Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF CROWN HILL CAPITAL CORPORATION AND
WAYNE LAWRENCE PUSHKA

REASONS FOR DECISION ON SANCTIONS AND COSTS

Hearing: February 24 and 28, 2014

Decision: August 8, 2014

Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Christopher Portner	- Commissioner
	Judith N. Robertson	- Commissioner
Appearances:	Anna Perschy Albert Pelletier	- For Staff of the Commission
	Alistair Crawley Melissa MacKewn Clarke Tedesco	- For Crown Hill Capital Corporation and Wayne Lawrence Pushka

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REASONS FOR DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") to consider pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") whether it is in the public interest to make an order with respect to sanctions and costs against Crown Hill Capital Corporation ("**CHCC**") and Wayne Lawrence Pushka ("**Pushka**") (collectively, the "**Respondents**").

[2] The hearing on the merits (the "**Merits Hearing**") was heard over 14 days from May 9, 2012 to September 18, 2012 and our decision on the merits and our reasons were issued on August 23, 2013 (the "**Merits Decision**").

[3] Following the release of the Merits Decision, we held a separate hearing on February 24 and 28, 2014 to consider submissions from Staff of the Commission ("**Staff**") and counsel for the Respondents regarding sanctions and costs.

[4] Capitalized terms that are not defined in these reasons are used as defined in the Merits Decision.

II. THE MERITS DECISION

[5] On July 7, 2011, the Commission issued a Notice of Hearing in this matter pursuant to sections 127 and 127.1 of the Act in connection with a Statement of Allegations issued by Staff on the same day.

[6] This proceeding related to alleged multiple breaches by CHCC of its fiduciary duty under section 116 of the Act in connection with the actions and transactions set out in the Merits Decision. Staff also alleged that (i) disclosure made by CHCC in a management proxy circular of the Crown Hill Fund (the "**CHF**") dated June 3, 2009 was materially misleading; (ii) CHCC caused CHF to enter into a transaction that breached its declaration of trust; (iii) CHCC failed to have written policies and procedures required by Ontario securities law to address conflict of interest matters; and (iv) Pushka, as President and Chief Executive Officer and a director of CHCC, authorized, permitted or acquiesced in the conduct of CHCC that breached the Act and in so doing is deemed pursuant to section 129.2 of the Act to have also not complied with the Act. Staff also alleged that the foregoing conduct of the Respondents was contrary to the public interest.

[7] The alleged misconduct spanned a period of over a year, from April 2008 to June 2009, and involved a number of different transactions involving or affecting the following investment funds and unitholders of those funds:

(a) MACCs Sustainable Yield Trust ("**MACCs**");

(b) Crown Hill Dividend Fund ("**CHDF**");

(c) CHF;

(d) Fairway Diversified Income and Growth Trust ("**Fairway Fund**"); and

(e) 13 investment funds known as the "**Citadel Funds**".

We note that MACCs and CHDF were merged on December 30, 2008 to form CHF and that the Fairway Fund was subsequently merged with CHF. CHCC was during the relevant time the investment fund manager ("**IFM**") for each of MACCs, CHDF and CHF. Five of the Citadel Funds were merged with CHF on December 2, 2009 and the continuing fund was renamed the Citadel Income Fund ("**CIF**") (see paragraph 28 below). References in these reasons to CHF after that date include CIF. CHCC subsequently became IFM for five of the remaining Citadel Funds and for the Energy Income Fund ("**EIF**") (see paragraphs 31 and 32 below). References in these reasons to CHCC include references to CHCC's affiliates.

[8] We issued reasons for our decision on the merits on August 23, 2013.

[9] We held in the Merits Decision that:

(a) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act in making the amendments to the MACCs Declaration of Trust referred to in paragraph 202 of the Merits Decision;

(b) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act by (i) making the changes to the rights of CHDF unitholders referred to in paragraph 275 of the Merits Decision by means of the merger of CHDF with MACCs; and (ii) failing to appropriately address the conflicts of interest arising in connection with that merger (see paragraph 284 of the Merits Decision);

(c) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act by (i) causing CHF to make the Fairway Loan (see paragraph 394 of the Merits Decision); and (ii) causing CHF to enter into the Citadel Acquisition and by proposing the Reorganization (see paragraph 568 of the Merits Decision);

(d) the June 09 Circular was materially misleading and failed to provide sufficient information to permit a reasonable CHF unitholder to make an informed judgment whether to vote to approve the Reorganization, contrary to Ontario securities law (see paragraph 575 of the Merits Decision);

(e) the indirect acquisition by CHF of the rights to the Citadel Management Agreements was contrary to and breached Section 5.2(1) of the CHF Declaration of Trust. Accordingly, by causing CHF to enter into the Citadel Acquisition, CHCC acted contrary to and breached its fiduciary duty to CHF, contrary to subsection 116(a) of the Act (see paragraph 587 of the Merits Decision);

(f) during the relevant time, CHCC failed to have written policies and procedures to address matters such as the Fairway Loan and the Reorganization, contrary to section 2.2 of National Instrument 81-107 (see paragraph 594 of the Merits Decision);

(g) during the relevant time, Pushka was, among his various roles, the President and Chief Executive Officer and a director of CHCC and he authorized, permitted or acquiesced in

all of the actions, decisions and transactions made or approved by CHCC that were the subject matter of this proceeding. As a result, where we concluded that CHCC did not comply with Ontario securities law, Pushka was deemed pursuant to section 129.2 of the Act to also have not complied with such law (see paragraph 633 of the Merits Decision); and

(h) by reason of the findings in clauses (a) to (g) above, we found that each of CHCC and Pushka acted contrary to the public interest (see paragraph 639(h) of the Merits Decision).

[10] We relied upon the foregoing findings and conclusions in determining the appropriate sanctions and costs to impose on the Respondents in the circumstances.

III. CHRONOLOGY OF EVENTS SUBSEQUENT TO JUNE 9, 2009

[11] The relevant events for purposes of the Merits Decision occurred prior to June 9, 2009 and are reflected in that decision. We note in particular that the Citadel Acquisition occurred on June 3, 2009. For purposes of determining sanctions, however, a number of relevant events and transactions occurred subsequent to June 9, 2009. The following is a summary of those significant events and transactions. For purposes of these reasons, the relevant period is from June 9, 2009 to January, 2013 (the "**Relevant Period**").

[12] On July 10, 2009, the postponed CHF unitholder meeting scheduled for July 13, 2009 was cancelled in order to address concerns raised by Staff.

[13] On July 16, 2009, Brompton Administration Limited ("**Brompton**") and Bloom Investment Counsel, Inc. ("**Bloom**") announced that they were soliciting unitholders of the Citadel Funds to requisition special meetings of the Citadel Funds to replace CHCC with Brompton as IFM of those funds (the "**Blue Ribbon Proposal**").

[14] On July 20, 2009, CHCC announced that Jarislowsky, Fraser Limited had been appointed portfolio manager of CHF.

[15] On July 23, 2009, CHCC announced that unitholder meetings of CHF and the Citadel Funds would be held on September 30, 2009 to vote on the reorganization proposed by CHCC that included the merger of a number of the Citadel Funds with CHF (see paragraph 18 below).

[16] On August 6, 2009, the independent directors of CHCC and the members of the CHF independent review committee (the "**IRC**") met with Staff and discussed the possibility that the rights to the Citadel Management Agreements would be transferred by CHF to CHCC for consideration that included a cash payment and a promissory note to be issued by CHCC. That proposal was referred to as the "**Divestiture Plan**". Ultimately, that proposal became the Divestiture referred to in paragraph 30 below.

[17] On August 20, 2009, the IRC met and determined that "the terms of the Divestiture Plan that might constitute a conflict of interest could achieve a fair and reasonable result for the Fund's unitholders subject to any comments from the OSC, or any material adverse changes affecting the Fund, the Citadel Funds or the markets generally."

[18] On August 27, 2009, CHCC issued a CHF management proxy circular for a unitholder meeting to be held on September 30, 2009 (the "**September 2009 Meeting**") to approve (i) the mergers of certain of the Citadel Funds with CHF; (ii) the Divestiture (referred to in paragraph 30 below); (iii) the creation of the special redemption rights (referred to in paragraph 19 below); and (iv) other amendments to the CHF declaration of trust (such matters are referred to collectively as the "**Proposed Reorganization**") (see the discussion of this meeting commencing at paragraph 206 of these reasons).

[19] The Special Redemption Right was a right of redemption for unitholders of CHF, and for unitholders of the Citadel Funds that were proposed to be merged with CHF, exercisable at 97% of NAV in the case of CHF, and at similar redemption prices based on NAV for unitholders of the Citadel Funds (the "**Special Redemption Right**") (see paragraph 206 of these reasons). As a result of the Special Redemption Right, unitholders of CHF had the option of redeeming their units at 97% of NAV in connection with any such mergers and unitholders of the Citadel Funds to be merged with CHF had similar redemption rights.

[20] Also on August 27, 2009, CHCC issued a joint management proxy circular for unitholder meetings of the Citadel Funds to be held on September 30, 2009 to, among other matters, approve mergers with CHF and the Special Redemption Right. The circular contained disclosure similar to that in the CHF proxy circular referred to in paragraph 18 above.

[21] On September 9, 2009, Brompton and Bloom issued a dissident proxy circular soliciting unitholders of the Citadel Funds to vote against the Proposed Reorganization and to vote instead for the Blue Ribbon Proposal.

[22] At the September 2009 Meeting, the CHF resolution approving the Proposed Reorganization was passed by 97.4% of the units that were voted at the meeting. Unitholders of Equal Weight Plus Fund ("**EWP**") also approved the merger of that fund with CHF as proposed by CHCC. The results of the votes by unitholders of the remaining Citadel Funds at the unitholder meetings held on that day were "inconclusive" in that neither the Blue Ribbon Proposal nor CHCC's proposal referred to in paragraph 20 above was approved by the necessary votes.

[23] On October 13, 2009, CHCC reached an agreement with Brompton and Bloom, subject to unitholder approval, that Blue Ribbon Fund Management Ltd. ("**Blue Ribbon**") would be appointed IFM of Citadel Diversified Investment Trust ("**Diversified**") and Series S-l Income Fund ("**Series S-1**") and that those two funds would be merged to form the "**Blue Ribbon Fund**".

[24] On October 21, 2009, CHCC issued two proxy circulars for Citadel Fund unitholder meetings to be held on November 17, 2009; a joint management proxy circular for Diversified and Series S-l recommended that unitholders approve the Blue Ribbon Proposal, and the joint management proxy circular for the remaining Citadel Funds recommended that unitholders approve, among other matters, mergers with CHF. These circulars incorporated by reference the management proxy circular referred to in paragraph 18 above.

[25] At the November 17, 2009 unitholder meetings, unitholders of Diversified and Series S-l approved the Blue Ribbon Proposal by 95% of the units that were voted and 98% of the units that were voted, respectively. It was announced that the two funds would be merged to form the Blue Ribbon Fund on or about December 31, 2009.

[26] On the same day, unitholders of the remaining four Citadel Funds (other than the SMaRT Fund ("**SMaRT**")) approved, among other matters, mergers with CHF with the following votes: HYTES Fund ("**Hytes**") by 98.25% of the units that were voted; Premium Income Fund ("**Premium**") by 95.33% of the units that were voted; S-l Income Trust Fund ("**S-1**") by 97% of the units that were voted; and Stable S-l Income Fund ("**Stable S-1**") by 93.95% of the units that were voted.

[27] On November 20, 2009, Diversified and Series S-1 appointed Blue Ribbon as IFM and merged to form the Blue Ribbon Fund.

[28] On December 2, 2009, Hytes, Premium, S-1, Stable S-1 and EWP merged with CHF. CHF was the continuing fund and was renamed CIF. Termination fees paid by those funds to CH Administration LP as a result of those mergers totalled $7,809.122.21.

[29] On December 3, 2009, redemptions pursuant to the Special Redemption Right granted to unitholders resulted in a 48.8% decrease in the assets of the merging funds referred to in paragraph 28 above.

[30] On December 18, 2009, CIF, indirectly through CH Administration LP, transferred to CHCC the rights to the Citadel Management Agreements based on the approval by CHF unitholders given at the September 2009 Meeting (see paragraph 22 above). The consideration for those rights was satisfied by a cash payment to CIF of $18,690,000 and the issuance of a promissory note by CHCC in the principal amount of $9,955,000 (the "**CHCC Note**"). That transaction is referred to in these reasons as the "**Divestiture**" (see paragraph 206 of these reasons). The primary source of the cash payment was $17,193,534 of termination or break fees paid by Diversified, Series S-1 and the other Citadel Funds referred to in paragraph 28 above (the aggregate of lines 13 and 14 of the Payments Summary).

[31] On December 22, 2009, CHCC obtained directly the management powers with respect to five of the six remaining Citadel Funds consisting of SMaRT, Energy Plus Income Fund ("**Energy Plus**"), Sustainable Production Energy Trust ("**Sustainable**"), Financial Preferred Securities Corporation ("**FPS Corp.**") and CGF Resources 2008 Flow-Through LP ("**CGF LP**").

[32] On August 30, 2010, a meeting of unitholders of Sustainable and a meeting of limited partners of CGF LP were held to approve the merger of those funds with Energy Plus to form the EIF. The merger was effective on October 8, 2010 (see paragraph 132(d)).

[33] On March 3, 2011, CHCC filed a preliminary short form prospectus for a CIF warrant offering. OSC Staff refused to issue a receipt for the preliminary prospectus.

[34] On July 7, 2011, the Notice of Hearing in this matter was issued together with Staff's Statement of Allegations.

[35] On August 4, 2011, following a hearing under subsection 8(2) of the Act, a Commission order was issued overturning the Director's decision to refuse a receipt for the preliminary prospectus referred to in paragraph 33 above.

[36] On September 23 and 26, 2011, CHCC filed short form prospectuses for warrant offerings by CIF and EIF, respectively (see paragraph 202 of these reasons).

[37] On October 7, 2011, the warrant offerings were completed. The net proceeds from the warrant offerings were $95,907,119 for CIF and $31,194,619 for EIF.

[38] On December 21, 2011, Artemis Investment Management Limited ("**Artemis**") gave notice to Staff of its proposed acquisition of all or a substantial part of the assets of CHCC. As a result of that acquisition, Artemis would become the IFM for CIF and EIF. Staff initially objected to the acquisition on January 18, 2012 but approved it almost one year later on January 14, 2013 (see paragraph 159 of these reasons).

[39] On March 23, 2012, SMaRT merged with EIF.

[40] The Merits Hearing took place from May 9, 2012 to September 18, 2012.

[41] On July 4, 2012, a CIF proxy circular (the "**CIF Circular**") was issued by CHCC for a special meeting of unitholders to be held on August 7, 2012 to approve what was described as the "Unitholder Empowerment Plan" that included changes to the CIF declaration of trust imposing a fee of 5% of NAV on the termination or resignation of CHCC as IFM and imposing on unitholders a redemption fee of 5% of NAV upon any redemption of units, both payable to CHCC (see paragraph 139 of these reasons).

[42] On the same day, an EIF management proxy circular was issued by CHCC for a special meeting of unitholders also to be held on August 7, 2012 to approve the "Unitholder Empowerment Plan" that included the same matters referred to in paragraph 41 above. The CIF unitholder meeting referred to in paragraph 41 above, together with the EIF unitholder meeting held the same day, are referred to as the "**August 2012 Meetings**" and the Unitholder Empowerment Plan referred to in paragraph 41 and in this paragraph are referred to as the "**Unitholder Empowerment Plan**".

[43] On August 7, 2012, the CIF and EIF unitholders separately approved the Unitholder Empowerment Plan. The CIF resolution was approved by 94.20% of the units that were voted and the EIF resolution was approved by 89.62% of the units that were voted.

[44] On August 17, 2012, 21,330,664 CIF units were redeemed, and 6,081,669 EIF units were redeemed, pursuant to the special redemption rights approved at the August 2012 Meetings.

[45] On November 15, 2012, CHCC called CIF and EIF unitholder meetings to be held on December 18, 2012 to seek the approval of unitholders to appoint Artemis as IFM of both funds.

[46] On the same day, a facilitation agreement was entered into among 2223785 Ontario Inc., an affiliate of CHCC (referred to as "**Triple Two**" in these reasons), Artemis and Artemis Investment Management Corporation which provided for the payment of a facilitation fee of $3,735,609 (the "**Facilitation Fee**") by Artemis to Triple Two for causing CHCC to resign as IFM and trustee of CIF and EIF (see paragraphs 213 and 214 of these reasons).

[47] The resolution appointing Artemis as IFM was approved by CIF unitholders on December 18, 2012 by 91.35% of the units that were voted, and by EIF unitholders on January 2, 2013 (the postponed date of the meeting) by 92.86% of the units that were voted.

[48] On January 14, 2013, Staff approved the Artemis acquisition in connection with the appointment of Artemis as IFM of CIF and EIF.

[49] On January 15, 2013, CHCC resigned as IFM of CIF and EIF. CHCC received aggregate termination fees of $7,902,546 paid by CIF and EIF (the aggregate of lines 20 and 21 of the Payments Summary) and Triple Two was paid the Facilitation Fee of $3,735,609 (see paragraph 213 of these reasons and line 22 of the Payments Summary).

[50] The Respondents submit that we should avoid commenting on the appropriateness or effectiveness of events or transactions that occurred subsequent to June, 2009. We have, however, found it necessary to consider such events or transactions to the extent that they are relevant to our decisions with respect to sanctions. For instance, the Respondents have put in issue as mitigating considerations the various approvals given by CIF and EIF unitholders at the unitholder meetings referred to in these reasons that were held during the Relevant Period. If we are to take those approvals into account as relevant to sanctions, we must also consider the disclosure made to unitholders in obtaining those approvals. We are not, however, imposing sanctions on the Respondents based on or as a result of any such subsequent events or transactions.

IV. SANCTIONS AND COSTS REQUESTED BY STAFF

[51] Staff requests the following sanctions and costs orders against the Respondents:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, that trading in any securities by the Respondents cease permanently;

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by the Respondents be prohibited permanently;

(c) pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to the Respondents permanently;

(d) pursuant to paragraph 6 of subsection 127(1) of the Act, that Pushka be reprimanded;

(e) pursuant to paragraph 8 of subsection 127(1) of the Act, that Pushka be prohibited permanently from becoming or acting as a director or officer of any issuer;

(f) pursuant to paragraph 8.1 of subsection 127(1) of the Act, that Pushka resign all positions that he holds as a director or officer of a registrant;

(g) pursuant to paragraph 8.2 of subsection 127(1) of the Act, that Pushka be prohibited permanently from becoming or acting as a director or officer of a registrant;

(h) pursuant to paragraph 8.3 of subsection 127(1) of the Act, that Pushka resign all positions that he holds as a director or officer of an investment fund manager;

(i) pursuant to paragraph 8.4 of subsection 127(1) of the Act, that Pushka be prohibited permanently from becoming or acting as a director or officer of an investment fund manager;

(j) pursuant to paragraph 8.5 of subsection 127(1) of the Act, that Pushka be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(k) pursuant to paragraph 9 of subsection 127(1) of the Act, that CHCC and Pushka pay, on a joint and several basis, administrative penalties in a minimum amount of $400,000 for each separate breach of section 116 of the Act, and a minimum amount of $100,000 for the breach of section 2.2 of National Instrument 81-107, for an aggregate minimum total administrative penalty of $2.1 million;

(l) pursuant to paragraph 10 of subsection 127(1) of the Act, that CHCC and Pushka disgorge to the Commission, on a joint and several basis, the amount of $23,952,833; and

(m) pursuant to section 127.1 of the Act, that the Respondents pay a portion of Staff's costs of the investigation and hearing in this matter in the amount of $467,648.70.

