest benefit accruing over a period of approximately three and a half years. In addition, unlike some cases brought before the ASC, there is no evidence that he perpetrated a fraud and lived an extravagant lifestyle off its avails at the expense of his clients.

[79] Overall, our analysis of this factor leads us to conclude that it necessitates sanctions that will provide a moderate degree of specific deterrence, but a significant degree of general deterrence. While Rustulka may not have become wealthy as a result of his misconduct, it had the potential to generate a much larger financial benefit. Others must be discouraged from the temptation to emulate him in the hope of gaining such a benefit.

4. Mitigating Considerations

[80] While Staff suggested that there are no mitigating considerations in this case, we discern two possibilities.

[81] The first arises from what we have described as the character reference offered by Blaire Rustulka as one of his brother's clients and a WealthTerra investor. We are prepared to accept that he had a different experience than that of the clients who testified at the Merits Hearing. That said, his positive experience does not ameliorate the significant harm suffered by the investor witnesses as a result of Rustulka's misconduct. Blaire could speak only to his personal experience; he acknowledged that he did not witness any of the meetings or conversations Rustulka had with those who testified during the initial phase of these proceedings.

[82] The second arises from Rustulka's expressions of remorse, as summarized previously in these reasons. We found those expressions and his apologies sincere, and accept that he understands and regrets the role he played in his clients' misfortune.

[83] However, we agree with Staff that Rustulka's evidence at the Sanction Hearing and his written submissions cast doubt on the extent to which he accepts full responsibility for his own actions and recognizes the extent and seriousness of his failures as a registrant. The effect of his remorse and his apologies is significantly attenuated by the fact that in his testimony, he cast so much blame on others, including, most egregiously, the clients he failed. We also noted that he was largely focused on conveying the extent of his own suffering.

[84] With respect to Rustulka's efforts to shift blame to WealthTerra, we have already noted that its conduct is not before us in these proceedings and that even if it were, it would not diminish Rustulka's responsibility for his own actions. As we tried to make clear to him during the Sanction Hearing, the only issue remaining for this panel to decide is what sanction and cost orders, if any, should be imposed against him.

[85] Further, there is no blame to be ascribed to Staff for not naming WealthTerra or its management as respondents, or for not calling witnesses or making arguments favourable to Rustulka, even in his absence from the proceedings. Staff have considerable discretion in this regard, including which witnesses to call. They have no responsibility to present evidence or make a case on behalf of an opposing party, whether that party chooses to participate in the proceedings or not.

[86] In *Re Proprietary Industries Inc.* (2005 ABASC 745), the respondents made various complaints about the fairness of the proceedings against them, including that Staff failed to investigate other parties (see para. 103). The ASC panel observed that, "it is [Staff's] task to determine, in the exercise of prosecutorial discretion, what case to bring to a hearing, how to prepare that case (including who to interview) and how to present that case to the hearing panel (including the choice of witnesses, if any)" (at para. 105). The panel went on to cite several superior court decisions in support of this proposition (see paras. 109-111), including the following excerpt from *R. v. V. (J.)* ((1994), 91 C.C.C. (3d) 284 (Que. C.A.) at pp. 287-288):

> Crown counsel, of course, while bound by strict duties so as to ensure the preservation of the integrity of the criminal justice system, however must operate in the context of an adversarial procedure. Once he has satisfied the obligation to disclose the evidence, it is for him, in principle, to choose the witnesses necessary to establish the factual basis of his case. If he does not call the necessary witnesses or evidence, he exposes the prosecution to dismissal of the charge for having

> failed to establish its case completely and in accordance with the reasonable doubt rule . . . The defence may, at that time, do its work and call its own witnesses, if it considers it appropriate to do so. In the tradition of the common law, on which Canadian criminal procedure is based, the case retains its adversarial nature and Crown counsel, while an officer of the court, does not act as defence counsel. . . .

[87] This does not change where a party declines to advance a defence on his or her own behalf.

[88] The panel in *Homerun* stated that, "[p]ersuasive indications that a respondent appreciates the wrong done, and its seriousness" and "a genuine acceptance of responsibility" can be mitigating factors because they suggest that the risk of the misconduct recurring is reduced and that less severe sanctions will provide the necessary deterrence (see paras. 39-42). While we acknowledge what Rustulka has said about his remorse, those sentiments were undermined by his continued deflection of responsibility. Accordingly, pursuant to *Homerun*, this is more of a "neutral consideration" in this case (at para. 41; see also *Re Fauth* (2019 ABASC 102) at para. 58).

5. Aggravating Considerations

[89] There are several aspects of Rustulka's misconduct that we consider especially egregious and therefore aggravating. These include that he encouraged virtually all of the investor witnesses to use leverage regardless of their circumstances and without disclosing the increased risk, and that he disregarded their concentration levels in specific securities and in the exempt market itself. This was a complete abdication of his responsibilities as a Dealer Representative, and suggests that making sales and earning commissions took priority over steering his clients away from patently unsuitable investments and investment strategies.

[90] We also find it an aggravating consideration that Rustulka encouraged some clients' trust by ensuring they were aware of his background as a police officer and a pastor. We reject as nonsensical the explanation for doing so that he gave at the Sanction Hearing – that he was trying to make the point to his clients that they should not simply accept someone else's word no matter who they are, and should instead do their own due diligence. We consider it far more likely that he mentioned his background to achieve the effect that it actually had on the investor witnesses, according to their testimony: increasing their trust and therefore increasing the probability they would accept his investment advice.

[91] Rustulka's exploitation of his clients' trust was even more serious given their vulnerability (see *Phillips* at para. 25). Because they lacked investment knowledge and experience, they were highly reliant on him to provide accurate information and recommend suitable investments based on their circumstances. He did neither.

[92] These considerations argue in favour of more severe sanctions.

6. Outcomes in Other Proceedings

[93] Although Rustulka did not cite any comparable decisions, Staff referred to several. As is almost always observed by ASC panels at the sanction stage, none was on all fours with the circumstances in this case. Nonetheless, they suggest a range of sanction orders appropriate for

reasonably similar misconduct. Those that we considered helpful in identifying that range are as follows:

- *Lamoureux* (Sanction), *supra*: The respondent, an experienced registrant, was found to have breached his KYC and suitability obligations with respect to nine clients. He had been sanctioned twice before by the ASC. The panel noted that the investors had "placed considerable trust and reliance on the advice they received from the Respondent" (at para. 25), and suffered significant losses to their net worth. The respondent raised arguments with respect to the negative impact the events had had on his health and personal finances. He was ordered to pay an administrative penalty of $20,000 and was banned from using any securities law exemptions for 10 years.

- We note that this decision was rendered in 2002, prior to amendments to the Act that provide for disgorgement orders and the broad range of market-access bans now available under s. 198. In addition, the maximum available administrative penalty for individual respondents at that time was $100,000 per contravention. In June 2005, the maximum was increased to $1 million per contravention. If one assumes that the panel imposed 20% of the maximum administrative penalty to arrive at $20,000, a similar exercise under the current Act would result in a presumptive administrative penalty of $200,000.

- *Re Campbell* (2015 ABASC 750): The individual respondent made several misrepresentations concerning the investments he sold, including with respect to their security and the qualities and experience of the issuer. In addition, he made prohibited representations offering to personally guarantee any capital and to repurchase anyone's investment in one year. 15-year market access bans and an administrative penalty of $100,000 were imposed against him.

- *Phillips*, *supra*: With respect to three separate clients, this IIROC registrant was found liable for making unsuitable securities purchases and unauthorized discretionary trades, as well as conducting a sale while in a conflict of interest without advising the client and preparing client tax returns without firm authorization. One client lost over $169,000, and another lost $69,000. The panel ordered a fine of $290,000, $10,350 in disgorgement, and a three-year registration suspension.

- *Gareau*, *supra*: The respondent breached IIROC Rules with respect to two client families by recording inaccurate client information, making unsuitable recommendations, and selling a bond against a client's express wishes. One family experienced either no or very minor financial consequences. The other lost over $600,000, but was repaid $500,000, including $100,000 contributed by the respondent. The panel imposed a $100,000 fine, as well as an order for disgorgement of $47,383 in commissions. In addition, the panel suspended the respondent's registration for one year.