V. STAFF SUBMISSIONS

[52] Staff submits that breaches by an IFM of its fiduciary duties to the funds it manages is a very serious matter and that the misconduct of the Respondents in this matter warrants substantial sanctions. Staff submits that the Respondents' misconduct had a significant and negative impact on the efficiency, integrity and reputation of Ontario's capital markets.

[53] Staff submits that the misconduct in this matter as found by the Commission goes to the heart of the duty of loyalty inherent in an IFM's fiduciary duty.

[54] Staff submits that the unlawful conduct in this matter was prolonged and widespread. Both Respondents engaged in the conduct for more than a year. They breached their fiduciary obligations to MACCs, CHDF and CHF during that time. Their conduct involved the Fairway Fund and the thirteen Citadel Funds whose management rights were acquired by CHF. The Citadel Funds had over a billion dollars in assets under administration.

[55] Staff submits that the violations were far from isolated; the Respondents committed multiple separate breaches of the Act involving three general and distinct transactions; namely, changes made to the MACCs' Declaration of Trust, the Fairway Transaction and the Citadel Transaction. Those transactions occurred at different times and involved distinct steps affecting the different investment funds.

[56] Further, Staff submits that the violations built on each other and that many of the Respondents' violations of the Act were committed in order to make feasible or facilitate additional steps and did, in fact, make feasible or facilitate those additional steps. Those additional steps themselves involved further serious violations of Ontario securities law.

[57] Staff submits that the Respondents' ultimate goal was to increase the assets under management and CHCC's management fees so as to reap future financial benefits which would accrue over the long-term. CHCC did obtain very substantial long-term financial benefits as a result of the Respondents' misconduct. Staff submits that the financial benefits achieved reflect the combined consequences of the multiple prior violations of the Act.

[58] The Respondents' conduct included two instances in which the Commission concluded that they acted in bad faith for their own benefit including the exercise of their discretionary power to

make amendments to the MACCs Declaration of Trust and the appointment of Robson Capital Management Inc. ("**Robson**") as portfolio manager of CHF.

[59] Staff submits that the Respondents' experience and Pushka's knowledge of CHCC's obligations as an IFM and his position as a registrant are significant aggravating factors in the circumstances and serve to underscore the fact that this matter involved planned and deliberate acts in breach of fiduciary obligations owed to funds and investors that were motivated by greed and that ultimately resulted in substantial harm to investors.

[60] Staff submits that there was ample evidence, as found by the Commission in the Merits Decision, of the Respondents' deliberate actions to mislead, conceal from or delay giving accurate and material information to, the funds and their unitholders or to hinder potential opposition, including:

(a) misleading MACCs when the Respondents sought and obtained discretionary amending power in connection with the approval of the merger strategy to purportedly reduce costs without disclosing their plan to make further amendments which adversely affected the rights of the unitholders;

(b) increasing the quorum required for unitholder meetings in the MACCs Declaration of Trust which then became the declaration of trust for CHF;

(c) not disclosing to CHDF any of the material changes to their rights that would result from the merger of CHDF with MACCs;

(d) failing to disclose how the Fairway Loan was to be addressed as part of the Reorganization;

(e) causing CHF to make the Citadel Acquisition before seeking unitholder approval for the Reorganization when the two transactions were directly linked, which gave unitholders "little practical choice but to approve the Reorganization" (see the Merits Decision at paragraph 532);

(f) making materially misleading disclosure in the June 09 Circular; and

(g) taking active steps to avoid unitholders of CHF having a redemption right at NAV by seeking to delist CHF from the Toronto Stock Exchange ("**TSX**").

[61] Further, Staff submits that in the course of breaching their fiduciary duty to the investment funds and their unitholders, Pushka also took deliberate steps to mislead the independent directors of CHCC and the members of the IRC. The nature of CHCC's misconduct overall in abusing its discretionary powers as an IFM posed real, serious and ongoing risks to investors and the integrity of the Ontario capital markets. Staff submits that the nature of that misconduct supports Staff's request for substantial sanctions to serve both general and specific deterrence.

[62] Staff submits that the Respondents' misconduct as found by the Commission resulted in significant harm to the investment funds they managed as well as their unitholders. The Commission found that the unitholders of MACCs and CHDF were wrongfully deprived of various material rights. The Respondents took away fundamental rights of unitholders including rights that

adversely affected the ability of investors to oppose actions of their IFM and their ability to vote with their feet by redeeming their units. Further, they deliberately put CHF's assets at risk in the Fairway Transaction and the Citadel Transaction, assets which investors had entrusted to them.

[63] Staff submits that the various risks arising from the Citadel Transaction were foreseeable and occurred and resulted in further harm to CHF and their unitholders, including the following:

(a) Citadel Funds paid over $17 million in break or termination fees in 2009 including the fees paid by Diversified, Series S-l and other Citadel Funds that merged with CIF (see lines 13 and 14 of the Payments Summary) as well as additional fees of at least $190,000 paid by Sustainable, Energy Plus and CGF LP on their mergers to form EIF;

(b) CIF and at least one Citadel Fund paid increased legal expenses totalling approximately $2.3 million;

(c) redeeming unitholders of CIF paid additional fees of approximately $2.6 million charged to reduce the amount owing by CHCC on the Fairway Loan and later to reduce the CHCC Note; and

(d) CIF, EIF and their redeeming unitholders paid CHCC resignation fees in 2012 totalling over $14 million (see paragraph 213 of these reasons and the Payments Summary).

[64] Staff submits that the Respondents intended to obtain long-term financial benefits from the actions they took during the relevant period. In doing so, the Respondents limited potential risks to themselves by placing those risks on CHF and its unitholders. The Respondents should be held accountable for the subsequent consequences of that misconduct.

[65] Staff submits that the Respondents' misconduct includes, in particular, increasing the management fees payable by MACCs and then CHF and using CHF's assets to finance the acquisition of the management rights for the Fairway Fund and the Citadel Funds for their own benefit. Staff submits that the Respondents did so in order to obtain huge financial benefits and did receive such benefits as a result.

[66] According to Staff, the Respondents received net benefits arising from their actions of $23,952,833 between 2009 and 2012 (see paragraph 188 of these reasons). This does not include the $2,129,471 Pushka obtained through Crown Hill Asset Management Inc. ("**CHAM**") and First Paladin Inc. ("**First Paladin**"), both affiliates of CHCC, for their respective portfolio management and back-office administration services to CHF and the various Citadel Funds (see paragraph 219 of these reasons). In Staff's submission, the amounts received by the Respondents flow directly from, and are causally connected to, their misconduct as found by the Commission.

[67] Staff submits that CHCC and Pushka have demonstrated disregard for Ontario securities law and investors and Pushka, in particular, has failed to recognize the seriousness of his improprieties.

[68] Staff submits that the Respondents' conduct has been so harmful that they should be permanently prevented from participating in any capacity in Ontario capital markets. The gravity of the Respondents' conduct and the risks to the investing public warrant the sanctions proposed by Staff. Section 116 of the Act imposes fiduciary obligations on IFMs in recognition of the fact that IFMs have significant powers which can affect the rights and interests of unitholders and those

powers are open to abuse by those inclined to take advantage of them. Those powers can be used to achieve very substantial financial gains for an IFM, as occurred in this matter.

[69] In Staff's view, the Respondents deliberately and repeatedly abused their powers and did so for financial gain. Orders removing the Respondents permanently from the capital markets, substantial administrative penalties, and disgorgement of all amounts obtained as a result of their misconduct are proportionate to the Respondents' misconduct and will send a strong deterrent message to the Respondents and to like-minded individuals that participating in these types of actions and transactions, and failing to comply with their fiduciary duty to investors, will result in severe sanctions.

VI. RESPONDENTS' SUBMISSIONS

[70] The Respondents submit that this is not an appropriate case for a disgorgement order. They submit that a disgorgement order has been and should continue to be reserved for cases in which the moneys in question result directly from illegal or otherwise wrongful conduct. Examples of circumstances in which disgorgement is appropriate include those where moneys are raised from investors pursuant to an illegal investment scheme, where fees result from artificially inflated asset values, or where profits are made from illegal trading activities. In this case, Staff seeks the disgorgement of amounts that were lawfully earned pursuant to legal service contracts or were the result of legal transactions approved by unitholders over a four-year period following the Citadel Acquisition. The transactions in question occurred under the oversight of Staff and in important respects were tacitly approved or not disapproved by Staff.

[71] The amounts received by CHCC were received after the significant restructuring of the Reorganization in order to address the concerns that had been expressed by Staff. The Respondents submit that it would send a very mixed message to the market to see such a high level of cooperation ultimately punished by the confiscation of lawful income received after cooperating with Staff. This would not encourage market participants to cooperate with Staff in connection with transactional matters on a real-time basis.

[72] The Respondents stress that CHCC was not running an illegal enterprise. It was not receiving fees as a result of erroneous asset calculations, profits or commissions from improper trading activities or any improper or undisclosed benefits from the funds it managed. The amounts received by CHCC arose from contracts and transactions that have not been impugned. The confiscation of all amounts received by CHCC during the relevant four-year period would be an erroneous application of the concept of disgorgement and would amount to a form of punishment well outside the bounds of any sanctions imposed by the Commission in the past.

[73] The Respondents submit that there is no tangible evidence of harm to investors from the Respondents' conduct and certainly none that is quantifiable and directly linked to the breaches of the Act found by the Commission. There is no evidence of investor losses. Further, CHF and its predecessor funds have been transformed over the years and the unitholder base is not the same. Staff seek the confiscation of $23,952,833 purportedly received by CHCC between 2009 and 2012, that amount to be designated for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act. However, there is no one to whom to distribute such funds should the Commission make the requested order.

[74] The unitholders of both CIF and EIF voted overwhelmingly to affirm CHCC as the IFM of those funds, including the amount of compensation that CHCC was to receive for managing the funds. Those unitholders who did not want to continue under those terms were provided with a cash alternative and a further opportunity to redeem at NAV the following year. The units of CIF and EIF were also traded on the TSX throughout. The Respondents submit that the circumstances leading up to the unitholder votes should not affect the unitholders' clear wishes in that regard, particularly where CHCC has actually performed the duties that it was required to perform pursuant to the various declarations of trust and management contracts.

[75] The Respondents submit that the transactions entered into by CHCC were successful from a financial perspective, notwithstanding the extraordinary intervening events during the summer of 2009. The adverse consequences of the breaches found by the Commission, such as the loss of annual retraction rights or better disclosure, are hard to quantify and raise more of a concern with respect to market integrity. Further, those concerns are moot as a result of the unitholder votes on November 17, 2009 for the creation by merger of CIF and on August 30, 2010 for the creation by merger of EIF.

[76] The Respondents submit that the transactions approved were an attempt to alleviate legitimate problems with the structure of closed-end funds. In executing the transactions, the Respondents sought to alleviate the problem of a shrinking fund, including the arbitrage opportunity for redeeming unitholders (which comes at the expense of remaining unitholders), increased MER and decreased liquidity that results. While the Commission has reached the conclusion that the Respondents' responses to these problems was disproportionate - that the benefit received by them was greater than the potential benefit to the funds - the Respondents' urge the Commission to consider that, as structured, the transactions were meant to benefit unitholders through the reduction of MER and an increase in liquidity. Further, in structuring each of the transactions, the Respondents ensured that CHF would realize a financial return, and in the case of the Citadel Transaction, would realize that return before CHCC would receive any benefit.

[77] The Respondents ask the Commission to consider the following mitigating factors, which they say are unique to this case:

(a) reliance was placed on the detailed legal advice that was received with respect to the design and implementation of the relevant transactions and the compliance of those transactions with Ontario securities law;

(b) the review and consideration of the various transactions by CHCC's independent directors;

(c) the consideration of the various transactions by CHF's IRC; and

(d) the added layer of review by Robson, the independent portfolio manager of CHF.

[78] In addition, the Respondents note that they repaid to CHF the purchase price of the rights to the Citadel Management Agreements, together with interest, before collecting any of the management fees that were due to it under the CIF and EIF declarations of trust. Therefore, to the extent that the investment in the management contracts is considered to have left unitholders out of pocket, the Respondents have already made restitution of those amounts, including the payment of market interest.

[79] Further, the Respondents urge the Commission to consider CHCC's comprehensive response to the concerns raised by Staff following their intervention in 2009, and CHCC's co-operation with Staff during that period.

[80] In assessing penalties, the Respondents submit that the Commission should not make deterrence the focus of its analysis. As stated above, this is not a case of fraud and no investor funds were misappropriated. It is a unique factual circumstance and, regardless of the Commission's view of the propriety of the various transactions, each transaction was conducted in the open, presented to the CHCC board and IRC, and was the subject of specific legal advice.

[81] Given the unique circumstances of this case, the Respondents submit that there are not a great number of 'like-minded individuals' to whom deterrence would be aimed. Further, specific deterrence is of little consequence in this case. Pushka has surrendered his registration and left the industry and CHCC is no longer managing investment funds. Staff's approval would be required in the unlikely event that the Respondents chose to re-enter the industry. Therefore, the Commission should be careful when fashioning sanctions not to adopt Staff's purely punitive approach.

VII. ANALYSIS

A. THE LAW ON SANCTIONS

(i) Discussion of the Law on Sanctions

[82] The Commission's dual mandate is (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act).

[83] Subsection 127(1) of the Act gives the Commission power to make various orders if, in the opinion of the Commission, it is in the public interest to do so. The Commission's jurisdiction under subsection 127(1) is neither remedial nor punitive. Rather, the Commission's authority is prospective in operation and preventive in nature. The Supreme Court of Canada has stated that:

> … The purpose of an order under s.127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.
>
> …
>
> Pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited… The sanctions under the section are preventive in nature and prospective in orientation.
>
> (*Committee for the Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at paras. 43 and 45)

[84] Accordingly, the Commission's objective when imposing sanctions is not to punish past conduct but to restrain future conduct that may be harmful to investors or Ontario's capital markets. This objective was described in *Re Mithras* as follows:

> … [T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now section 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Re Mithras Management Ltd.* (1990), 13 OSCB 1600 ("***Re Mithras***") at pp. 1610-1611)

[85] In *Gordon Capital Corp*., the Ontario Divisional Court noted the connection between the public interest purposes of the Act and the maintenance of high standards of behavior in the securities industry:

> The general legislative purpose of the *Act* and the OSC's role thereunder is to preserve the integrity of the capital markets of Ontario and protect the investing public. In this context, the proceedings against Gordon and Bond under subs. 26(1) of the *Act* are properly characterized as regulatory, protective or corrective. The primary purpose of the proceedings is to maintain standards of behaviour and regulate the conduct of those who are licensed to carry on business in the securities industry. The proceedings are not criminal or quasi-criminal in their design or punitive in their object. This distinction has been made in a number of cases involving proceedings of a regulatory or public protective nature such as that under subs. 26(1) of the *Act*.
>
> *(Gordon Capital Corp.* v. *Ontario (Securities Commission),* [1991] OJ No 934, 50 OAC 258 ("***Gordon Capital Corp.***") at p. 8).

[86] In *Norshield Asset Management (Canada) Ltd.*, the Commission confirmed that its role is not to punish respondents in Commission proceedings for breaches of Ontario securities law nor to right any wrongs suffered by investors. The Commission noted, however, that the impact of breaches of the Act on investors is a factor that the Commission should consider when determining the appropriate sanctions (*Norshield Asset Management (Canada) Ltd. (Re)* (2010), 33 OSCB 7171 at paras. 92-93).

[87] Further, the Supreme Court of Canada has recognized general deterrence as an additional factor that the Commission may consider when imposing sanctions. In *Cartaway Resources Corp.*, the Supreme Court stated that: "…it is reasonable to view general deterrence as an appropriate and perhaps necessary consideration in making orders that are both protective and preventative" (*Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***") at para. 60). The Court also stated that:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway, supra,* at para. 52)

[88] In *Re Momentas Corp.*, the Commission applied the Supreme Court's decision in *Cartaway* and considered "the importance of deterring not only those involved in this matter, but also like-minded people from engaging in similar conduct." The Commission concluded that:

> … [i]n order to promote both general and specific deterrence we found it necessary to impose severe sanctions including permanent cease trade orders, permanent exclusions from exemptions, and a permanent prohibition from acting as an officer or director of a reporting issuer.
>
> (*Re Momentas Corp.,* 30 OSCB 6475 *("**Momentas**")* at paras. 51-52)

[89] The Commission must impose sanctions in each case that are proportionate to the circumstances and the conduct of each respondent. The Commission has previously identified the following as some of the factors that a panel should consider when imposing sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been recognition by a respondent of the seriousness of the improprieties;

(e) whether the violations are isolated or recurrent;

(f) whether or not the sanctions imposed may serve to deter not only those involved in the matter being considered, but any like-minded people, from engaging in similar abuses of the capital markets;

(g) the size of any profit obtained or loss avoided from the illegal conduct;

(h) the size of any financial sanction or voluntary payment;

(i) the effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(j) the effect any sanction might have on the livelihood of a respondent;

(k) the effect of the sanctions on the reputation and prestige of the respondent;

(l) the shame or financial pain that any sanction would reasonably cause to a respondent;

(m) the remorse of the respondent; and

(n) any mitigating factors.

(*Re Belteco Holdings Inc.* (1998), 21 OSCB 7743 at p. 7746; *Re M.C.J.C. Holdings Inc. and Michael Cowpland* (2002), 25 OSCB 1133 at para. 26; and *Erikson* v. *Ontario (Securities Commission)* [2003] OJ No. 593 (Div. Ct.) at para. 58 ("***Erikson***"))

The most relevant factors in this case are the considerations referred to in clauses (a), (b), (e), (f), (g) and (i) above. We discuss those and other relevant considerations commencing at paragraph 115 of these reasons.

[90] In *Limelight Entertainment Inc.,* the Commission held that, in addition to the general sanctioning factors referred to above, the following factors should be considered when a disgorgement order is proposed to be made:

(a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;

(b) the seriousness of the misconduct and the breaches of the Act and whether investors were seriously harmed;

(c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;

(d) whether the individuals who suffered losses are likely to be able to obtain redress; and

(e) the deterrent effect of a disgorgement order on the respondents and other market participants.

(Limelight Entertainment Inc. (Re), (2008), 31 OSCB 12030 ("***Limelight***") at para. 52)

The most relevant factors in this case are the considerations referred to in clauses (a), (b), (c) and (e) above.

[91] Accordingly, we considered the factors referred to in paragraph 90 above in coming to our conclusions with respect to disgorgement.

[92] Ultimately, the sanctions we impose should protect investors and Ontario's capital markets and deter the Respondents and others from similar misconduct in the future.

(ii) Breach of Fiduciary Duty Cases

[93] This matter involves CHCC's multiple breaches of its fiduciary duty as found in the Merits Decision. Staff referred us to several cases in which courts have considered breaches of fiduciary

duty. Those decisions are relevant in considering sanctions for a breach of section 116 of the Act, which imposes a fiduciary duty on IFMs.

[94] While a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty and confidentiality inherent in the fiduciary obligation imposes a corresponding duty of loyalty on a fiduciary. The fiduciary principle "monitors the abuse of a loyalty reposed" (see *Hodgkinson v. Simms,* [1994] 3 SCR 377 ("***Hodgkinson***") at paras. 26 and 27). The misconduct in this matter goes "to the heart of the duty of loyalty that lies at the core of the fiduciary principle" (*Hodgkinson, supra,* at para. 93).

[95] At common law, when a court is considering remedies for breaches of fiduciary duty, it considers both prophylactic and restitutionary purposes (*Strother* v. *3464920 Canada Inc.,* [2006] 2 SCR 177 at paras. 75 and 76 *("**Strother**"*)).

[96] With respect to the prophylactic purpose, the Supreme Court of Canada held in *Strother:*

> [W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits ... equity requires disgorgement of any profits received *even where the beneficiary has suffered no loss* because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. (Emphasis added)
>
> (*Strother, supra,* at para. 77)

[97] In *Re Manna Trading Corp. Ltd.*, the British Columbia Securities Commission (the "**BC Commission**") ordered disgorgement in circumstances involving a fraudulent investment scheme. The BC Commission held that disgorgement orders serve a prophylactic purpose, citing the Supreme Court's decision in *Strother:*

> In *Strother* v. *3464920 Canada Inc.,* 2007 SCC 24 the Supreme Court of Canada held that disgorgement orders serve a prophylactic purpose, noting that "the objective is to preclude the fiduciary from being swayed by considerations of personal interest." The court goes on to say that such orders "teaches [*sic*] faithless fiduciaries that conflicts do not pay. The prophylactic purpose thereby advances the policy of equity..."
>
> Although *Strother* is about civil disgorgement orders against fiduciaries, the reasoning, in our opinion, applies equally well to administrative disgorgement orders under section 161(l)(g). Those orders serve to deter persons from illegal activity by removing the incentive of profiting from illegal misconduct. Section 161(l)(g) does not have punishment as its objective. It removes from contravening parties money not rightfully theirs, thus advancing the policy of ensuring that those who contravene securities laws do not profit from their misconduct, and that money obtained by contravening the Act is returned.
>
> (*Re Manna Trading Corp. Ltd. (Re),* 2009 BCSECCOM 595 ("***Manna Trading***") at paras. 35 and 36)

[98] In *Hodgkinson,* the Supreme Court of Canada upheld a trial decision in which an accountant was held to have breached his fiduciary obligation to his client, a stock broker, when he advised him to invest in certain tax sheltered properties. At the time, the accountant was also acting for the developers in structuring the projects and did not disclose that fact to his client. The client relied on the advice and suffered significant losses when the value of the properties fell in a general decline in the real estate market. The Supreme Court noted that while there had been a general economic recession, the fiduciary breach had initiated the chain of events leading to the client's loss and the breaching party was required to account for the loss in full (*Hodgkinson, supra,* at paras. 4-12 and 70).

[99] The Supreme Court upheld the trial judge's award of damages finding that it was unjust to place the risk of market fluctuations on an investor who would not otherwise have entered into the transaction but for the advice of the accountant. In doing so, the Supreme Court noted that "[t]he law of fiduciary duties has always contained within it an element of deterrence" and commented that there was a "need to put special pressure on those in positions of trust and power over others in situations of vulnerability" (*Hodgkinson, supra,* at para. 93).

[100] The Supreme Court also stated:

> Like-minded fiduciaries in the position of the respondent would not be deterred from abusing their power by a remedy that simply requires them, if discovered, to disgorge their secret profit, with the beneficiary bearing all the market risk. If anything, *this would encourage people in his position to in effect gamble with other people's money*, knowing that if they are discovered they will be no worse off than when they started. As a result, the social benefits of fiduciary relationships, particularly in the field of independent professional advisors, would be greatly diminished. (Emphasis added)
>
> (*Hodgkinson, supra,* at para. 93)

[101] The comments of the Supreme Court set out in paragraphs 96 and 100 above are particularly apt in the circumstances before us. In this case, CHCC gambled with other people's money by causing CHF to make the Fairway Loan and to enter into the Citadel Acquisition. CHCC very substantially profited from that misconduct.

(iii) Fraud Cases

[102] The Respondents submit that the cases referred to by Staff involving fraud are not relevant to imposing sanctions in this case.

[103] In *Re Sextant Capital Management Inc*. (2011) 34 OSCB 5863 ("***Sextant***"), the Commission held that all of the respondents breached their duties as IFMs contrary to section 116 of the Act, committed other violations of securities laws, and acted contrary to the public interest. The corporate respondents and Otto Spork ("**Spork**"), the directing mind of the corporate respondents, were held to have perpetrated a fraud contrary to section 126.1 of the Act, and the corporate respondents were held to have failed to maintain proper books and records contrary to section 19 of the Act. Two other participants were found to have failed to act honestly, fairly and in good faith toward their clients, contrary to section 2.1 of Rule 31-505, and to have acted contrary to the public

interest (decision on sanctions in *Sextant Capital Management Inc. (Re)* (2012), 35 OSCB 5213 at para. 3).

[104] The Commission found that the securities law violations in *Sextant* were serious and the respondents' conduct was egregious. The respondents raised $23 million by way of subscriptions from approximately 250 investors. The Commission found that Spork wrongfully inflated the carrying value of his hedge fund's assets which resulted in fee payments to Spork of almost $7.0 million. As a result, the Commission found that investors suffered substantial financial losses.

[105] The Commission imposed permanent market conduct bans on Spork and the corporate respondents, and required Spork to disgorge $6.35 million and pay a $1.0 million administrative penalty and $350,000 in costs.

[106] Staff submits that the decision in *Sextant* is highly relevant to this case because it involved a breach of section 116 of the Act, where the respondents gained financially through increased fees while investors suffered substantial harm. On the other hand, the Respondents submit that *Sextant* involved a finding of fraud and secret personal benefits and that there is no analogy between that case and this one.

[107] Staff submits that the breaches of CHCC's fiduciary duty under section 116 of the Act are just as serious as breaches of Ontario securities law involving fraud and that sanctions decisions involving fraud may be of assistance in determining sanctions in this case.

(iv) Conclusions

[108] Where there has been a breach of fiduciary duty from which a fiduciary has substantially benefited, it is appropriate to order full disgorgement of that benefit to the extent that we are legally entitled to do so under the Act. Ordering disgorgement preserves the integrity of the fiduciary relationship and ensures that others in similar fiduciary relationships are deterred from similar breaches of duty. Disgorgement may be ordered for breach of fiduciary duty even where the beneficiaries of the duty (in this case, CHF and its unitholders) suffered no direct financial loss (see paragraph 96 of these reasons).

[109] There would be limited deterrence if a fiduciary is allowed to profit from its breach of duty. This is particularly so with respect to the regulation of capital markets where enormous sums of money and financial benefits can be involved. As a result, there may be large economic incentives for non-compliance with Ontario securities law (*Rowan* v. *Ontario (Securities Commission),* [2012] OJ No 1375 (CA) ("***Rowan Appeal***"); see paragraph 224 of these reasons). The Commission has adopted the similar principle that a person should not be permitted to profit from their breach of Ontario securities law (see *Allen (Re)* (2006), 29 OSCB 3944 at paras. 35-36, *Momentas, supra,* at para. 46, *Sabourin (Re)* (2010) 33 OSCB 5299 at paras. 68-69, *Pogachar (Re)* (2012), 35 OSCB 6479 at paras. 34-36; and *Sextant, supra*, at para. 16).

[110] While Pushka may have surrendered his registration and is no longer active in the investment fund industry, we must nonetheless consider the general deterrence of others.

[111] In this case, CHCC and Pushka benefited substantially from the breaches of their fiduciary duties. Staff submits that the amounts paid to CHCC over the Relevant Period as a result of the Respondents' misconduct totalled $53,806,738 (although Staff makes various deductions from that

amount in requesting disgorgement; see paragraph 188 of these reasons). There is no doubt that CHCC profited very substantially from the Fairway Loan and the Citadel Acquisition, even if there were some benefits to unitholders from those transactions and even though the Fairway Loan was repaid and the CHCC Note was ultimately discharged.

[112] An IFM such as CHCC is in a particular position of trust because it is managing investors' money on a discretionary basis. An IFM has a particular duty to ensure that, in the management of that money, it does not put itself in a position of conflict and, if it does, to ensure that any conflict is appropriately addressed. CHCC has profited very substantially from transactions that it caused CHF to implement and in which CHCC had a clear conflict of interest. CHCC was gambling with other people's money in connection with the Fairway Loan and the Citadel Acquisition. We held in the Merits Decision that, in doing so, CHCC breached its fiduciary duty to CHF and its unitholders. This is one of the most important considerations in imposing disgorgement and other sanctions in this matter.

[113] We acknowledge, however, that Commission decisions relating to fraudulent investment schemes and illegal distributions are of limited relevance to our consideration of the appropriate sanctions in this matter. While *Sextant* is relevant because that decision involved a breach of section 116 of the Act, we recognise that this matter does not involve fraud or an illegal distribution.

[114] We are satisfied that we have sufficient cogent and compelling evidence before us upon which to base our decisions on sanctions and costs and to appropriately exercise our public interest jurisdiction.

B. FACTORS CONSIDERED IN IMPOSING SANCTIONS

[115] The Commission must apply the principle of proportionality in determining the appropriate sanctions to be imposed on a respondent. That means that the sanctions imposed must be proportionate to both the conduct of the respondent and to the particular circumstances of the respondent.

[116] In imposing sanctions on the Respondents, we considered the following factors.

(i) The Seriousness of the Contraventions of Ontario Securities Law

[117] The contraventions by the Respondents of Ontario securities law found in the Merits Decision involve very serious breaches of Ontario securities law, including multiple breaches of fiduciary duty.

[118] An IFM has a fiduciary duty under section 116 of the Act. Accordingly, an IFM is required to act with utmost good faith and in the best interests of the investment fund it manages and to put the interests of the fund and its unitholders ahead of its own. We held in the Merits Decision that acting in the best interests of CHF included "an obligation to look to and take account of the best interests of the unitholders of that fund as a whole" (Merits Decision at para. 109). We also held in the Merits Decision that there were multiple breaches by CHCC of this duty. An IFM's breach of its fiduciary duty under section 116 of the Act by using fund assets for its own benefit is very serious misconduct.

[119] The misconduct in this case took place over approximately one year and was not an isolated event. The Respondents materially breached their fiduciary duties to CHF and its unitholders four times during that period.

[120] The Commission held in the Merits Decision that Pushka "orchestrated all of these events and transactions, manipulated them to obtain his intended outcomes and knew exactly what he was doing." The Commission concluded that "[o]verall, Pushka's conduct was appalling for a person in a fiduciary relationship with CHF (and its predecessors)" (Merits Decision at para. 632).

(ii) Investor Harm

[121] One of the factors we must consider in imposing sanctions is whether the breaches by CHCC of its fiduciary duty gave rise to investor harm. Accordingly, we must assess whether CHF unitholders suffered direct financial losses as a result of CHCC's breaches of its fiduciary duty. In this case, the Fairway Loan was repaid with interest to CHF and the investment by CHF in the rights to the Citadel Management Agreements was repaid in cash and by the issuance of the CHCC Note that was ultimately discharged.[1] These circumstances are a factor in considering appropriate sanctions. We note, however, that disgorgement, in particular, can be ordered for a breach of fiduciary duty even where there have been no direct investor losses (see paragraph 96 of these reasons).

[122] The fact that CHF unitholders did not suffer direct financial losses (except as referred to in paragraph 125 below) does not mean, however, that unitholders of CHF did not suffer harm as a result of the breaches by CHCC of its fiduciary duty. As discussed in the Merits Decision, unitholders were exposed to substantial financial and other risks as a result of the Fairway Loan and the Citadel Acquisition (see paragraph 377 of the Merits Decision and the discussion commencing at paragraph 524 of the Merits Decision). For instance, we stated in the Merits Decision with respect to the Citadel Acquisition that:

> [528] If the unitholders of the Citadel Funds voted to terminate the Citadel Management Agreements, the relevant Citadel Funds would have been obligated to pay CHF (assuming that CHF was holding the rights in those agreements) aggregate termination fees of approximately $16 million (based on Pushka's statement at the CHCC Board meeting on June 22, 2009; see paragraph 443 of these reasons). Those termination fees were substantially less than the $28 million paid by CHF for the acquisition of the rights to the Citadel Management Agreements. Pushka advised the CHCC Board that terminations of those agreements were unlikely. Nonetheless, they were a real risk given the controversial nature of the proposed mergers from the perspective of the Citadel unitholders and the material changes that were proposed to be made to the rights of Citadel unitholders, including increased management fees, through the mergers …
>
> (Merits Decision at para. 528).

[1] We refer to the "discharge" of the CHCC Note. That was the term used in the CHF financial statements and we have adopted that usage primarily because the CHCC Note was reduced by redemption fees paid by unitholders (see paragraph 213 of these reasons) and by "profits" arising from CHF's normal course issuer bid (see paragraph 126 of these reasons).

[123] As events ultimately turned out, only five of the Citadel Funds were merged with CHF. The other Citadel Funds paid break fees of $9,756,275 to CH Administration LP[2] as a result of the termination of the relevant Citadel Management Agreements (line 13 of the Payments Summary). That means that one of the significant risks to CHF of the Citadel Acquisition actually occurred. As noted above, if all of the Citadel Management Agreements had been terminated, CHF would have received $16 million in termination or break fees, far less than its investment of $28 million in the rights to the Citadel Management Agreements.

[124] The Respondents caused CHF to enter into the Fairway Loan and the Citadel Acquisition knowing the substantial risks that would arise and that those risks would be borne by CHF and its unitholders. Those risks were real and foreseeable. The fact that the Fairway Loan was repaid and the CHCC Note was ultimately discharged does not detract from the seriousness of those risks. While CHF was exposed to the risks, the Citadel Acquisition allowed CHCC to obtain substantial financial benefits that were disproportionate to any benefits to unitholders that arose upon the mergers of the Citadel Funds with CHF (see paragraph 128 below).

[125] Further, (i) CHF unitholders who redeemed their units after the Fairway Transaction were charged a portion of the Fairway Loan totalling $364,884 (see paragraph 343 of the Merits Decision and line 26 of the Payments Summary); (ii) CIF and EIF unitholders who redeemed their units after the amendments to their respective declarations of trust approved at the August 2012 Meetings (referred to in paragraph 139 of these reasons) were charged a 5% redemption fee aggregating $6,598,892 during the Relevant Period (see paragraph 213 of these reasons and lines 18 and 19 of the Payments Summary); and (iii) the CHCC Note was reduced by the difference between the market price of units purchased by CHF pursuant to its normal course issuer bid and the NAV of those units aggregating $4,980,491 (line 25 of the Payments Summary). Accordingly, CHF unitholders directly subsidised the repayment of the Fairway Loan and the discharge of the CHCC Note.

[126] As noted above, the CHCC Note was reduced by the difference between the market price of units purchased by CHF pursuant to its normal course issuer bid and the NAV of those units. CHF used its own assets to acquire the units pursuant to its normal course issuer bid. Any "profit" from those purchases was a CHF asset. By reducing the amount of the CHCC Note in this manner, CHCC appropriated a CHF asset and applied that asset to reduce *the debt of CHCC to CHF*.

[127] Accordingly, there was real investor harm, and potential harm, as a result of CHCC's breaches of its fiduciary duty.

(iii) Amounts Obtained by CHCC

[128] The financial benefits obtained by CHCC as a result of its breaches of fiduciary duty are one of the most important considerations in this matter. We made the following statements in this respect in the Merits Decision:

> [374] There is no doubt that the small size of CHDF as of July 2008 meant that the fixed costs of operating the fund were becoming a burden to unitholders (see the

[2] CH Administration LP was the limited partnership that, indirectly through 1472278 Alberta Ltd., held the rights to the Citadel Management Agreements. CHF owned, directly or indirectly, all of the equity of that partnership.

disclosure in the August 08 Circular set out in paragraph 239 of these reasons). As of July 23, 2008, the CHDF NAV was approximately $6.4 million. CHDF and MACCs were merged on December 30, 2008, as a result of which the NAV of the continuing fund increased to approximately $10.2 million. Pushka reported to the CHCC Board on March 27, 2009 that, as a result of the merger of CHDF and MACCs, "liquidity had increased greatly" (see paragraph 262 of these reasons). A similar report was made to the IRC at a meeting held on April 8, 2009. As a result of the merger of CHF with the Fairway Fund on January 23, 2009, the NAV of the continuing fund increased to approximately $44 million. The following table shows these increases in NAV and includes the subsequent increase in NAV as a result of the merger of five of the Citadel Funds with CHF in December 2009:

	Approximate CHF NAV[1]
As of July 23, 2008 (for CHDF)	$6.4 million
After the merger with MACCs on December 30, 2008	$10.2 million
After the merger with the Fairway Fund on January 23, 2009	$44 million
After the mergers with five of the Citadel Funds in December 2009	$237 million

[1]Approximate NAV of the continuing fund.

[375] There is equally no doubt that CHF unitholders obtained benefits from the merger of CHF with the Fairway Fund. Those benefits were increased market liquidity for their units as a result of having more units outstanding and the spreading of fixed fund costs over the larger number of units outstanding. As a result of the merger, CHF increased its NAV from approximately $10.2 million to approximately $44 million. Subsequent to the Fairway Transaction, CHF's MER was reduced to 1.8% for the six months ended June 30, 2009. (The CHDF MER for the period ended June 30, 2008 was 3.62% and for MACCs was 5.10% (see paragraph 183 of these reasons)). Further, the Fairway Transaction did not dilute the interests of CHF unitholders (because the merger of CHF with the Fairway Fund was carried out based on NAV) and the costs were represented by Pushka in the Discussion Document as being a fraction of what they would have been if CHF had carried out a public distribution of additional units (see paragraph 320 of these reasons).

[376] Those benefits were, however, much less significant than the increase in management fees that CHCC received as a result of the acquisition of the rights to the Fairway Management Agreement and the increase in NAV of CHF following the merger of CHF with the Fairway Fund. For the year ended December 31, 2008, the management fees paid by CHF to CHCC were $44,218 and the management fees paid by MACCs to CHCC were $21,767. For the year ended December 31, 2009, the management fees paid by CHF to CHCC had increased to $606,404 (we note that

five Citadel Funds were merged with CHF in December 2009) and for the year ended December 31, 2010, they were $2,458,427...

(Merits Decision at paras. 374 to 376)

[129] Clearly, CHCC substantially benefited from increased management fees following the mergers of the Fairway Fund and five of the Citadel Funds with CHF. CHCC also benefited from the payment to it of management, termination, redemption and other fees.

[130] Staff prepared a summary of the amounts they say were obtained by CHCC and Pushka as a result of their contraventions of Ontario securities law in connection with the Citadel Acquisition. Yvonne Lo, a Staff senior forensic accountant, submitted an affidavit sworn on November 8, 2013 addressing this issue (the "**Lo Affidavit**"). Exhibit "HHH" to the Lo Affidavit is attached as Schedule B to these reasons. That Schedule sets forth a summary of those amounts (we refer to that Schedule as the "**Payments Summary**".) The Payments Summary shows that, over the Relevant Period, CHCC and related entities received, or had the direct benefit of, management and other fees and amounts totalling $53,806,738 (see paragraphs 187 and 188 of these reasons and the Payments Summary). Accordingly, it is clear that CHCC received very substantial amounts as a result of the breaches of its fiduciary duty in connection with the Citadel Acquisition (see the discussion of causation commencing at paragraph 197 of these reasons).