- *Karas*, *supra*: The respondent breached MFDA Rules with respect to his KYC and suitability obligations, having made unsuitable recommendations involving leverage to at least 18 clients without explaining the risks of leveraged investing (to the contrary, he told the clients the leveraged investments were risk-free). The panel found that he had been motivated by a desire to increase his commissions, and expected that the clients' losses would exceed $1 million. Like Rustulka, the respondent suggested that all he had done was present options to his clients, and left the decisions up to them. He was fined $750,000 and permanently prohibited from registration. The high fine appears to have been based on the large number of clients who made claims against the respondent in a separate class action, and the panel's sense that he had received a large amount in commissions from sales to so many clients.

- *Re Pretty* (2014 CanLII 46024 (CA MFDAC)): The respondent contravened MFDA Rules and by-laws by recommending leveraged investments to six clients for whom they were unsuitable. He was also found to have deliberately disregarded his KYC obligations and to have failed to explain the risks of leveraged investing adequately. In addition, he failed to cooperate with MFDA staff's investigation. The clients' losses were estimated at $540,000. The panel fined the respondent $125,000 and imposed a 10-year prohibition on registration.

- *Re Balani* (2020 CanLII 80704 (CA MFDAC)): The respondent was found to have failed to cooperate with MFDA staff's investigation, prepared inaccurate client account forms, and breached his KYC and suitability obligations to two clients. He also failed to explain the risks of leveraged investing. His conduct was particularly egregious in that he misled clients by providing one set of application forms to them that contained accurate information, and a different set that contained false information to his dealer employer and a lender. The panel imposed a fine of $125,000, and stated that $50,000 of that amount related to the respondent's failure to cooperate with the investigation. The panel also permanently prohibited him from registration.

D. Conclusions on Sanction

[94] Based on the submissions of the parties, the comparable decisions just discussed, and our application of the *Homerun* factors to the facts and circumstances of this case, we conclude that a significant package of sanctions is necessary and appropriate to effect the specific and general deterrence required. Rustulka knowingly failed to execute his core responsibilities as a registrant by recommending investments that were entirely unsuitable for his clients. He deliberately misrepresented the risks of the investments and strategies he presented, and exploited his clients' trust in him in the interest of selling more securities. Not only must he be prevented from acting in this manner again, it must be made clear to other registrants that such conduct will attract serious consequences.

[95] In determining the orders we should make in the public interest, we have remained mindful of the need for proportionality given Rustulka's personal circumstances and the comparable case law. At the same time, we have taken into account "the special role of a registrant in our securities regulatory regime" (*Lamoureu*x (Sanction) at para. 18). Rustulka's misconduct was serious, and the resulting effect on most of the investors who testified at the Merits Hearing was dire.

[96] In addition, we have taken into account the consequences to our capital market. As stated in *Lamoureux* (Sanction) (at para. 24):

> It is our view that registrants must bear responsibility for their conduct. Conduct like the Respondent's undermines not only individual investors who relied on the Respondent, but other investors' confidence in the integrity of our capital markets. Investors must be able to rely on and have trust in the integrity and capability of registrants. Without effective deterrence, inappropriate conduct can continue and public confidence in the fairness of our markets can be seriously damaged.

[97] We have therefore concluded that we will impose market-access bans, a disgorgement order, and an administrative penalty. However, we differ from Staff with respect to the quantum of the disgorgement order and the administrative penalty for the reasons discussed below.

1. Market-Access Bans

[98] Section 198(1) of the Act permits us to impose various restrictions on a respondent's ability to participate in the Alberta capital market where it is in the public interest to do so. Such bans may be limited or indefinite in duration, and can be made subject to exceptions or "carve-outs", depending on the circumstances. They are directed at the specific respondent under consideration and are intended to prevent him or her from engaging in misconduct in the future. In addition, they send a message to other market participants about the consequences they could face if they do not abide by the requirements of Alberta securities laws. We agree with the following observation of the hearing panel in *Re Planned Legacies Inc.* (2011 ABASC 278 at para. 42):

> As [the ASC] has noted in many other cases, 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.