(iv) Deterrence

[131] Deterrence is one of the most important considerations in determining sanctions for an IFM for breaches of fiduciary duty because of the real possibility that an IFM will abuse its position of trust to obtain substantial financial gains. Section 116 of the Act imposes a fiduciary obligation on an IFM in recognition of that possibility and of the fact that an IFM has significant discretion over the management of the assets of others. An IFM that abuses that trust must be subject to substantial sanctions that send a strong deterrent message (see our conclusions in this respect commencing at paragraph 108 of these reasons). Sanctions in this matter must be sufficient overall to provide effective deterrence to the Respondents and others.

(v) Approvals by Unitholders

[132] The Respondents urge us to consider the role played by unitholders in approving matters that occurred subsequent to the intervention by Staff in June 2009 following the Citadel Acquisition. The Respondents submit that we should consider the importance of the following unitholder approvals:

(a) the approval by CHF unitholders of mergers with certain of the Citadel Funds, the Divestiture and other matters at the September 2009 Meeting, by 97.64% of the units that were voted (see the discussion commencing at paragraph 206 of these reasons);

(b) the approval of the creation by merger of CIF by the unitholders of Hytes (by 98.25% of the units that were voted), Premium (by 95.33% of the units that were voted), S-l (by 97% of the units that were voted) and Stable S-l (by 93.95% of the units that were voted) (see paragraph 26 of these reasons);

(c) the approval of the creation of the Blue Ribbon Fund by the unitholders of Diversified by 95% of the units that were voted and by the unitholders of Series S-l by 98% of the units that were voted (see paragraph 25 of these reasons). The Respondents submit that the circular sent to unitholders in connection with that meeting clearly disclosed the termination fees that would be paid if the transaction was approved;

(d) the approval of the creation of EIF, with CHCC as IFM, by 83.05% of the units of Sustainable that were voted and by 99.51% of the units of CGF LP that were voted (see paragraph 32 of these reasons); and

(e) the approval by unitholders of CIF and EIF at the August 2012 Meetings at which unitholders approved the Unitholder Empowerment Plan that included fees of 5% of NAV payable to CHCC on CHCC's termination or resignation as IFM, and redemption fees of 5% of NAV upon any redemption of units, which resolution was approved by 94.20% and 89.62% of the units that were voted, respectively (see paragraph 43 of these reasons).

[133] The September 2009 Meeting is discussed in more detail commencing at paragraph 206 below and the August 2012 Meetings are discussed in more detail commencing at paragraph 139 below.

[134] We do not accept the Respondents' submission that the unitholder approvals referred to in paragraph 132 above are material mitigating factors for the following reasons:

(a) the mergers referred to in paragraphs 132 (a), (b) and (d) above were directly related to the Citadel Acquisition and were carried out in furtherance of CHCC's original objective of causing CHF to merge with the Citadel Funds as part of the Citadel Transaction;

(b) the approvals by unitholders at the September 2009 Meeting and at the August 2012 Meetings were based, in each case, on a single vote on one resolution relating to a number of different material matters (see the discussion commencing at paragraphs 206 and 139 of these reasons);

(c) a unitholder who opposed or disagreed with (i) the terms of the Divestiture considered at the September 2009 Meeting, or (ii) the matters considered at the August 2012 Meetings, may well have voted in favour in order to be able to redeem their CIF or EIF units based on NAV rather than the lower market price (see paragraph 136 below);

(d) there was no disclosure to unitholders in connection with the vote at the September 2009 Meeting of the alleged contraventions by CHCC of its fiduciary duty that were the subject of the Merits Hearing (see paragraph 138 below);

(e) the disclosure in the CIF Circular in connection with the August 2012 Meetings provided no substantive disclosure to unitholders of the basis or reasons for the views expressed by the IRC (see paragraphs 144 to 146 of these reasons); and

(f) while the percentage votes in favour of the relevant matters appear overwhelming, those percentages are of the units that were voted at the meetings; generally, relatively few

unitholders of investment funds participate in or vote at such meetings; the quorum for meetings of unitholders of CHF was 10% of the units; we do not know how many units were represented at each meeting.

See our specific conclusions with respect to the CHF unitholder approvals given at the September 2009 Meeting and the August 2012 Meetings in paragraphs 151 and 211 of these reasons.

[135] It is important to note that simply because CIF or EIF unitholders approved the matters voted on at the August 2012 Meetings does not mean that the later payment of termination or resignation fees to CHCC were not amounts obtained by CHCC as a result of its breach of its fiduciary duty. Depending on the circumstances, unitholder approval may not be absolution for a breach of fiduciary duty, particularly where the circumstances are not adequately disclosed to unitholders or the unitholders are not given the opportunity to vote separately on distinct and material matters. That appears to be the case with respect to the approvals given by unitholders at the August 2012 Meetings (see the discussion commencing at paragraph 139 below). Further, in our view, the CHF unitholder approvals given at the September 2009 Meeting and the August 2012 Meetings did not break the causal link between the Respondents' breach of their fiduciary duty in connection with the Citadel Acquisition and the subsequent payment of termination or resignation fees to CHCC.

[136] With respect to paragraph 134(c) above, we know that redemptions in connection with the mergers following the September 2009 Meeting resulted in an approximate 50% decrease in the assets of the merging funds; redemptions in connection with the mergers referred to in paragraph 132(d) above resulted in a reduction of fund assets of approximately 25%; and redemptions following the August 2012 Meetings resulted in CIF redemptions of $96,992,273, and EIF redemptions of $30,811,978.

[137] We note in this respect that the CIF Circular (for the August 2012 Meetings) contained the following disclosure:

> **1. Enhanced Redemption Option:**
>
> Since Citadel Income Fund's (the "Fund") issuance of warrants in 2011, units of the Fund have been trading at a higher discount to net asset value (the "Discount") than in prior years. In an effort to reduce the Discount and provide enhanced liquidity, the Manager has actively purchased and cancelled units through a normal course issuer bid.
>
> Despite the Manager's best efforts, the Discount has not substantially narrowed and averaged 17.4% as recently as May 2012.
>
> By providing the right to unitholders to voluntarily elect to receive an **unlimited cash redemption** of their units at 95% of the net asset value of units less expenses, unitholders will be able to redeem potentially at a price in excess of the trading price and thereby narrow the Discount. (Emphasis in original)

Accordingly, any redeeming unitholders would have received on redemption an amount that was approximately 12.4% more than the market price of their units but nonetheless 5% less than NAV.

[138] We note with respect to paragraph 134(d) above that the disclosure in the proxy circular for the September 2009 Meeting was that "[t]he OSC has expressed strong concerns about the Fund, as a closed-end fund, having acquired a beneficial interest in the management of other closed-end funds through the Citadel Acquisition. They expressed a separate concern because the Citadel Acquisition is significant relative to the size of the Fund. In recognition of the OSC's concerns, and assuming that the Hostile Proposal is unsuccessful, the Manager intends to implement a divestiture plan (the "Divestiture Plan") for the Administrative Services Agreements."

(vi) Unitholder Approvals Given at the August 2012 Meetings

[139] The special meetings of CIF and EIF unitholders held on August 7, 2012 (referred to in these reasons as the August 2012 Meetings) was to consider and vote on the Unitholder Empowerment Plan. The notice of meeting for the CIF unitholder meeting indicated that the vote was on a single resolution that:

(a) provided for the right of unitholders to redeem an unlimited number of their units at 100% of NAV per unit less retraction costs and a fee payable to CHCC as IFM of 5% of the NAV of the units redeemed;

(b) implemented a series of minority unitholder protections which included a requirement that ordinary and extraordinary resolutions would require affirmative votes of 50% and 66 2/3%, respectively, of beneficial unitholders;

(c) amended the provisions of the trust indenture relating to the "termination and replacement" of the IFM;

(d) removed certain provisions of that trust indenture that allowed the trustee of CIF to make changes to the declaration of trust without unitholder approval; and

(e) made a number of other amendments to the declaration of trust.

(Notice of Special Meeting of Unitholders dated July 4, 2012)

We note that the reference to the "termination and replacement of the IFM" does not refer expressly to the "voluntary resignation" of the IFM.

[140] As noted above, the CIF Circular was entitled "The Unitholder Empowerment Plan". The cover letter to unitholders accompanying the CIF Circular made no mention of the amendments to the provisions of the trust indenture relating to the termination or resignation of CHCC as IFM (although the reference set forth in paragraph 139(c) above was made to that matter in the notice of meeting and in the CIF Circular under "Special Meeting Business"). At the end of the cover letter in bold text was the statement that "Special Redemption Right Only available if the Extraordinary Resolution is approved" and "If you wish to redeem your units, please contact your investment adviser."

[141] There were two paragraphs in the CIF Circular under the heading "Amendments to Provisions Relating to Resignation or Removal of Manager". The first paragraph indicated that the CIF Declaration of Trust was proposed to be amended "to reduce the period for removal of the

Manager by Unitholders from 180 to 60 days and reduce the notice period for resignation from 180 days to 45 days."

[142] The second paragraph provided as follows:

> The Manager will be entitled to a fee of 5% of the net asset value of the Fund upon removal or resignation. This fee represents a recapture by the Manager of the significant long-term investment it has had to undertake to act as manager of the Fund, for which it would have been reimbursed in the normal course had the Manager remained the manager [*sic*] of the Fund.

[143] Schedule I to the CIF Circular set out the specific amendments being made to the CIF Declaration of Trust with respect to the resignation or removal of the IFM. In addition to permitting the IFM to resign on 45 days' notice, a new Section 11.5(4) was proposed as follows:

> If the Manager is terminated pursuant to Section 11.5(1) or the Manager is partially terminated through the redemption, cancellation or retraction of units, the Trust shall pay to the Manager, in cash, at least one business day prior to the termination an amount equal to the product of the net asset value of the number of units to be terminated and five percent (plus applicable taxes, if any), together in any event with the reasonable expenses of the Manager resulting from such termination, including without limitation, costs incurred to terminate employees, office and equipment leases and agreements for services. Each of the Trust and the Manager agree that the foregoing obligations of the Trust represent a genuine pre-estimate of the damages that would be suffered by the Manager in the event the Manager or the Trust was terminated or partially terminated.
>
> If the Manager tenders its resignation pursuant to Section 11.5(1), then the Trust shall pay to the Manager, in cash, within 45 days of such resignation being tendered an amount equal to the product of the net asset value of the number of units to be terminated and five percent (plus applicable taxes, if any), together in any event with the reasonable estimate of expenses of the Manager anticipated to result from such resignation, including without limitation, costs incurred to terminate employees, office and equipment leases and agreements for services.

It is not clear to us how this last paragraph operated on a resignation of the IFM because there are no "units to be terminated" in the case of a resignation. It was presumably this paragraph that was relied upon by CHCC to receive the termination fees in connection with its resignation as IFM referred to in paragraph 213 of these reasons.

[144] There was only one paragraph of the CIF Circular under the heading "Recommendation of the Independent Review Committee". That paragraph provided as follows:

> As required by National Instrument 81-107, "Independent Review Committee for Investment Funds", the Manager has established an independent review committee (the "IRC") for the Fund. The Manager referred the calling of the Meeting to the IRC for its consideration. On July 4, 2012, the IRC advised the Manager that it had concluded that the calling of this Meeting to put before Unitholders such resolutions as are contemplated in this Circular is a fair and reasonable process to be followed by

> the Fund and that the matters to be considered at the Meeting, if approved, would achieve a fair and reasonable result for the Fund.

[145] There was no disclosure in the CIF Circular identifying the members of the IRC and there was no discussion of (i) what conflicts of interest on the part of CHCC required matters to be submitted to the IRC; or (ii) what the IRC considered and relied on in concluding that "… the matters to be considered at the Meeting, if approved, would achieve a fair and reasonable result for the Fund." We note that those matters included the payment to CHCC of (i) a termination or resignation fee of 5% of NAV in the event it was terminated as IFM or it resigned; and (ii) a fee to be paid by redeeming unitholders to CHCC of 5% of the NAV of any units redeemed.

[146] There was no other disclosure in the CIF Circular relating to the resignation of CHCC as IFM. *In particular, there was no statement by CHCC as to its intentions with respect to resigning as IFM and there was no reference in the circular to the notice filed by Artemis with Staff, almost eight months earlier, on December 21, 2011, relating to Artemis' proposed acquisition of all or a substantial part of the assets of CHCC and Artemis becoming IFM of CIF and EIF* (see paragraph 159 of these reasons).

[147] The Respondents filed written submissions in connection with this hearing on sanctions and costs (the "**Submission**"). In Part II of the Submission – Statement of Facts, reference was made to the August 2012 Meetings. The Submission included the following two concluding paragraphs:

> 95. Further, a resolution was proposed that the Manager would be entitled to a fee of 5% of NAV upon removal or resignation.
>
> 96. At the unitholder meeting of CIF on August 7, 2012, the various resolutions were proposed as part of the Unitholder Empowerment Plan, including the Special Retraction and fee for the removal or resignation of the Manager, were approved 94.20% of the units voted[48] [*sic*]. At the EIF meeting, the resolutions were approved by 89.62% of the units voted.[49]

[148] The reference to the EIF meeting was a reference to the special meeting of unitholders of EIF also held on August 7, 2012 at which identical business was conducted (defined as one of the August 2012 Meetings). The proxy circular for that meeting was substantially identical to the CIF Circular (see paragraph 42 of these reasons).

[149] The amendments made to the CIF and EIF declarations of trust as a result of the August 2012 Meetings must be the basis upon which termination fees were paid to CHCC following CHCC's resignation as IFM of CIF and EIF. CHCC evidently decided to resign as IFM no later than the previous December 21, 2011 when Artemis gave notice to Staff of its proposed acquisition of the assets of CHCC (see paragraph 159 of these reasons). Artemis was approved as the new IFM by unitholders of CIF and CEF at unitholder meetings held on December 18, 2012. The resignation of CHCC as IFM appears to have been effective on January 15, 2013 when Artemis was appointed.

[150] The Respondents submit, among other things, that the termination fees and other amounts paid to CHCC upon its resignation as IFM were not causally connected to CHCC's breach of fiduciary duty arising from the Citadel Acquisition because the approvals given by unitholders at the August 2012 Meetings were intervening events that broke the chain of causation (see the discussion of causation commencing at paragraph 197 of these reasons). We do not accept that

submission. First, we do not agree that the unitholder approvals or other intervening events referred to by the Respondents broke the chain of causation between the breach by CHCC of its fiduciary duty and the payment of those fees and amounts (see paragraphs 203 and 204 of these reasons). In any event, the circumstances described above relating to the August 2012 Meetings (commencing at paragraph 139 above) raise on their face sufficient concerns surrounding (i) the adequacy of the disclosure made to unitholders, and (ii) the validity and effectiveness of the approvals by unitholders of the amendments permitting the payment of termination fees to CHCC on its voluntary resignation, as to lead us to conclude that the resolutions passed by CIF and EIF unitholders at the August 2012 Meetings did not break the causal link between the breach by CHCC of its fiduciary duty in connection with the Citadel Acquisition and the payment of those termination fees.

[151] Accordingly, we conclude that the approvals given by CIF and EIF unitholders at the August 2012 Meetings are not mitigating considerations in imposing sanctions on the Respondents.

(vii) Involvement of Staff in Subsequent Events

[152] CHCC submits that:

> In this case, Staff was intimately involved with the events that followed the Citadel Acquisition and, if Staff was of the view that it was inappropriate for the respondents to obtain any amount of money, it had significant powers at its disposal to restrain such event. It is completely unfair for Staff to have passively observe [*sic*] the various events that have occurred over the past five years, many of which directly resulted in the payment of money to CHCC and many of which were completed with the express approval of the Commission, and then attempt to claim those amounts for the Consolidated Revenue Fund as being an 'improper benefit' obtained as a result of non-compliance.
>
> (Submission at para. 143)

[153] We respond to those submissions as follows.

[154] First, there is no question that CHCC responded to Staff's concerns by restructuring the CHF investment in the rights to the Citadel Management Agreements (by means of the Divestiture) and by addressing a number of the other concerns raised by Staff with respect to the Citadel Acquisition and the Reorganization as originally contemplated. Further, a number of those other concerns were addressed by CHCC by (i) maintaining the listing of CHF units on the TSX; (ii) CHF granting the Special Redemption Right to unitholders in connection with the Divestiture; and (iii) CHCC not implementing mergers of CHF and certain of the Citadel Funds based on the permitted merger provision in a fund's declaration of trust.

[155] It appears to us, however, that Staff's principal objective was to have the Citadel Acquisition reversed or restructured in the best interests of CHF unitholders. CHCC was, however, unable to obtain financing to simply purchase the rights to the Citadel Management Agreements from CH Administration LP for cash. As a result, CHF's investment was restructured by the transfer of the rights to the Citadel Management Agreements to CHCC, the consideration for which was a cash payment to CHF and the issuance of the CHCC Note. That transaction is referred to in these reasons as the "Divestiture" (see paragraphs 30 and 209 of these reasons). Further, Staff appears to have

reviewed the disclosure in the CHF management proxy circular related to unitholder approval of the Divestiture (see paragraph 206 of these reasons). We note, however, that events subsequent to June, 2009 were not the subject matter of the Merits Hearing as agreed by Staff and the Respondents. Further, no witnesses were called by any party to testify at the sanctions and costs hearing as to what Staff may or may not have reviewed or approved and on what basis. The Respondents have the onus of establishing that Staff approved all of the matters the Respondents say that Staff approved.

[156] In any event, Staff must have been prepared to accept the terms of the Divestiture, including the issue and terms of the CHCC Note, the Special Redemption Right and the disclosure with respect to Staff's position referred to in paragraph 138 of these reasons. Further, CHCC addressed a number of the other Staff concerns with the Citadel Acquisition and the Reorganization referred to in paragraph 154 above. Accordingly, CHCC's co-operation with Staff in restructuring CIF's investment in the rights to the Citadel Management Agreements and in addressing Staff's other concerns are mitigating factors that we take into account in considering the imposition of sanctions on the Respondents.

[157] The Respondents knew, however, that Staff had been investigating the circumstances surrounding, among other matters, the Fairway Loan and the Citadel Acquisition. There is no evidence before us or any suggestion that Staff agreed to discontinue that investigation as a result of CHCC proceeding with the Divestiture. Rather, the Divestiture appears to us to have been undertaken by CHCC in order to stay Staff's hand from taking more immediate action to intervene in the interests of unitholders. The terms of the Divestiture and the disclosure in the management proxy circular related to unitholder approval of the Divestiture were ultimately CHCC's responsibility and any review or comments by Staff did not relieve CHCC from that responsibility.

[158] Staff did not allege in this matter that the disclosure to unitholders with respect to the Divestiture was defective or inadequate or that the Divestiture was not validly approved by unitholders. There is no evidence, however, that Staff directly approved the making of any payments by CIF or EIF to CHCC as IFM during the Relevant Period, including any management, termination, redemption or other fees paid to CHCC. It is not sufficient to say that Staff indirectly approved those fees because Staff knew of the existence of the fees because they were referred to in a disclosure document reviewed by Staff. In our view, Staff acceded, by staying its hand, only to the matters referred to in paragraph 156 above. Further, we note that the Divestiture did not directly address the payment to CHCC of management, termination, redemption or other fees (other than the Special Redemption Right). The payment of termination, redemption and other fees was approved by CIF and EIF unitholders at the August 2012 Meetings held *approximately three years after the Divestiture.* We discuss the approvals given at the August 2012 Meetings commencing at paragraph 139 of these reasons.