[99] We also agree with Staff that the nature and seriousness of Rustulka's misconduct – which went to the heart of the obligations owed by registrants to their clients – call for the permanent bans that they have recommended and that Rustulka has acknowledged he will face. The specific orders set out at the end of this decision are directed at the capacities in which Rustulka acted when he breached NI 31-103 and s. 92(4.1) of the Act, but also at the other ways in which we perceive the investing public could be at risk if his participation in the capital market were not curtailed. Permanent bans as sought by Staff are appropriate on the facts of this case, proportionate in light of the overall circumstances, and consistent with Rustulka's expectations.

[100] We have acknowledged Rustulka's indication that he does not intend to return to the securities industry and accept that that is his current intention. However, intentions can change, and given that he acted as he did despite his training and the fact that some of his clients were, by his own admission, friends and fellow community members, we do not believe that it would be in

the public interest to rely on those assurances alone. Moreover, others continue to work in the field, and the need for general deterrence aimed at other registrants and EMDs remains high.

[101] In their written submissions, Staff indicated they "would consider a reasonable carve-out" from the bans if Rustulka were to provide acceptable justification for one. However, Rustulka has not requested any. We therefore decline to provide for any carve-outs at this time. In the future, should Rustulka believe there to be a compelling reason for a carve-out, he may apply for a variation of the relevant market-access ban under section 214(1) of the Act.

2. Monetary Sanctions

[102] As indicated, we are of the view that to achieve the necessary deterrence, monetary sanctions are required in addition to market-access bans. Since the purpose of disgorgement orders and administrative penalties differ and different considerations apply to each, we conclude that both are required in this case.

(a) Disgorgement

[103] Our authority to order disgorgement is found in s. 198(1)(i) of the Act, which states:

> 198(1) Where the [ASC] considers that it is in the public interest to do so, the [ASC] may order one or more of the following:
>
> . . .
>
> (i) if a person or company has not complied with Alberta securities laws, that the person or company pay to the [ASC] any amounts obtained or payments or losses avoided as a result of the non-compliance.

[104] In other words, the section permits us to order a respondent to divest any monetary benefits obtained as a result of breaching Alberta securities laws. As explained in *Fauth* (at para. 77):

> In *Planned Legacies*, the panel explained that a disgorgement order "reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act" (at para. 71). As the sum ordered is paid to the ASC and not to wronged investors, "[i]t is not a compensation mechanism" (at para. 71). Rather, it "provides a further element of specific and general deterrence" by removing the incentive to profit from misconduct (at para. 71; see also *Re Pro-Financial Asset Management Inc.*, 2018 ONSEC 18 at para. 48). While disgorgement is thus like an administrative penalty in that both are aimed at deterrence, they have different purposes.

[105] *Fauth* discusses the law concerning disgorgement orders at some length (see paras. 76-87), and we adopt that discussion here. For ease of reference, the following are the main principles that apply to this case:

- 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).

[106] With reference to one of Staff's exhibits from the Merits Hearing, Rustulka acknowledged in his testimony at the Sanction Hearing that he received $463,159.12 in total commissions during his time at WealthTerra. While Staff argued that it was therefore open to us to order disgorgement in that amount, they also separated out the commissions Rustulka was paid on the investments made by the eight investor witnesses who appeared at the Merits Hearing and their spouses, for a total of $99,242.37. If the commissions Rustulka was paid on the additional investments made by two of the children of those investor witnesses are added, the total is the $101,946.12 Staff submitted should be the minimum amount of any disgorgement order we make.

[107] We are satisfied that the figure of $99,242.37 represents the amount obtained by Rustulka as a result of the specific misconduct we found in the Merits Decision. Although it is certainly possible – perhaps even likely – that he misconducted himself in a similar fashion vis-à-vis other clients (including the children of the investor witnesses) while he was with WealthTerra, we do not have evidence in that regard. We decline to speculate for the purposes of calculating the appropriate amount for disgorgement in this case.

[108] In the Rustulka Submissions, Rustulka provided a breakdown of the ways in which he used the commissions he received through WealthTerra, including business expenses and amounts he said he had to pay to referral agents. However, we noted that the aforementioned Staff exhibit showing Rustulka's total commissions accounted separately for the referral fees paid – the $463,159.12 was net of any such fees.

[109] Rustulka also claimed that from January to May 2016, he was under mandatory supervision by Wellwood, and had to pay her approximately $32,000 in commissions and expenses. He provided no independent evidence to support this amount, but it is nonetheless clear that none of it could have related to transactions involving the clients who testified at the Merits Hearing, all of whom made their investments between 2013 and 2015. Therefore, there is no basis on which we might exercise our discretion to order disgorgement net of those purported commissions.

[110] In the result, we are satisfied that it is in the public interest to issue a disgorgement order against Rustulka in the amount of $99,242.37. This sends the necessary message to Rustulka and any other registrants who may consider conducting themselves in a similar fashion that they will not be permitted to retain a financial benefit from breaching legislative and regulatory requirements. If Rustulka had been aware of this earlier, he may not have been motivated to act as he did to maximize his sales and, consequently, his commissions. The order therefore serves the goals of specific and general deterrence, and, in turn, the protective and preventative purposes of the Act.

(b) Administrative Penalty

[111] In addition to our orders under s. 198 of the Act, s. 199 provides us with the authority to impose administrative penalties of up to $1 million per contravention or failure to comply with Alberta securities laws. The reason for imposing an administrative penalty on top of a disgorgement order was 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."

[112] Without the addition of an administrative penalty, a respondent 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.

[113] That said, there is a reduced need for the specific deterrence afforded by an administrative penalty in this case given that we have permanently banned Rustulka from future participation in the capital market. While we are of the view that there is still a significant need for general deterrence and any administrative penalty we impose must be large enough to have that effect, it still must be proportional to the circumstances of the misconduct and the offender, and in line with the penalties imposed in similar cases.

[114] Rustulka and his brother each provided evidence with respect to Rustulka's current financial situation. This evidence would have carried greater weight if it had been supported by independent confirmation, but we are nevertheless prepared to accept it as some evidence of his impecuniosity. We have also noted his age and his future employment prospects. This is a "moderating consideration" with respect to the quantum of the administrative penalty to be imposed (see *Holtby* at para. 55). However, it does not mean that there should be no penalty or that the penalty should be a nominal amount. As observed in *Homerun* (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."

[115] In combination with the disgorgement order and permanent market-access bans, we have concluded that the $250,000 administrative penalty suggested by Staff is higher than necessary to achieve specific and general deterrence, and disproportionate to Rustulka's circumstances. We agree with the panel in *Fauth*, which stated (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 permanent market-access bans.

[116] We are satisfied that it is in the public interest and in accordance with the facts and principles discussed in these reasons to order that Rustulka pay an administrative penalty in the amount of $100,000. This accords with the range suggested by the comparable decisions cited by Staff, and, in particular, *Lamoureux* (Sanction) (as notionally adjusted for the change in legislation), which we have referenced heavily in both this decision and the Merits Decisions given its factual similarities to the case at bar.

[117] In arriving at this amount, we have carefully considered the need to reflect the nature and seriousness of Rustulka's misconduct. A lower amount would give insufficient regard to the consequences of his failure to abide by the fundamental obligations of his special position as a registrant, and would not suffice to achieve meaningful general deterrence. By contrast, the higher figure recommended by Staff is more than necessary for specific deterrence when combined with the disgorgement order and permanent bans. We remain mindful of the Alberta Court of Appeal's caution in *Walton* not to over-emphasize general deterrence or overlook Rustulka's personal circumstances, including his financial situation and his age.

IV. COSTS

A. The Law

[118] Section 202 of the Act provides us with the authority to impose a costs order against a respondent who has been found to have contravened Alberta securities laws or acted contrary to the public interest. Section 20 of the *Alberta Securities Commission Rules* (General) sets out the types of costs that may be claimed by Staff, including the time and expenses associated with the investigation and prosecution, and the expenses associated with the witnesses who testified.

[119] Although costs are typically addressed at the same time as sanctions, costs orders are not sanctions. They are a means of ensuring that the costs of enforcement proceedings taken against an offender are not solely borne by the law-abiding market participants whose fees indirectly fund the ASC's operations (see *Fauth* at para. 115). In addition, costs orders provide us with a means of encouraging procedural efficiency in ASC hearings. If a respondent has contributed to an efficient proceeding – for example, by admitting non-controversial facts – that may be taken into account in setting the quantum of costs. We may also take into account factors that suggest it is appropriate to make a deduction from the total costs claimed, such as indications of duplicated effort by Staff or costs associated with allegations that were not proved (see *Homerun* at paras. 49-50).