[159] There was, however, approval given by Staff of the acquisition by Artemis in January, 2013 of all or a substantial part of the assets of CHCC, which included the right to be appointed IFM for CIF and EIF. By letter dated December 21, 2011, Artemis gave notice to Staff of that proposed acquisition. Staff initially objected to the acquisition on January 18, 2012 (in order to require Staff approval of that transaction, Staff had to object to it within 30 days of receiving the notice). Subsequent to that objection, Artemis amended its notice by further correspondence dated February 13, 2012, September 27, 2012, December 5, 2012, December 12, 2012, December 14, 2012, January 3, 2013, January 4, 2013 and January 7, 2013. More than a year after the initial notice from

Artemis, Staff withdrew its objection and approved the proposed acquisition by Artemis in a one-page letter dated January 14, 2013 (the "**Approval Letter**") (the Approval Letter was Exhibit S to the affidavit of Clarke Tedesco sworn February 21, 2014). Staff did not, in that letter, expressly address the payment of any fees to CHCC in connection with that acquisition. Further, the letter expressly states that:

> Notwithstanding the foregoing approval, OSC staff has concerns with how the special meetings of the Funds' unitholders were conducted by CHCC to effect the Proposed Acquisition.

We note that CHCC was not expressly a party to the Approval Letter or, we assume, to the correspondence referred to in that letter.

[160] The Approval Letter was submitted to us in evidence. We do not, however, have in evidence before us any of the correspondence between Staff and Artemis referred to in the Approval Letter and we do not know what issues may have been addressed in that correspondence or what Staff concerns caused the delay in Staff approving the acquisition for more than a year. We are not prepared to conclude, based only on the Approval Letter, that Staff approved any of the termination fees or other amounts paid to CHCC in connection with its resignation as IFM. As a matter of principle, it is unlikely that Staff would ever agree to approve the payment of any such fees. At its highest, the Respondents' submission must be that Staff *indirectly* approved such fees. Having agreed with Staff not to address in the Merits Hearing events or transactions occurring after June, 2009, and having failed to introduce any evidence at the sanctions and costs hearing (other than the Approval Letter) supporting the submission that Staff approved the termination fees and other amounts paid to CHCC upon its resignation as IFM, the Respondents cannot expect such an unsubstantiated submission to be given much weight. In our view, the Respondents have not met the onus of establishing that Staff approved any matters other than those referred to in paragraphs 156 and 159 above. In particular, the Respondents have not established that Staff approved any termination fees or other amounts paid by CIF and/or EIF in connection with CHCC ceasing to be the IFM of those funds.

[161] There is no evidence whatsoever that the Commission itself approved the Divestiture or any fees or other amounts paid to CHCC during the Relevant Period or as a consequence of CHCC resigning as IFM of CIF and EIF.

[162] We also reject the submission by the Respondents that Staff's request for disgorgement is "an improper attempt to punish the respondents by seeking the disgorgement of amounts that Staff, and the Commission, could have prevented the payment of at first instance" (Submission at para. 144). It hardly lies in the mouth of the Respondents who, in breach of their fiduciary duty, orchestrated and implemented the events and transactions addressed in the Merits Decision to say that Staff or the Commission could have intervened to prevent payments to CHCC made pursuant to or subsequent to those events and transactions.

[163] Accordingly, except as noted in paragraphs 156 and 159 above, the Respondents cannot rely on purported Staff approvals as a significant mitigating factor in our consideration of the sanctions that should be imposed on the Respondents.

(viii) Approvals by Independent Directors and the IRC

[164] The Respondents also submit that mitigating factors in connection with this matter include the review and approval of the Fairway Loan and the Citadel Acquisition by CHCC's independent directors and by the independent review committee for the Fairway Fund and CHF. While those are relevant considerations, they are not significant factors for the following reasons:

(a) CHCC had a fiduciary duty to CHF and its unitholders and it cannot shift that responsibility by pointing to the roles or approvals of others; and

(b) we stated in the Merits Decision that:

> [632] It is clear that CHCC and its affiliates were a one-man band. Pushka was the directing mind, the sole shareholder (directly or indirectly), a director, Chief Executive Officer and the only senior officer of CHCC. Pushka initiated, caused to be carried out and directed all of the actions and transactions involving CHCC, its affiliates and CHF (and its predecessors) described in these reasons. Among other things, Pushka:
>
> (a) caused to be made the amendments to the MACCs Declaration of Trust referred to in paragraphs 191 and 202 of these reasons;
>
> (b) initiated and caused the mergers of CDHF with MACCs, the merger of CHF with the Fairway Fund and the mergers of CHF with five of the Citadel Funds;
>
> (c) established the terms of the Fairway Loan, the Reorganization and the Preferred Return, and negotiated and caused the Citadel Acquisition to be carried out;
>
> (d) determined the nature and extent of the information submitted to the CHCC Board and the IRC in considering the matters referred to in clauses (a), (b) and (c) above including preparation of the Discussion Document, the Pushka Memorandum and the Results Document;
>
> (e) caused the preparation of, and approved the disclosure in, the June 08 Circular, the August 08 Circular and the June 09 Circular;
>
> (f) instructed Stikeman;
>
> (g) communicated the Stikeman legal advice to the IRC in connection with the Citadel Transaction; and
>
> (h) made representations to the independent directors of CHCC and the members of the IRC referred to in these reasons, and responded orally to questions by them.
>
> In our view, Pushka orchestrated all of these events and transactions, manipulated them to obtain his intended outcomes and knew exactly what he

> was doing. At times, he misled the independent directors of the CHCC Board and the members of the IRC … but, in any event, he failed to make full disclosure to them. CHCC cannot rely on any approval by the CHCC Board or any recommendation of the IRC where less than full disclosure was made. Overall, Pushka's conduct was appalling for a person in a fiduciary relationship with CHF (and its predecessors).
>
> (Merits Decision at para. 632)

(ix) Robson's Involvement

[165] The Respondents submit that Robson's role as portfolio manager of CHF provided an added layer of review of the Fairway Transaction and the Citadel Acquisition. We made the following statements in the Merits Decision as to the appointment of Robson as portfolio manager:

> [363] CHCC had a fundamental conflict of interest in making the decision to appoint Robson because that decision was made in order to facilitate a $1.0 million loan by CHF to CHCC Holdco. While the independent directors of CHCC and the IRC were aware that the change in portfolio manager was to facilitate the Fairway Loan, it does not appear that the relevant issues relating to the change in portfolio manager were fully considered and addressed by either the independent directors of CHCC or the IRC. There is no indication in the minutes of the CHCC Board or IRC meetings that either the independent directors of CHCC or the IRC addressed the question of whether the appointment of Robson was in the best interests of CHF and its unitholders and, in particular, considered Robson's qualifications to be portfolio manager. Allen testified that he did not recall the CHCC Board considering Robson's expertise. For his part, Pushka testified that he was satisfied with Shaul's skills and expertise. He also stated, however, that "I don't think he had as much experience as I would have liked."
>
> [364] While Robson entered into the Fairway Loan Agreement on behalf of CHF, it is clear that CHCC and Pushka made the decision to cause CHF to make that loan, established the terms of the loan, and caused Robson to be appointed as portfolio manager in order to permit it.
>
> [365] The decision by CHCC to appoint Robson as portfolio manager of CHF was not a decision made in the normal course of business. It had nothing to do with ensuring that CHF received expert portfolio management advice from an experienced portfolio manager. It was an action taken for the sole purpose of permitting a related party transaction between CHF and CHCC Holdco, an affiliate of the IFM of CHF. Accordingly, the discretion of CHCC as IFM under the CHF Declaration of Trust to appoint Robson as portfolio manager was not exercised for the purpose for which it was granted.
>
> [366] We find that the appointment by CHCC of Robson as portfolio manager of CHF in these circumstances was an action taken by CHCC in bad faith. As a result, we find that the appointment of Robson and the entering into of the Fairway Loan in

> these circumstances was contrary to and breached CHCC's duty to act in good faith and in the best interests of CHF, contrary to section 116(a) of the Act.
>
> (Merits Decision at paras. 363 to 366)

[166] We made the following statements in the Merits Decision as to Robson's role in the Citadel Acquisition:

> [540] Pushka testified that Shaul accompanied him to Alberta to negotiate the Citadel Acquisition and that Pushka would not have proceeded if Shaul had objected to the transaction. We note, in this respect, that in an e-mail dated May 16, 2009 from Julie Mansi [of BLG] to Shaul, which was copied to Page, it was stated that "[w]e understand that Robson as the investment adviser does in fact believe that the Citadel transaction (including the funding of CH LP) is in the interests of the unitholders of Crown Hill Fund and the merged fund…" That is, however, different than saying that Robson, as portfolio manager of the CHF, made an independent investment decision to have CHF invest more than 60% of its assets in the rights to the Citadel Management Agreements. That was clearly not the case.
>
> [541] It is quite telling that the portfolio manager of CHF would take the position that it had not expressly approved the Citadel Acquisition.
>
> [542] In any event, it is clear that CHCC and Pushka made the decisions to cause CHF to enter into the Citadel Acquisition and to propose the Reorganization. Pushka was the driving force behind those transactions and he negotiated and caused them to be carried out.
>
> (Merits Decision at paras. 540 to 542)

[167] In the result, Robson's role is not a significant mitigating factor in our consideration of the sanctions that should be imposed on the Respondents.

(x) Legal Advice

[168] The Respondents submit that the transactions that were at issue in this matter, in particular, the Fairway Transaction and the Citadel Acquisition, were the subject of detailed legal advice and due diligence by two of Canada's leading corporate law firms.

[169] The Respondents urge the Commission to consider as a mitigating factor CHCC's reliance on the detailed legal advice that was received with respect to the design and implementation of the Fairway Transaction and the Citadel Acquisition, and the compliance of those transactions with Ontario securities law. As a result, the Respondents submit that they did not willfully breach Ontario securities law or act in bad faith in connection with those transactions.

[170] Staff submits, however, that Pushka was the President and Chief Executive Officer and a director of CHCC, which he wholly owned directly or indirectly. Staff says that Pushka initiated, caused to be carried out and directed all of the actions and transactions involving CHCC, its affiliates and CHF (and its predecessors) described in the Merits Decision. Pushka alone instructed

legal counsel and communicated legal advice obtained from legal counsel to the CHCC Board and the IRC in connection with the Citadel Acquisition.

[171] We concluded in the Merits Decision that it was reasonable, given Stikeman's expertise, for CHCC and the members of the CHCC Board to rely on Stikeman's legal advice that the Fairway Transaction and the Citadel Acquisition complied with applicable Ontario securities law (Merits Decision at para. 604). However, we also concluded that Stikeman's legal advice did not extend to the question of whether CHCC complied with its fiduciary duty in approving and carrying out the Fairway Transaction and the Citadel Transaction (Merits Decision at paras. 611 and 605). We concluded that "… the fact that CHCC obtained legal advice from Stikeman is some evidence that supports the submission that CHCC acted in good faith and with due care in connection with the approval and implementation of the Fairway Transaction and the Citadel Transaction. We set out our conclusions as to whether CHCC complied with its fiduciary duties in connection with those transactions elsewhere in these reasons" (Merits Decision at para. 614).

[172] Accordingly, CHCC's reliance on legal advice is a mitigating consideration in imposing sanctions but is not a significant factor given CHCC's multiple breaches of its fiduciary duty and the fact that the legal advice obtained did not extend to CHCC's compliance with its fiduciary duty.

(xi) Respondents' Experience in the Marketplace

[173] A registrant is held to a higher level of ethical conduct and is expected to have a higher level of awareness of its responsibilities than a non-registrant (*Re Rowan* (2009), 33 OSCB 91 at para. 145 ("***Rowan***")).

[174] Pushka was the President and Chief Executive Officer and a director of CHCC, which he wholly-owned directly or indirectly. He was also registered with the Commission as an Investment Counsel and Portfolio Manager and had been registered in that capacity since at least 2006. In addition to his role at CHCC, Pushka was the director and sole officer of CHAM, which was the registered portfolio manager of CHF and its predecessor funds until it was replaced by Robson.

[175] Pushka testified that he knew that CHCC, as IFM, had fiduciary obligations under section 116 of the Act and knew what those duties were. As both registrants and fiduciaries, CHCC and Pushka must be held to the highest standard of ethical conduct.

(xii) Respondents' Recognition of the Seriousness of their Misconduct

[176] Staff submits that Pushka and, through his direction and control, CHCC have demonstrated utter disregard for Ontario securities law and investors and that Pushka, in particular, has failed to recognize the seriousness of his misconduct. We agree that Pushka has failed to acknowledge the seriousness of CHCC's contraventions of Ontario securities law found in the Merits Decision.

(xiii) Restraints on the Ability to Participate in the Capital Markets

[177] Staff submits that the Respondents' conduct has been so harmful to Ontario capital markets and investors that they should be permanently prevented from future participation in those markets in any capacity. Staff says that the gravity of the Respondents' conduct in this matter, and the risk to the public, warrant the sanctions proposed by Staff. Staff notes that the Divisional Court has held

that "[p]articipation in the capital markets is a privilege, not a right" (*Erikson, supra,* at paras. 55-56). That is undoubtedly the case.

[178] While the Respondents' conduct was unacceptable, we do not believe it requires permanent market conduct prohibitions provided the amounts we order for disgorgement, administrative penalties and costs are paid by the Respondents. We discuss the issue of the appropriate market conduct prohibitions commencing at paragraph 238 of these reasons.

C. DISGORGEMENT

(i) The Disgorgement Remedy

[179] The Commission has the authority pursuant to subsection 127(1)10 of the Act to order disgorgement of "any amounts obtained as a result of the non-compliance" with Ontario securities law. The question of disgorgement is one of the most important issues addressed in these reasons because of the large amounts that Staff submits should be disgorged by the Respondents. Addressing disgorgement is complicated by the complex nature of the events and transactions in this matter and because of the period of time that has passed since the breaches by CHCC of its fiduciary duty.

[180] The disgorgement remedy is designed to (i) ensure that respondents do not obtain financial benefits from their non-compliance with Ontario securities law; and (ii) satisfy the goals of specific and general deterrence (see our general conclusions as to disgorgement commencing at paragraph 108 of these reasons).

[181] In *Limelight,* the Commission held that, in considering disgorgement, the Commission should consider the factors referred to in paragraph 90 of these reasons as well as other relevant sanctioning factors such as those referred to in paragraph 89 of these reasons. In *Limelight*, the Commission considered the scope and interpretation of the phrase "any amounts obtained as a result of the non-compliance" contained in subsection 127(1)10 of the Act. The Commission stated:

> We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. This approach also avoids the Commission having to determine how "profit" should be calculated in any particular circumstance. Establishing how much a respondent obtained as a result of his or her misconduct is a much more straightforward test.
>
> *(Limelight, supra,* at para. 49)

[182] The reasoning in *Limelight* is consistent with the principles articulated in *Allen (Re)* (2006), 29 OSCB 3944 ("***Re Allen***") at paras. 35-37. In that case, the respondent argued that he did not, as alleged, make $600,624 in profit because of the costs of the offering and the commissions paid to salespeople. The Commission held that the Act permits the Commission to "order disgorgement of

the gross amount obtained" because to restrict any disgorgement order to the net amount "would reduce the deterrent effect of the disgorgement sanction" (*Re Allen,* at paras. 36 and 37).

[183] In *Sextant,* the respondents were held to have breached their duties as IFMs under section 116 of the Act and three of the respondents were held to have breached section 126 of the Act by committing fraud. Staff submitted in *Sextant* that "while staff could properly request disgorgement of the whole amount obtained [from] investors, so the whole $23 million, staff has confined its request to the profits in this case" (*Sextant, supra,* at para. 28). In that case, the Commission ordered disgorgement of the management and performance fees paid by Sextant to Spork as IFM in the amount of $6.35 million (the net amount after a reduction for amounts actually collected by a receiver). In addition to disgorgement, Spork was ordered to pay an administrative penalty of $1.0 million (see paragraph 105 of these reasons). Two other individual respondents were required to disgorge the bonuses they received notwithstanding submissions that the bonuses were employment related and not tied to the performance of the fund or to the particular non-compliance.

[184] *Sextant* stands for the proposition that an IFM can be ordered to disgorge management and performance fees obtained as a result of a breach of its fiduciary duty under section 116 of the Act. We agree with that conclusion.

(ii) The Payments Summary

[185] The Payments Summary prepared by Staff (attached as Schedule B to these reasons) shows the direct and indirect amounts received by CHCC and related entities during the Relevant Period. The Payments Summary was prepared by Staff to assist us in determining the amounts obtained by the Respondents as a result of CHCC's non-compliance with its fiduciary duty and the amounts, if any, that we should order disgorged by the Respondents.

[186] The nature and calculation of the amounts reflected in the Payments Summary were not disputed by the Respondents, although they submitted, among other things, that this was not an appropriate case for ordering any disgorgement at all, that the various amounts identified by Staff were too remote as a matter of causation to be treated as amounts obtained by the Respondents as a result of their non-compliance with the Act and that, in any event, intervening events such as various unitholder approvals, and the effluxion of time, have broken any causal link between the amounts obtained and the particular non-compliance (see the discussion of causation commencing at paragraph 197 below). The Respondents submit that events occurring subsequent to June 9, 2009 undermined any "tenuous causal connection" between the financial benefits obtained by CHCC and the misconduct that we found in the Merits Decision.

[187] The Payments Summary shows that:

(a) management fees paid by CHF and the relevant Citadel Funds to CHCC or related entities during the Relevant Period aggregated $10,597,564 (after deducting the estimated fees that CHCC would have received from MACCs and CHDF for the period 2009 to 2012);

(b) break fees, termination fees, unitholder redemption fees and the Facilitation Fee paid to CHCC during the Relevant Period aggregated $35,620,386; and

(c) other amounts applied in repayment of the Fairway Loan and the discharge of the CHCC Note amounted to $7,588,788.

[188] Accordingly, Staff submits that the total amounts obtained by CHCC over the Relevant Period as a result of its contraventions of its fiduciary duty in connection with the Citadel Acquisition amounted to $53,806,738. Staff then deducts from that amount $29,853,904, representing amounts obtained by CHCC that were applied to repay the Fairway Loan and to discharge the CHCC Note. Accordingly, Staff submits that we should order the Respondents to disgorge, on a joint and several basis, $23,952,833, being the aggregate amount obtained by the Respondents net of amounts applied to repay the Fairway Loan and to discharge the CHCC Note.

(iii) Amounts Obtained by the Respondents

[189] We have the discretion to order disgorgement of the gross amounts obtained by a respondent as a result of the respondent's non-compliance with the Act (subsection 127(1)10 of the Act). The words "amount obtained" should be interpreted in a purposive manner consistent with the policy objectives of the Act. The principle of purposive statutory interpretation is to consider a provision in its entire context and its grammatical and ordinary sense, harmoniously with the scheme of the relevant act (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21).

[190] We should order the amount of disgorgement that we find to be in the public interest in the circumstances. That means that we have the discretion to decide whether to order any disgorgement at all and whether, in fairness, there should be any deductions made from the gross amounts otherwise obtained by a respondent.

[191] In addition to determining what amounts were "obtained" by a respondent, we must also determine whether those amounts were obtained "as a result of the [respondent's] non-compliance" with Ontario securities law (within the meaning of subsection 127(1)10 of the Act). That requires us to determine the question of causation: were the particular amounts obtained as a result of the respondent's non-compliance with Ontario securities law? We discuss the issue of causation commencing at paragraph 197 below.

[192] The Commission has accepted the general principle that a person should not benefit or profit from breaches of Ontario securities law (see the discussion commencing at paragraph 108 of these reasons). If CHCC is permitted to benefit financially from its breaches of fiduciary duty, others may not be deterred from similar misconduct, particularly when the potential financial benefits from such breaches can be so large.

[193] While that is a principle we endorse, we nonetheless recognize that (i) ordering disgorgement is a matter for our discretion to be exercised in light of all the circumstances; (ii) there are a number of relevant factors we must consider in making any such order (including those discussed commencing at paragraph 115 of these reasons); and (iii) our legal authority under the Act is to order disgorgement of "amounts obtained" by a person "as a result of the [person's] non-compliance" with Ontario securities law. With respect to clause (iii), not all benefits obtained by a person as a result of a contravention of Ontario securities law may represent such amounts.

[194] Accordingly, we are entitled to determine the amounts obtained by CHCC and Pushka as a result of their non-compliance with Ontario securities law without adjusting for how CHCC may have applied those amounts or determining what its "profits" may have been in the circumstances.

[195] In this case, CHCC obtained the amounts set out in the Payments Summary referred to in paragraph 187 above. *Accordingly, as a threshold matter, we have the legal authority to order all of those amounts, aggregating $53,806,738, to be disgorged*.

[196] However, CHCC submits, among other things, that such amounts are too remotely connected to CHCC's contraventions of Ontario securities law and that intervening events and the effluxion of time have broken any causal link that might otherwise have existed.

(iv) Causation

[197] The Supreme Court of Canada has recognized that causation and remoteness should be considered when assessing whether and to what extent disgorgement (or an accounting of profits) ought to be ordered in cases involving a breach of fiduciary duty (*Canson Enterprises Ltd.* v. *Boughton & Co.,* [1991] S.C.J. No. 91 ("***Canson***")). In *Strother*, the Court noted that "… a "cut off" is appropriate in this case as well. At some point, the intervention of other events and actors (as well as the behaviour of the claimant) dissipates the effect of the breach…" (*Strother, supra,* at para. 90).

[198] Staff submits that CHCC's misconduct in this case was intended to obtain long-term management and other fees and benefits, and that such fees and benefits were in fact obtained by CHCC over the approximately three and a half-year period following the Citadel Acquisition. Staff says that "but for" CHCC's breach of its fiduciary duty in causing CHF to complete that transaction, CHCC would not have obtained the amounts set out in the Payments Summary. Staff also submits that, in any event, the Commission has already found that CHCC was not itself able to finance the acquisition of the rights to the Citadel Management Agreements (for a consideration of $28 million). Accordingly, CHCC would not have been able to obtain any of the amounts set out in the Payments Summary because the Citadel Acquisition would not have occurred. We agree with those submissions.

[199] The Respondents submit, however, that the 'but for' analysis is insufficient because it ignores the assessment of whether CHCC's non-compliance was a "proximate cause" of CHCC obtaining the relevant amounts (*Canson, supra,* at page 94). The Respondents point to the following events that they say break the chain of events:

(a) Staff intervened in the Reorganization in June 2009, and that reorganization did not proceed as originally contemplated;

(b) in July 2009, Brompton and Bloom attempted pursuant to the Blue Ribbon Proposal to take over management of the Citadel Funds. This action caused several other events, including the holding of three additional unitholder meetings and the creation of the Blue Ribbon Fund for which CHCC was not IFM;

(c) on September 30, 2009, unitholders of CHF approved the Divestiture at the September 2009 Meeting (see paragraph 206 below). The Respondents submit that, at that meeting, unitholders had before them all of the relevant facts relating to the Citadel Acquisition, including Staff's objections to that transaction. The Respondents submit that, as a result of the votes at that meeting, unitholders freely chose the structure and management of the continuing funds;

(d) in 2011, CIF and EIF issued warrants to purchase additional units pursuant to a

prospectus filed with the Commission and a substantial number of those warrants were exercised (see paragraph 202 below);

(e) at the August 2012 Meetings, the unitholders of CIF and EIF each approved a special resolution amending the relevant declarations of trust to add certain unitholder rights, to authorize a special right of redemption at 95% of NAV and to authorize payments to CHCC on its termination or resignation as IFM (see paragraph 139 of these reasons); and

(f) on December 19, 2012, the unitholders of CIF approved the appointment of Artemis as IFM of CHF and the granting of a further special redemption right. Similarly, on January 2, 2013, the unitholders of EIF approved the appointment of Artemis as IFM and the granting of a similar special redemption right.

[200] It is worth noting in considering the Respondents' submissions in paragraph 199 above that:

(a) Staff intervened in the Reorganization proposed in June 2009 because of its concerns with respect to CHCC having caused CHF to enter into the Citadel Acquisition; the Citadel Acquisition was one of the principal focuses of the Merits Hearing;

(b) the Blue Ribbon Proposal (referred to in paragraph 199(b) above) was a proposal competing with CHCC's attempt to cause at least eight of the Citadel Funds to merge with CHF pursuant to the Reorganization; those mergers were contemplated by, and were a key element of, the Citadel Transaction; the uncertainty about whether those mergers would actually occur was a significant risk that we held in the Merits Decision should not have been imposed on CHF unitholders; and

(c) the Divestiture arose directly from the Citadel Acquisition and constituted a restructuring of CHF's investment pursuant to the Citadel Acquisition in the rights to the Citadel Management Agreements; that restructuring was in response to Staff's concerns with respect to that transaction.

Accordingly, the events referred to in clauses (a), (b) and (c) above were all directly connected to CHCC's breach of fiduciary duty in connection with the Citadel Acquisition.

[201] We have discussed our views with respect to the effect of the approvals by unitholders given at the September 2009 Meeting and the August 2012 Meetings commencing at paragraph 132 of these reasons and we have reached the conclusions with respect to the unitholder approvals given at those meetings in paragraphs 151 and 211 of these reasons. We also note that, as a result of the change in IFM referred to in paragraph 199(f), CHCC obtained the termination fees and the Facilitation Fee referred to in paragraph 213 of these reasons.

[202] On September 23 and 26, 2011, CHCC filed short form prospectuses for warrant offerings of each of CIF and EIF. CIF received net proceeds from its warrant offering of $95,907,119 and EIF received net proceeds from its warrant offering of $31,194,619. Those distributions increased the assets of the two funds by more than 50%. The warrant offerings were subsequent events that had the effect of increasing the NAV of CIF and EIF (and therefore increasing the management, termination and other fees payable to CHCC). We have not adjusted the amount we order to be disgorged in paragraph 221 of these reasons as a result of the net proceeds from the warrant

offerings. There were a number of other events during the Relevant Period that may have significantly affected the NAV of CIF and EIF. We have concluded that such changes in NAV do not undermine or negate the causal connection between CHCC's breach of fiduciary duty and the payment of the amounts set out in the Payments Summary.

[203] CHCC caused CHF to enter into the Citadel Acquisition in breach of CHCC's fiduciary duty to CHF. CHCC acquired the rights to the Citadel Management Agreements as a result of the restructuring of the Citadel Acquisition in response to Staff's concerns with that transaction. CHCC received termination fees paid by CIF and EIF, and the Facilitation Fee, when it disposed of its interest in the rights to the Citadel Management Agreements to Artemis and ceased to be IFM of CIF and EIF. *Accordingly, CHF funded the purchase of the rights to the Citadel Management Agreements in the first instance and CIF and EIF paid substantial termination fees to CHCC when those rights were disposed of and CHCC ceased to be IFM of CIF and EIF* (see paragraph 213 of these reasons). In our view, CHCC should not be permitted to benefit from that disposition. It is common sense that the receipt by CHCC of those termination fees and the Facilitation Fee was causally connected to CHCC's breach of fiduciary duty in causing CHF to enter into the Citadel Acquisition. But for that transaction, CHCC would not have become the IFM of CHF and its successors and would not have received those fees.

[204] Accordingly, we find that the amounts received by the Respondents as reflected in the Payments Summary flowed directly from, and are causally connected to, CHCC's breach of its fiduciary duty in connection with the Citadel Acquisition. But for CHCC's breach of its fiduciary duty, the amounts identified in the Payments Summary would not have been paid to or obtained by CHCC. The breach by CHCC of its fiduciary duty is the proximate cause of the payment to CHCC of the amounts set out in the Payments Summary.

[205] We find that the amounts obtained by the Respondents reflected in the Payment Summary, amounting to $53,806,738, are causally connected to the breaches by CHCC of its fiduciary duty in connection with the Citadel Acquisition. In our view, the payment of those amounts is not so remote as to break the chain of causation between the contravention by CHCC of its fiduciary duty and the payment of those amounts. We find that none of the events referred to in paragraph 199 of these reasons (including the unitholder approvals), the effluxion of time or any other intervening event, broke that chain of causation.

(v) Unitholder Approval of the Divestiture

[206] Unitholders of CHF approved the Divestiture by resolution passed at the September 2009 Meeting and, in connection with their approval of that transaction, unitholders were given the Special Redemption Right that permitted them to redeem their units at 97% of the NAV (see paragraph 19 of these reasons). The circular for the meeting indicated that the 3% discount to NAV reflected CHCC's "best estimate of the benefits realized from the Citadel Acquisition until the date of redemption" and accordingly was "the obligation of such redeeming unitholders to remaining unitholders of the Continuing Fund in respect of payment for the Citadel Acquisition" (CHF Management Information Circular dated August 27, 2009 under "Cash Alternative").

[207] With respect to the Special Redemption Right, we note that the proxy circular dated September 8, 2009 issued by Brompton and Bloom in connection with the Blue Ribbon Proposal

(see paragraph 13 of these reasons) stated under "Why Are We Making the Blue Ribbon Proposal" that:

> On June 4, 2009, Crown Hill Capital Corp. ("Crown Hill Capital") announced that a fund it manages, Crown Hill Fund, had acquired the administration contracts for the Citadel Group of Funds. It was their intention to merge the Citadel Funds and other funds in the Citadel Group of Funds, without unitholder approval, into the Crown Hill Fund. Crown Hill Fund does not have a 100% of net asset value ("NAV") redemption right, and, as of June 2, 2009, it was trading at a 26% discount to its NAV per unit.

Accordingly, the Special Redemption Right would have been an important element of the Divestiture to unitholders and a significant inducement to approve it.

[208] The CHF unitholders were also given a special redemption right exercisable in November 2010 at an amount equal to NAV, less any costs or expenses including "any amounts relating to any contractual obligations entered into by the Continuing Fund". In order to exercise that redemption right, a redeeming unitholder had to tender one CHF warrant for each unit to be redeemed.

[209] The Divestiture constituted the restructuring of the CHF investment in the rights to the Citadel Management Agreements in response to Staff's concerns. In connection with the Divestiture, the rights to the Citadel Management Agreements were transferred to CHCC in consideration for a cash payment to CHF of $18,690,000 and the issuance by CHCC to CHF of the CHCC Note in the amount of $9,955,000. The cash payment and the CHCC Note represented an amount of $28,645,000, somewhat more than the original purchase price of $28 million paid by CHF for the rights to the Citadel Management Agreements. We assume that $645,000 of that amount represented the payment of interest on the CHCC Note. We note that the Citadel Transaction originally contemplated a Preferred Return to CHF which included a $4.0 million payment and 6% interest. It does not appear that the $4.0 million amount was reflected in the consideration to CHF from the Divestiture.

[210] The unitholder approval given at the September 2009 Meeting consisted of passing a single resolution in one vote approving a number of matters, including the mergers of one or more Citadel Funds with CHF, the Divestiture, the creation of the Special Redemption Right, and multiple amendments to the CHF Declaration of Trust that were generally beneficial to unitholders. Approving all of those matters in a single vote on one resolution raises the obvious question whether unitholders effectively or validly approved the Divestiture as a free standing transaction. We note that, in the circumstances, unitholders may have had little choice but to approve the Divestiture given that the Citadel Acquisition had already occurred. Further, unitholders would only have obtained the benefit of the Special Redemption Right if the Divestiture was approved and completed.

[211] Whatever our views may be on the matters referred to in paragraph 210 above, it seems to us that CHF unitholder approval of the Divestiture at the September 2009 Meeting, together with the grant of the Special Redemption Right, are matters to which we should give some weight in deciding whether CHCC should be required to disgorge all of the management fees it received during the Relevant Period as shown on the Payments Summary (reflected on lines 1 to 10 of the

Payments Summary). We note, in particular, that a very substantial portion of the management fees paid was applied to the discharge of the CHCC Note.

(vi) No Disgorgement of Management Fees

[212] In the circumstances, for the reasons set out in paragraph 211 above, we have concluded that CHCC should not be required to disgorge the management fees it received during the Relevant Period as shown on the Payments Summary.

(vii) Disgorgement of Termination and Other Fees

[213] CHCC also received the following fees during the Relevant Period in connection with its role as IFM of CIF and EIF or upon CHCC resigning as IFM for those funds:

Description	Paid by	Paid To	Nature/Time Period for Payment	Amount
18. CIF redemption fee per unit of 5% x NAV	CIF redeeming unitholders	CHCC	August 9, 2012 to 31-Dec-12	$5,001,165
19. EIF redemption fee per unit of 5% x NAV	EIF redeeming unitholders	CHCC	August 9, 2012 to 31-Dec-12	$1,597,727
20. Termination fees for change of manager to Artemis	CIF	CHCC	January 2013	$5,351,944
21. Termination fees for change of manager to Artemis	EIF	CHCC	January 2013	$2,550,602
22. Facilitation fee for arranging the resignation of CHCC	CIF & EIF[3]	Triple Two[4]	January 2013	$3,735,609
				$18,237,047

(These fees are reflected in lines 18 to 22 of the Payments Summary.)

[214] Termination fees are paid by a fund to its IFM, if the IFM is terminated, as compensation for ceasing to be IFM and for no longer being able to receive management fees. We do not know whether comparable fees are typically paid for that purpose when an IFM voluntarily resigns.

[3] While payment of this fee by CIF and EIF is shown on the Payment Summary, we have treated that fee as having been paid by Artemis and not by CIF or EIF.

[4] Triple Two is an affiliate of CHCC.

CHCC stated in the CIF Circular that the termination or resignation fee to which CHCC would be entitled "represents a recapture by the Manager of the significant long-term investment it has had to undertake to act as manager of the Fund, for which it would have been reimbursed in the normal course had the Manager remained the manager [*sic*] of the Fund" (CIF Circular under "Amendments to Provisions related to Resignation or Removal of a Manager"). There is no evidence before us of any such long-term investment by CHCC. Further, we held in the Merits Decision that CHCC benefited disproportionately from the Citadel Acquisition relative to the potential benefits to unitholders and the risks that investment imposed on them. The payment of termination fees by CIF or EIF on the resignation of CHCC substantially reduced the NAV of those funds. Accordingly, those fees came directly out of the pockets of unitholders.

[215] We note that all of the fees referred to in paragraph 213 above, other than the Facilitation Fee, were paid by CIF or EIF, or by unitholders of CIF and EIF on the redemption of their units. All those fees were paid to CHCC. The Facilitation Fee was paid by Artemis to Triple Two, an affiliate of CHCC. Accordingly, the Facilitation Fee was not paid out of the assets of CIF or EIF.

[216] In our view, the amounts referred to in paragraph 213 above are all amounts obtained by CHCC as a result of its non-compliance with Ontario securities law. They are amounts purportedly paid to compensate CHCC for ceasing to be the IFM of CIF or EIF or for the reduction in NAV of those funds as a result of redemptions of units by unitholders. The Facilitation Fee was paid by Artemis to Triple Two for having caused the resignation of CHCC as IFM of CIF and EIF and was therefore directly related to CHCC's resignation as IFM. CHCC would not have obtained those amounts, including the Facilitation Fee, if the Citadel Acquisition had not occurred (see paragraphs 203 and 204 above). In our view, it is appropriate and in the public interest to order disgorgement by CHCC of all of those amounts. Further, in our view, there should be no deductions made from those amounts.

[217] We recognize that the termination fees and the Facilitation Fee referred to in paragraph 213 above were paid approximately three years and seven months after the completion of the Citadel Acquisition, the event constituting CHCC's breach of fiduciary duty. That fact does not change our conclusion. We are not saying that the effluxion of time and intervening events would never break the chain of causation arising from a contravention of Ontario securities law. We accept that there must be some appropriate cut-off date. We are simply saying that, in the circumstances of this case, those factors did not break the chain of causation.

[218] The redemption and termination fees referred to in paragraph 213 above were paid by CIF or EIF or their unitholders pursuant to the relevant declarations of trust permitting such payments. Amendments to those declarations of trust permitting such payments were approved by resolutions of unitholders of each fund given at the August 2012 Meetings (discussed commencing at paragraph 139 of these reasons). As discussed above, we have found that those unitholder approvals did not break the causal link between the contraventions by CHCC of its fiduciary duty in connection with the Citadel Acquisition and the payment of those fees.

[219] We note that we are not requiring to be disgorged any of the management fees obtained by CHCC as a result of the Citadel Acquisition, any amounts obtained by the Respondents as a result of the Fairway Transaction or the $2,129,471 received by CHAM and First Paladin (entities wholly-owned by Pushka) for their respective portfolio management and back office administration services to CHF and to the various Citadel Funds.

[220] We also note that we have not included in the amount to be disgorged, break fees or termination fees paid by Citadel Funds in the amount of $17,383,338. That amount is the aggregate of the fees reflected in lines 13 to 17 of the Payments Summary.

(viii) Disgorgement Ordered

[221] Based on the foregoing, we order CHCC and Pushka to disgorge to the Commission, on a joint and several basis, pursuant to subsection 127(1)10 of the Act, $18,237,047, being amounts they obtained as a result of their contraventions of Ontario securities law in connection with the Citadel Acquisition. The aggregate amount ordered disgorged consists of the fees set out in paragraph 213 of these reasons.

D. ADMINISTRATIVE PENALTIES

(i) Analysis

[222] Staff seeks an order that the Respondents pay administrative penalties in the aggregate minimum amount of $2.1 million (see paragraph 51(k) of these reasons).

[223] In imposing an administrative penalty on the Respondents, we have considered the factors referred to in paragraph 89 and the other considerations discussed in these reasons.

[224] In *Rowan Appeal*, the Ontario Court of Appeal upheld the constitutionality of section 127(1)9 of the Act which allows the Commission, if in its opinion it is in the public interest, to order an administrative penalty of not more than $1.0 million for each failure by a person to comply with Ontario securities law. The Court of Appeal stated:

> Penalties of up to $1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. The recommendation of the *Securities Act* Five Year Review Committee that the Commission be given the power to impose administrative penalties of up to $1,000,000 per contravention was based on the need to ensure that the administrative penalty would not simply be viewed as a "cost of doing business" or a "licensing fee" for unscrupulous market participants: Ontario, *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario)* (Toronto: Queen's Printer, 2003), at p. 214. The Committee noted the importance of allowing "the Commission to send an appropriate deterrent message, having regard to, among other things, the gravity and impact of the conduct under consideration and the nature of the respondents that are the subject of the proceedings."
>
> (*Rowan Appeal, supra,* at para. 49)

[225] The Court of Appeal in *Rowan Appeal* upheld the Commission's administrative penalties of $1,220,000, among other sanctions, noting the large number of infractions for failing to file insider trading reports involving over a billion dollars' worth of securities and the over $2.0 million earned in commissions (*Rowan Appeal, supra,* at para. 55).

[226] In *Biovail Corp*, the Commission approved a settlement with a corporate respondent and held that administrative penalties totaling $5.0 million were appropriate given the multiple breaches of the Act. The decision focused on deterrence, citing the following statement made in *Limelight:*

> The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future and [sends] a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets.
>
> *(Biovail Corp, (Re)* (2009), 32 OSCB 1094 at paras. 46 and 50)

[227] A disgorgement order alone is not sufficient deterrence because, as recognized by the Supreme Court of Canada, "this would encourage people in his [the fiduciary's] position to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started" (*Hodgkinson, supra,* at para. 93). In this case, CHCC and Pushka were gambling with other people's money and benefited substantially from doing so. That is the most important factor in considering the imposition of administrative penalties in this matter.