[120] As with respect to disgorgement orders, a respondent's impecuniosity is not generally factored into the analysis of an appropriate costs order (*Fauth* at para. 117).

B. Positions of the Parties

1. Staff

[121] Staff largely relied on the law set out above in support of their position on costs. They cited *Homerun* (at paras. 48-53) for the factors that should be considered in setting the amount, including the time spent on the matter by Staff and the disbursements incurred, whether any allegations were dismissed, and whether the respondent brought any efficiencies or inefficiencies to the proceedings.

[122] At the Sanction Hearing, Staff tendered the aforementioned Bill of Costs indicating time and disbursements incurred totalling $57,247.93. They submitted that Rustulka should be ordered to pay $55,000 of that amount, as the costs are reasonable and were necessary to investigate and prosecute this matter. They further noted that the Bill of Costs is a conservative estimate of the actual costs incurred, in part because it does not include any of the costs associated with the sanction phase of the proceedings.

[123] Lastly, Staff pointed out that with the exception of one particular, all of the allegations were proved, despite the fact that Rustulka made no admissions.

2. Rustulka

[124] Rustulka made no specific submissions with respect to costs.

C. Analysis and Conclusions on Costs

[125] We find that it is appropriate and in the public interest to make a cost-recovery order in the amount of $55,000, as suggested by Staff. We see nothing in the Bill of Costs or the backup receipts and information provided that would argue in favour of a reduction. It is already a conservative estimate of the actual costs incurred because, as Staff represented, it does not appear to include the costs of the Sanction Hearing or any of Staff's preparation for either that hearing or their written sanction submissions. In addition, as argued by Staff, all of their allegations were proved except one particular concerning the misrepresentation allegations. We consider that any costs specifically attributable to this allegation would be *de minimis*.

[126] Moreover, Rustulka's non-participation in the Merits Hearing made no contribution to the efficiency of the proceedings, because Staff were still required to go to a full hearing, expending resources that could have been directed elsewhere and inconveniencing numerous witnesses who had already been victimized by his misconduct. He appeared at the Sanction Hearing, but added further inefficiency by leading evidence and making submissions relevant only to the merits of the allegations against him despite our repeated cautions that the time for the same – the Merits Hearing – had passed and would not be reopened.

[127] Rustulka represented that his health prevented his participation in the Merits Hearing, but produced no independent evidence to support that assertion. It is also evident from the time entries in Staff's Bill of Costs that he or his previous counsel were in contact with Staff on multiple occasions well before the Merits Hearing commenced. We therefore conclude that he knew how to get in touch with the appropriate personnel at the ASC, and that he or a representative – including his brother – could have consulted someone about his claimed inability to participate at that time and the options that might have been available to him as a result, including a possible adjournment. The onus to initiate contact with respect to his personal circumstances was on him.

V. CONCLUSION AND ORDERS

[128] For the foregoing reasons, we make the following orders:

(a) pursuant to s. 198(1)(d) of the Act, Rustulka must immediately resign from any 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;

(b) pursuant to ss. 198(1)(b), (c), (c.1), (e), (e.1), (e.2), and (e.3), Rustulka is permanently prohibited from:

(i) trading in or purchasing any security or derivative, and from relying on any exemptions contained in Alberta securities laws;

(ii) engaging in investor relations activities;

(iii) becoming or acting as a director or officer (or both) of any issuer or other person or company that is authorized to issue securities, or of any registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

(iv) advising in securities;

(v) becoming or acting as a registrant, investment fund manager or promoter; and

(vi) acting in a management or consultative capacity in connection with activities in the securities market;

(c) pursuant to s. 198(1)(i), Rustulka must pay to the ASC disgorgement in the amount of $99,242.37;

(d) pursuant to s. 199, Rustulka must pay to the ASC an administrative penalty of $100,000; and

(e) pursuant to s. 202, Rustulka must pay costs to the ASC in the amount of $55,000.

[129] These proceedings are now concluded.

February 5, 2021

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Kate Chisholm

"original signed by"
Raymond Crossley