[228] In our view, simply ordering disgorgement of amounts obtained by CHCC is not sufficient deterrence. There must be administrative penalties of a substantial amount in order to remove the economic incentive for misconduct and to deter others.

(ii) Conclusions

[229] We order that CHCC and Pushka pay to the Commission, on a joint and several basis, the following administrative penalties:

(a)	for CHCC acting contrary to and breaching its fiduciary duty under subsection 116(a) of the Act by making certain amendments to the MACCs Declaration of Trust (see paragraph 639(a) of the Merits Decision):	$250,000
(b)	for CHCC acting contrary to and breaching its fiduciary duty under subsection 116(a) of the Act by (i) making the changes to the rights of CHDF unitholders referred to in paragraph 275 of the Merits Decision by means of the merger of CHDF with MACCs; and (ii) failing to appropriately address the conflicts of interest arising in connection with that merger (see paragraph 639(b) of the Merits Decision):	$250,000
(c)	for CHCC acting contrary to and breaching its fiduciary duty under subsection 116(a) of the Act by causing CHF to make the Fairway Loan (see paragraph 639(c)(i) of the Merits Decision):	$250,000

(d) for the June 09 Circular being materially misleading and failing to provide sufficient information to permit a reasonable CHF unitholder to make an informed judgment whether to vote to approve the Reorganization (see paragraph 639(d) of the Merits Decision): $100,000

(e) for CHCC acting contrary to and breaching its fiduciary duty under subsection 116(a) of the Act by (i) causing CHF to enter into the Citadel Acquisition and by proposing the Reorganization (see paragraph 639(c)(ii) of the Merits Decision); and (ii) breaching Section 5.2(1) of the CHF Declaration of Trust (see paragraph 639(e) of the Merits Decision): $1,000,000

(f) for CHCC failing to have written policies and procedures to address matters such as the Fairway Loan and the Reorganization (see paragraph 639(f) of the Merits Decision): $25,000

Total Administrative Penalty: $1,875,000

[230] We note that the matters referred to in paragraphs 229(a), (b), (c) and (e) above all involved a breach by CHCC of its fiduciary duty.

[231] We have imposed a substantially higher administrative penalty with respect to the Citadel Acquisition (paragraph 229(e) above) relative to the administrative penalty imposed in respect of the Fairway Loan (paragraph 229(c) above) for the following reasons: (i) the amount of the investment in the rights to the Citadel Management Agreements was substantially larger ($28 million invested pursuant to the Citadel Acquisition compared to $1.0 million for the Fairway Loan); (ii) the risks to CHF from the Citadel Acquisition were much greater; and (iii) there were more relative benefits to unitholders from the Fairway Transaction. We have imposed a combined administrative penalty in respect of the Citadel Acquisition and the breach of the CHF declaration of trust referred to in paragraph 229(e) above, because both of those contraventions arose from the same transaction.

[232] We have imposed a lower administrative penalty in paragraph 229(d) above because the Reorganization did not proceed as a result of the intervention of Staff.

[233] It is the Commission's practice to impose a total amount for administrative penalties that "takes into account the specific conduct of each respondent, the unique circumstances of the case, any aggravating or mitigating factors and the level of administrative penalties imposed in similar cases" (*In the Matter of Franklin Danny White et al* (2010) 33 OSCB 8893 at para. 50).

[234] While we recognize that the total amount imposed as an administrative penalty must be appropriate and proportionate in terms of the overall sanctions imposed, we consider it useful to have set out in paragraph 229 above the amounts of administrative penalties we impose in respect of the various breaches of Ontario securities law involved in this matter. That may be useful in understanding our overall order for administrative penalties of $1,875,000.

[235] The Respondents have submitted that Pushka was not given an opportunity to respond in his testimony to the question of whether he misled the CHCC Board or the IRC. Whether or not he did so did not affect our conclusions as to the appropriate sanctions in the circumstances.

[236] In imposing these administrative penalties, we have considered all of the circumstances, including the mitigating factors and considerations identified in these reasons. Further, we have imposed administrative penalties only in respect of our specific findings set out in paragraph 639 of the Merits Decision. We note that, while the administrative penalties we impose are substantial, they are far less than the amounts we order to be disgorged.

[237] We find that these administrative penalties are proportionate to the conduct of CHCC and Pushka in this matter and are necessary to underscore the importance we place on IFMs complying with their fiduciary duty in managing investors' money. We find that these administrative penalties, together with our disgorgement order, are necessary to deter others from similar misconduct. Accordingly, we find that the imposition of these administrative penalties is in the public interest. In light of these conclusions, it is not necessary for us to impose sanctions with respect to the Respondents' conduct also having been contrary to the public interest.

E. MARKET CONDUCT PROHIBITIONS

[238] The sanctions we impose upon CHCC and Pushka in these reasons relate to CHCC's conduct as an IFM for publicly distributed investment funds and as a registrant under the Act. In addition to disgorgement and administrative penalties, Staff has requested permanent trading and related bans against the Respondents. We have concluded that 10-year prohibitions on Pushka being a director or officer of any reporting issuer, registrant or investment fund manager, or CHCC and Pushka from being a registrant, investment fund manager or a promoter, are appropriate in this case. Those prohibitions address the specific roles that CHCC and Pushka played in this matter. We have not imposed permanent bans primarily because this matter did not involve fraud or illegal distributions, because the Fairway Loan was repaid and the CHCC Note was ultimately discharged and because CHCC relied on legal advice to the extent set forth in the Merits Decision.

[239] These prohibitions should be extended until such time as CHCC and Pushka have paid all amounts of disgorgement, administrative penalties and costs imposed in these reasons. Further, because participation in our capital markets is a privilege, we also consider it to be in the public interest to impose prohibitions on CHCC and Pushka trading securities, acquiring securities or relying on prospectus exemptions until such time as the Respondents have paid all such amounts of disgorgement, administrative penalties and costs.

[240] Accordingly, we will order that:

(a) each of CHCC and Pushka cease trading in any securities or derivatives until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid to the Commission in these reasons (pursuant to our authority under paragraph 2 of subsection 127(1) of the Act);

(b) each of CHCC and Pushka be prohibited from acquiring any securities until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid to the Commission in these reasons (pursuant to our authority under paragraph 2.1 of subsection 127(1) of the Act);

(c) any exemptions in Ontario securities law not apply to CHCC or Pushka until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid to the Commission in these reasons (pursuant to our authority under paragraph 3 of subsection 127(1) of the Act);

(d) Pushka be reprimanded (pursuant to our authority under paragraph 6 of subsection 127(1) of the Act);

(e) Pushka resign any positions he holds as an officer or director of any reporting issuer, registrant or investment fund manager (pursuant to our authority under paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act);

(f) Pushka be prohibited from becoming a director or officer of any reporting issuer, registrant or investment fund manager for a period of ten years from the date of these reasons, and thereafter until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid pursuant to these reasons (pursuant to our authority under paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act); and

(g) each of CHCC and Pushka be prohibited from becoming or acting as a registrant, an investment fund manager or a promoter for ten years from the date of these reasons, and thereafter until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid pursuant to these reasons (pursuant to our authority under paragraph 8.5 of subsection 127(1) of the Act).

VIII. COSTS

[241] Rule 18.2 of the Commission's *Rules of Procedure* provides that the Commission may consider the following factors in determining whether a respondent should be required to pay costs of an investigation and hearing under section 127.1 of the Act:

(a) whether the respondent failed to comply with a procedural order or direction of the Panel;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to the costs of the investigation and the proceeding;

(e) whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;

(f) whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;

(g) whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;

(h) whether the respondent participated in a responsible, informed and well-prepared manner;

(i) whether the respondent co-operated with Staff and disclosed all relevant information;

(j) whether the respondent denied or refused to admit anything that should have been admitted; or

(k) any other factors the Panel considers relevant.

(Ontario Securities Commission *Rules of Procedure,* Rule 18.2)

[242] Staff requested $467,648.70 for costs incurred in the investigation and hearing of this matter to be paid jointly and severally by the Respondents. Staff submitted a bill of costs supporting that amount. We accept that the costs and disbursements requested by Staff qualify as costs that can be required to be reimbursed by the Respondents.

[243] We note that the costs requested by Staff relate only to the time spent on the Merits Hearing by two litigation counsel and a Staff forensic accountant. Staff has provided time sheets with respect to the activities of those Staff members. Staff submits that the costs requested are conservative, well supported by the evidence and substantially less than the actual costs of approximately $962,000 incurred by the Commission in this matter.

[244] We determined the amount of costs to be awarded against the Respondents based on the following considerations.

[245] First, Staff was successful in establishing its allegations that the Respondents contravened Ontario securities law substantially as alleged by Staff in its Statement of Allegations.

[246] Second, a number of the issues discussed in the Merits Decision have not been expressly addressed in prior Commission decisions.

[247] Third, an award of costs is a matter in our discretion. While it is appropriate that respondents reimburse the Commission for costs incurred as a result of their misconduct, we do not want to unduly penalize or discourage respondents through costs awards from bringing matters before the Commission that respondents wish to contest in good faith.

[248] Finally, we have considered the factors set out in Rule 18.2 of the Commission's *Rules of Procedure* in considering the imposition of costs. In general, the Respondents contributed to a more effective hearing, did not unnecessarily lengthen the hearing and assisted the Commission in understanding the issues before it. The Respondents conducted themselves appropriately throughout. None of the factors referred to in clauses (a), (f) or (j) of paragraph 241 of these reasons apply to the Respondents.

[249] After considering all of these factors, we order CHCC and Pushka to pay, on a joint and several basis, costs of the Merits Hearing of $300,000.

IX. FINDINGS AND CONCLUSIONS AS TO SANCTIONS AND COSTS

[250] In the result, we will order that:

(a) pursuant to subsection 127(1)9 of the Act, CHCC and Pushka jointly and severally pay to the Commission an administrative penalty of $1,875,000;

(b) pursuant to subsection 127(1)10 of the Act, CHCC and Pushka jointly and severally disgorge to the Commission amounts obtained by them as a result of their non-compliance with Ontario securities law of $18,237,047;

(c) the market conduct and other prohibitions set out in paragraph 240 of these reasons apply to CHCC and Pushka on the terms provided in that paragraph; and

(d) pursuant to subsection 127.1(1) and (2) of the Act, the Respondents jointly and severally pay $300,000 of the costs incurred by the Commission in connection with the investigation and hearing of this matter.

[251] The amounts ordered paid to the Commission under paragraph 250(a) and (b) above shall be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) and (ii) of the Act.

VIII. CONCLUSION

[252] We have concluded that imposing these sanctions and costs is in the public interest. We will sign a separate order imposing these sanctions and costs substantially in the form of Schedule A to these reasons.

Dated at Toronto, this 8th day of August, 2014.

"James E. A. Turner"

James E. A. Turner

"Christopher Portner"	*"Judith N. Robertson"*
Christopher Portner	Judith N. Robertson

Schedule A

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF CROWN HILL CAPITAL CORPORATION AND
WAYNE LAWRENCE PUSHKA

ORDER
(Sections 127 and 127.1 of the *Securities Act*)

WHEREAS on July 7, 2011, a Notice of Hearing was issued by the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in respect of Crown Hill Capital Corporation ("CHCC") and Wayne Lawrence Pushka ("Pushka") (collectively, the "Respondents");

AND WHEREAS a Statement of Allegations in this matter was issued by Staff on the same day;

AND WHEREAS the hearing on the merits of this matter took place over 14 hearing days from May 9, 2012 to September 18, 2012;

AND WHEREAS by decision and reasons dated August 23, 2013 (the "Merits Decision"), the Commission found that:

(a) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act in making certain amendments to the MACCs Declaration of Trust;

(b) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act by (i) making certain changes to the rights of CHDF unitholders by means of the merger of CHDF with MACCs; and (ii) failing to appropriately address the conflicts of interest arising in connection with that merger;

(c) CHCC acted contrary to and breached its fiduciary duty under subsection 116(a) of the Act by (i) causing CHF to make the Fairway Loan; and (ii) causing CHF to enter into the Citadel Acquisition and by proposing the Reorganization;

(d) the June 09 Circular was materially misleading and failed to provide sufficient information to permit a reasonable CHF unitholder to make an informed judgment whether to vote to approve the Reorganization, contrary to Ontario securities law;

(e) the indirect acquisition by CHF of the rights to the Citadel Management Agreements was contrary to and breached Section 5.2(1) of the CHF Declaration of Trust; accordingly, by causing CHF to enter into the Citadel Acquisition, CHCC acted contrary to and breached its fiduciary duty to CHF, contrary to subsection 116(a) of the Act;

(f) during the relevant time, CHCC failed to have written policies and procedures to address matters such as the Fairway Loan and the Reorganization, contrary to section 2.2 of National Instrument 81-107;

(g) during the relevant time, Pushka was, among his various roles, President and Chief Executive Officer and a director of CHCC and he authorized, permitted or acquiesced in all of the actions, decisions and transactions made or approved by CHCC that were the subject matter of this proceeding; as a result, where the Commission concluded that CHCC did not comply with Ontario securities law, Pushka was deemed pursuant to section 129.2 of the Act to also have not complied with such law; and

(h) by reason of the findings in clauses (a) to (g) above, the Commission also found that each of CHCC and Pushka acted contrary to the public interest;

AND WHEREAS on February 24 and 28, 2014, a hearing was held before the Commission to consider pursuant to sections 127 and 127.1 of the Act whether it was in the public interest to make an order imposing sanctions on, and the payment of costs of the investigation and hearing by, the Respondents;

AND WHEREAS in coming to its conclusions on sanctions, the Commission considered the submissions of the parties, the evidence submitted and the other factors and circumstances that the Commission considered relevant as discussed in its reasons for decision on sanctions and costs dated the date of this Order;

AND WHEREAS the capitalized terms used in this Order, other than terms expressly defined in this Order, are used as defined in the Merits Decision;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS HEREBY ORDERED THAT:

(a) pursuant to paragraph 2 of subsection 127(1) of the Act, each of CHCC and Pushka cease trading in any securities or derivatives until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid to the Commission under this Order;

(b) pursuant to paragraph 2.1 of subsection 127(1) of the Act, each of CHCC and Pushka be prohibited from acquiring any securities until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid to the Commission under this Order;

(c) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions in Ontario securities law not apply to CHCC and Pushka until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid to the Commission under this Order;

(d) pursuant to paragraph 6 of subsection 127(1) of the Act, Pushka be reprimanded;

(e) pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, Pushka resign any positions he holds as an officer or director of any reporting issuer, registrant or investment fund manager;

(f) pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, Pushka be prohibited from becoming a director or officer of any reporting issuer, registrant or investment fund manager for a period of ten years from the date of this Order, and thereafter until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid under this Order;

(g) pursuant to paragraph 8.5 of subsection 127(1) of the Act, each of CHCC and Pushka be prohibited from becoming or acting as a registrant, an investment fund manager or a promoter for a period of ten years from the date of this Order, and thereafter until such time as CHCC and Pushka have paid all of the amounts of disgorgement, administrative penalties and costs ordered to be paid pursuant to this Order;

(h) pursuant to paragraph 9 of subsection 127(1) of the Act, CHCC and Pushka jointly and severally pay to the Commission an administrative penalty of $1,875,000;

(i) pursuant to paragraph 10 of subsection 127(1) of the Act, CHCC and Pushka jointly and severally disgorge to the Commission amounts obtained by them as a result of their non-compliance with Ontario securities law of $18,237,047;

(j) pursuant to subsection 127.1(1) and (2) of the Act, CHCC and Pushka jointly and severally pay $300,000 of the costs incurred by the Commission in connection with the investigation and hearing of this matter; and

(k) the amounts referred to in paragraphs (h) and (i) above of this Order shall be designated for allocation or use by the Commission pursuant to subsection 3.4(2)(b)(i) and (ii) of the Act.

DATED at Toronto this 8th day of August, 2014.

"James E. A. Turner"

James E. A. Turner

"Christopher Portner"

Christopher Portner

"Judith N. Robertson"

Judith N. Robertson

Schedule B

In the Matter of Crown Hill Capital Corporation and Wayne Lawrence Pushka **Summary**
Summary of Direct and Indirect Amount received by Pushka and Entities Beneficially Owned by Pushka
From 2009 to 2012

	Description	Paid By	Paid To	Nature/Time Period for Payment	Amount*	Supporting Document	Supporting Doc Source
	Management Fees Received						
1	Management fees	CHF/CIF	CHCC	2009	577,528	CIF 2009 annual audited F/S	Appendix JJJ
2	Management fees	5 Citadel funds that merged with CHF	278 Albert Ltd.	June to December 2009 (prior to merger)	1,495,323	Schedule 1	Appendix III
3	Management fees	CIF	CHCC	2010	2,261,790	CIF 2010 annual audited F/S	Appendix KKK
4	Management fees	CIF	CHCC	2011	1,667,193	CIF 2011 annual audited F/S	Appendix LLL
5	Management fees	CIF	CHCC	2012	1,609,319	CIF 2012 annual audited F/S	Appendix MMM
6	Management fees	2 Citadel funds that later formed Blue Ribbon	278 Albert Ltd.	June to November 2009	1,471,272	Schedule 1	Appendix III
7	Management fees	6 remaining Citadel funds	278 Albert Ltd.	June to December 2009 (prior to merger)	477,775	Schedule 1	Appendix III, QQQ, RRR, SSS & TTT
8	Management fees	6 remaining Citadel funds	CHCC	2010	579,046	Schedule 2	Appendix III, QQQ, RRR, SSS & TTT
9	Management fees	6 remaining Citadel funds	CHCC	2011	432,265	Schedule 2	Appendix III, QQQ, RRR, SSS & TTT
10	Management fees	6 remaining Citadel funds	CHCC	2012	395,783	Schedule 2	Appendix RRS, SSS & TTT
	Subtotal: Management Fees Received				**10,967,293**		
11	Adjust for:	MACCs fees as of June 2008	CHCC	x 4 years (2009 to 2012)	(170,415)	MACCs June 2008 interim F/S	Appendix NNN
12		CHDF fees as of June 2008	CHCC	x 4 years (2009 to 2012)	(199,314)	CHDF June 2008 interim F/S	Appendix OOO
	Subtotal: Adjusted Management Fees Received				**10,597,564**		

Schedule B

Summary

	Description	Paid By	Paid To	Nature/Time Period for Payment	Amount*	Supporting Document	Supporting Doc Source
	Other Fees Received						
13	Break fees for Citadel funds that formed Blue Ribbon	Series S-1 & Diversified	278 Albert Ltd.	November 2009	9,756,275	Break fee schedule	Appendix M
14	Termination fee	5 Citadel funds that merged with CHF	Citadel Fund LP	December 2009	7,437,259	Termination agreement dated Dec 1/09	Appendix Q
15	Termination fee	Sustainable	Triple Two	October 2010	99,714	Termination agreement dated Oct 4/10	Appendix SS
16	Termination fee (estimate)	Energy Plus	Triple Two	October 2010	-		Appendix PP
17	Termination fee (estimate)	FPS Corp	CHCC	June 2013	90,090	FPS Corp May 28, 2012 MIC & 2011 annual audited F/S	Appendix AAA & SSS
18	CIF redemption fee per unit of 5% x NAV	CIF redeeming unitholders	CHCC	August 9, 2012 to 31-Dec-12	5,001,165	CIF 2012 annual audited F/S	Appendix MMM
19	EIF redemption fee per unit of 5% x NAV	EIF redeeming unitholders	CHCC	August 9, 2012 to 31-Dec-12	1,597,727	EIF 2012 annual audited F/S	Appendix QQQ
20	Termination fees for change of manager to Artemis	CIF	CHCC	January 2013	5,351,944	CIF 2012 annual audited F/S	Appendix MMM
21	Termination fees for change of manager to Artemis	EIF	CHCC	January 2013	2,550,602	EIF 2012 annual audited F/S	Appendix QQQ
22	Facilitation fee for arranging the resignation of CHCC	CIF & EIF	Triple Two	January 2013	3,735,609	Correspondence between Artemis & Triple Two	Appendix II
	Subtotal of Other Fees Received				**35,620,386**		
	Total Amounts Received				**46,217,949**		

Schedule B

Summary

	Description	Paid By	Paid To	Nature/Time Period for Payment	Amount*	Supporting Document	Supporting Doc Source
	Other Amounts Applied to Reduce CIF Loans to CHCC & the parent of CHCC						
23	Fairway Loan pro rata redemption fees (estimate)	CHF redeeming unitholders	applied to $995,000 loan	2009	364,884	CIF 2009 annual audited F/S	Appendix JJJ
24	CIF retraction fees	CIF redeeming unitholders	applied to $9,955,000 loan	December 2009 to December 2012	2,243,413	CIF 2012 annual audited F/S	Appendix MMM
25	CIF difference between NCIB price & NAV at repurchase	CIF selling unitholders	applied to $9,955,000 loan	December 2009 to December 2012	4,980,491	CIF 2012 annual audited F/S	Appendix MMM
	Subtotal of Other Fees Applied Directly to Debts				**7,588,788**		
	Total Amounts Received & Indirect Benefits				**53,806,737**		
	Amounts Used to Repay Loans from CHF/CIF						
26	Fairway Loan pro rata redemption fee				(364,884)		
27	CIF retraction fees				(2,243,413)	CIF 2012 annual audited F/S	Appendix MMM
28	Difference between NCIB price & NAV at repurchase				(4,980,491)	CIF 2012 annual audited F/S	Appendix MMM
29	Balance of Citadel funds purchase loan of $9,955,000 + $213,904				(2,945,000)	CIF 2012 annual audited F/S	Appendix MMM
30	Balance of Fairway loan repaid				(630,116)		
31	Cash portion of Citadel funds purchase price				(18,690,000)	CIF material change report	Appendix U
	Subtotal of Other Fees Applied Directly to Debts				**(29,853,904)**		
	Net Amounts Remaining				**23,952,833**		

* Adjusted for GST (5% prior to July 1, 2009) and HST (13% on and after July 1, 2009)

** Estimate of Fairway Loan pro rata retraction fee = $33,162 + [2,683,223 / 7,780,092 units * ($995,000 Fairway Loan - $33,162 principal repaid prior to merger)]

Schedule B

Schedule 1

In the Matter of Crown Hill Capital Corporation and Wayne Lawrence Pushka
Management Fees Paid by the Citadel Group of Funds
From June 3, 2009 (Acquisition) to December 31, 2009

	Monthly Management Fees (before taxes)								
Citadel Group of Funds	**Jun-2009**	**Jul-2009**	**Aug-2009**	**Sep-2009**	**Oct-2009**	**Nov-2009**	**Dec-2009**	**Jul-Dec 2009**	
Citadel Diversified Investment Trust	142,959.17	161,989.97	170,692.69	166,886.91	179,661.55	115,437.35	--	794,668.47	Blue
Series S-1 Income Fund	84,118.58	95,109.71	97,446,69	93,957.40	99,295.63	63,696.32	--	449,525.75	Blue
Citadel S-1 Income Trust Fund	17,383.66	19,594.15	20,205.79	19,574.41	20,558.25	20,224.41	--	100,157.01	CIF
Citadel HYTES Fund	46,689.44	51,960.96	54,004.72	53,257.60	80,894.29	56,503.95	--	296,621.52	CIF
Citadel Premium Income Fund	136,580.33	113,803.72	119,136.52	115,305.09	122,937.57	121,897.36	--	593,080.26	CIF
Citadel Stable S-1 Income Fund	46,155.95	43,758.80	45,473.99	44,372.06	47,045.12	65,174.09	--	245,824.06	CIF
Equal Weight Plus Fund	2,041.35	2,310.91	2,426.39	1,935.03	2,074.64	2,042.35	--	10,789.32	CIF
Citadel SMaRT Fund	17,942.44	19,885.73	19,028.57	18,777.73	18,881.04	17,341.43	14,761.69	108,676.19	Note #1
Financial Preferred Securities Corporation	6,157.93	7,477.36	7,966.47	7,665.98	8,176.77	7,734.89	7,734.89	46,756.36	Note #2
Energy Plus Income Trust	19,452.33	21,720.23	23,061.84	23,211.60	24,720.84	23,928.99	24,231.05	140,874.55	Note #3
Sustainable Production Energy Trust	11,589.50	13,082.15	13,965.67	13,937.20	14,870.15	14,402.15	15,412.98	85,670.30	Note #4
CGF Resource 2008 FT Ltd. Partnership	5,696.81	6,108.34	6,654.26	6,744.40	7,787.36	7,664.53	--	34,958.89	Note #5
CGF Mutual Funds	--	--	--	--	--	--	--	--	
	536,767.49	556,802.03	580,083.60	565,625.41	626,903.21	516,047.82	62,140.61	2,907,602.68	

	Jun-2009	Jul-Dec 2009
2 Citadel Funds forming Blue Ribbon Funds subtotal	227,077.75	1,244,194.22
5 Citadel Funds that Merge subtotal	248,850.73	1,246,472.17
6 Remaining Citadel Funds	60,839.01	416,936.29
	536,767.49	2,907,602.68

Notes:

#1: Dec 2009 Estimate = [(2009 administrative & management fees per F/S) – (June 2009 per interim F/S)] x (50% for IFM fees) / (1.05 to eliminate the 5% GST) – fees paid from July to November 2009

#2: Dec 2009 Estimate = Nov 2009 fee

#3: Dec 2009 Estimate = [(2009 administrative & management fees per F/S) – (June 2009 per interim F/S)] x (.7/1.1 for IFM fees) / (1.05 to eliminate the 5% GST) – fees paid from July to November 2009

#4: Dec 2009 Estimate = [(2009 administrative & management fees per F/S) – (June 2009 per interim F/S)] x (.7/1.1 for IFM fees) / (1.05 to eliminate the 5% GST) – fees paid from July to November 2009

#5: Dec 2009 Estimate = zero since no December 2009 financial statements available

Schedule B

In the Matter of Crown Hill Capital Corporation and Wayne Lawrence Pushka
Summary of Management Fees Paid to by the 6 Remaining Citadel Funds
From 2009 to 2012

2010	Event Date	Management Fees	Basis
Smart		179,662.00	($359,324 admin & investment management fee per 2010 F/S) x (50% CHCC management fee)
FPS Corp		72,050.00	Amount per 2011 f/s as the 2010 comparative
Energy Plus	Merged with EIF on Oct 4/10	193,538.86	($202,755 admin & investment management fee per 2010 F/S) x (.7/1.1 for CHCC's share of the fees) x 1.5 to estimate fee for 9 months up to September 2010
Sustainable/EIF		116,078.45	Amount per 2011 f/s as the 2010 comparative
CGF LP	Merged with EIF on Oct 4/10	68,980.77	Estimate based on November 2009 monthly fee x 9 months up to September 2010
CGF Mutual Funds	Terminated Feb 1/10	--	Assume zero
	Subtotal	**630,310.09**	1/2 year with 5% GST and 1/2 year with 13% HST
	Subtotal, before tax	**579,045.93**	

2011			
Smart		82,405.00	($82,405 admin & investment management fee per 2011 F/S) x (50% CHCC management fee) x 2 to annualize
FPS Corp		64,737.00	Amount per 2011 F/S
EIF		341,317.00	Amount per 2011 F/S
	Subtotal	**488,459.00**	Full year of HST
	Subtotal, before tax	**432,264.60**	

2012			
Smart	Merged with EIF on March 23/12	20,601.25	Estimate based on 2011 fees x 3 months up to March 2012
FPS Corp	Redeemed on June 13/12	26,973.75	Estimate based on 2011 fees x 5 months up to May 2012
EIF		399,660.00	Amount per 2012 F/S
	Subtotal	**447,235.00**	Full year of HST
	Subtotal, before tax	**395,783.19**	

Schedule C

TERMS USED IN THESE REASONS

Acronym	Term	Definition
	Act	The *Securities Act*, R.S.O. 1990, c. S.5, as amended
	Approval Letter	A one-page letter dated January 14, 2013 from Staff approving the proposed acquisition by Artemis of all or a substantial part of the assets of CHCC (see paragraph 159 of these reasons)
	Artemis	Artemis Investment Management Limited, an investment manager that acquired all or a substantial part of the assets of CHCC in January, 2013 (see paragraph 38 of these reasons)
	August 2012 Meetings	The meetings of CIF and EIF unitholders held on August 7, 2012 to approve the "Unitholder Empowerment Plan" (see paragraphs 42 and 139 of these reasons)
	BC Commission	The British Columbia Securities Commission (see paragraph 97 of these reasons)
	Bloom	Bloom Investment Counsel Inc., portfolio manager for six of the largest Citadel Funds at the time of the Citadel Acquisition (see paragraph 13 of these reasons)
	Blue Ribbon	Blue Ribbon Fund Management Ltd., the IFM for Blue Ribbon Fund (see paragraph 23 of these reasons)
	Blue Ribbon Fund	The fund formed by the merger of Diversified and Series S-1 (see paragraph 23 of these reasons)
	Blue Ribbon Proposal	The solicitation of the unitholders of the Citadel Funds to requisition special meetings of the Citadel Funds to replace CHCC as IFM with Brompton (see paragraph 13 of these reasons)
	Brompton	Brompton Administration Limited, an IFM (see paragraph 13 of these reasons)
	CH Administration LP	CH Fund Administrator LP, an Ontario limited partnership (owned by CHF) that indirectly acquired the rights to the Citadel Management Agreements for $28 million (see paragraph 123 of these reasons and Footnote 2)

Schedule C

Acronym	Term	Definition
CHAM		Crown Hill Asset Management Inc., portfolio manager of CHF until it was replaced by Robson; an affiliate of CHCC (see paragraph 66 of these reasons)
CHCC		Crown Hill Capital Corporation, one of the Respondents; the IFM and trustee for CHF during the relevant time; wholly-owned, directly or indirectly, by Pushka (see paragraph 1 of these reasons)
	CHCC Board	The board of directors of CHCC
	CHCC Note	The promissory note issued by CHCC in the principal amount of $9,955,000 as part of the consideration for acquiring from CHF the rights to the Citadel Management Agreements (see paragraph 30 of these reasons)
CHDF		Crown Hill Dividend Fund, an investment fund that merged with MACCs to form CHF (see paragraph 7 of these reasons)
CHF	Crown Hill Fund	A publicly traded closed-end investment trust of which CHCC was IFM and trustee during the relevant time (see paragraph 6 of these reasons)
	CHF Management Agreement	The management services agreement for CHF
CGF LP		CGF Resources 2008 Flow-Through LP, one of the Citadel Funds that merged with Energy Plus and Sustainable to form EIF (see paragraph 31 of these reasons)
CIF	Citadel Income Fund	The continuing fund after five of the Citadel Funds were merged with CHF on December 2, 2009 (see paragraph 28 of these reasons)
	CIF Circular	A proxy circular for a meeting of CIF unitholders held on August 7, 2012 to approve the "Unitholder Empowerment Plan" (see paragraph 41 of these reasons)
	Citadel Acquisition	The transaction under which CHF indirectly acquired on June 3, 2009 the rights to the Citadel Management Agreements for a purchase price of $28 million; as defined in the Merits Decision
	Citadel Funds	The 13 investment funds referred to as the Citadel Group of Funds (see paragraph 7 of these reasons)

Schedule C

Acronym	Term	Definition
	Citadel Management Agreements	The management services agreements for the Citadel Funds; as defined in the Merits Decision
	Citadel Transaction	The Citadel Acquisition and the proposed Reorganization (defined by CHCC to include the merger over time of eight of the Citadel Funds with CHF, and related transactions); as defined in the Merits Decision
	Commission	The Ontario Securities Commission
	Diversified	The Diversified Investment Trust, one of the Citadel Funds that merged with Series S-1 to form the Blue Ribbon Fund (see paragraph 23 of these reasons)
	Divestiture	The transaction under which CHF indirectly transferred the rights to the Citadel Management Agreements to CHCC; approved by unitholders at the September 2009 Meeting (see paragraph 30 of these reasons)
	Divestiture Plan	A proposal for CHF to transfer the rights to the Citadel Management Agreements to CHCC for consideration that included a cash payment and a promissory note issued by CHCC; ultimately, that proposal became the Divestiture (see paragraph 16 of these reasons).
EIF	Energy Income Fund	The continuing fund after the merger of CGF LP and Energy Plus with Sustainable to form EIF; CHCC was the IFM during the relevant time (see paragraph 32 of these reasons)
	Energy Plus	The Energy Plus Income Fund, one of the Citadel Funds that merged with CGF LP and Sustainable to form EIF; CHCC was the IFM during the relevant time (see paragraph 32 of these reasons)
EWP		The Equal Weight Plus Fund, one of the Citadel Funds that merged with CHF (see paragraph 22 of these reasons)
	Facilitation Fee	The fee of $3,735,609 paid by Artemis to Triple Two for causing CHCC to resign as IFM and trustee of CIF and EIF (see paragraph 46 of these reasons)
	Fairway Fund	The Fairway Diversified Income and Growth Trust, an investment fund that merged with CHF on January 23, 2009 (see paragraph 7 of these reasons)
	First Paladin	First Paladin Inc., an affiliate of CHCC (see paragraph

Schedule C

Acronym	Term	Definition
		66 of these reasons)
	FPS Corp.	Financial Preferred Securities Corporation, one of the Citadel Funds in respect of which CHCC obtained management powers on December 22, 2009 (see paragraph 31 of these reasons)
	Hytes	The HYTES Fund, one of the Citadel Funds that merged with CHF (see paragraph 28 of these reasons)
IFM		An investment fund manager; a person or company that directs the business, operations and affairs of an investment fund (see paragraph 7 of these reasons)
	independent review committee	A committee that, under National Instrument 81-107, is required to be part of the governance structure of public investment funds in Canada; its role includes making recommendations in connection with conflict of interest matters referred to it by the IFM of an investment fund (see paragraph 144 of these reasons)
IRC		The independent review committee of CHF (see paragraph 16 of these reasons)
	Lo Affidavit	The affidavit of Yvonne Lo, a Staff senior forensic accountant, that contains a summary of the amounts that Staff says CHCC and Pushka obtained as a result of their contraventions of Ontario securities law (see paragraph 130 of these reasons)
MACCs		MACCs Sustainable Yield Trust, an investment fund that merged with CHDF to form CHF (see paragraph 7 of these reasons)
	Merits Decision	The Commission’s reasons and decision issued on August 23, 2013 in connection with the Merits Hearing (see paragraph 2 of these reasons)
	Merits Hearing	The Commission hearing on the merits in this matter, heard over 14 days from May 9, 2012 to September 18, 2012 (see paragraph 2 of these reasons)
NAV		The net asset value of an investment fund
	Payments Summary	Exhibit HHH to the Lo Affidavit containing a summary of the amounts that Staff says CHCC and related entities received, or had the direct benefit of, over the Relevant Period; attached as Schedule B to these reasons (see paragraph 130 of these reasons)

Schedule C

Acronym	Term	Definition
	Preferred Return	The return on CHF's investment in the rights to the Citadel Management Agreements consisting of the expenses of the acquisition (including the $28 million purchase price) and $4.0 million, plus 6% on those expenses and the $4.0 million; as defined in the Merits Decision
	Premium	The Premium Income Fund, one of the Citadel Funds that merged with CHF (see paragraph 28 of these reasons)
	Pushka	Wayne Lawrence Pushka, one of the Respondents; the President and Chief Executive Officer and a director of CHCC and its affiliates; CHCC and its affiliates are wholly-owned, directly or indirectly, by Pushka (see paragraph 1 of these reasons)
	Relevant Period	The period from June 9, 2009 to January, 2013 (see paragraph 11 of these reasons)
	Proposed Reorganization	The reorganization proposed by CHCC that was approved by CHF unitholders at the September 2009 Meeting (see paragraph 18 of these reasons)
	Reorganization	CHCC publicly announced on June 4, 2009 that it proposed to carry out a "Reorganization" under which the CHF Management Agreement and the Citadel Management Agreements would be consolidated in a joint venture as the first step in the process to facilitate the mergers over time of eight of the Citadel Funds with CHF; the Reorganization did not proceed as a result of concerns raised by Staff; as defined in the Merits Decision (see paragraph 9(c) and (d) of these reasons)
	Respondents	CHCC and Pushka (see paragraph 1 of these reasons)
	Robson	Robson Capital Management Inc., the portfolio manager of CHF appointed on January 16, 2009 (see paragraph 58 of these reasons)
	S-1	The S-1 Income Trust Fund, one of the Citadel Funds that merged with CHF (see paragraph 28 of these reasons)

Schedule C

Acronym	Term	Definition
	September 2009 Meeting	A CHF unitholder meeting held on September 30, 2009 to approve (a) the mergers of certain of the Citadel Funds with CHF; (b) the Divestiture; (c) the creation of the Special Redemption Right; and (d) other amendments to the CHF declaration of trust (see paragraphs 18 and 206 of these reasons)
	Series S-1	The Series S-1 Income Trust Fund, one of the Citadel Funds that merged with Diversified to form the Blue Ribbon Fund (see paragraph 23 of these reasons)
	SMaRT	The SMaRT Fund, one of the Citadel Funds that merged with EIF (see paragraph 39 of these reasons)
	Special Redemption Right	A right of redemption for CHF unitholders, and for unitholders of the Citadel Funds that were proposed to be merged with CHF, exercisable at 97% of NAV in the case of CHF, and at similar redemption prices based on NAV for unitholders of the Citadel Funds to be merged (see paragraph 19 of these reasons); approved by CHF unitholders at the September 2009 Meeting
	Stable S-1	The Stable S-1 Income Fund, one of the Citadel Funds that merged with CHF (see paragraph 28 of these reasons)
	Staff	Staff of the Commission
	Statement of Allegations	The statement of allegations dated July 11, 2011 in this matter (see paragraph 34 of these reasons)
	Submission	Written submissions filed by the Respondents in connection with the hearing on sanctions and costs (see paragraph 147 of these reasons)
	Sustainable	The Sustainable Production Energy Trust, one of the Citadel Funds that merged with Energy Plus and CGF LP to form EIF (see paragraph 31 of these reasons)
	Triple Two	2223785 Ontario Inc., an affiliate of CHCC (see paragraph 46 of these reasons)
TSX		Toronto Stock Exchange (see paragraph 60 of these reasons)

Schedule C

Acronym	Term	Definition
	Unitholder Empowerment Plan	A plan approved by CIF and EIF unitholders at the August 2012 Meetings that included changes to the CIF and EIF declarations of trust imposing a fee of 5% of NAV on the termination or resignation of its IFM and imposing on unitholders a redemption fee of 5% of NAV upon any redemption of units (see paragraph 42 of these reasons)