MAR 3 0 2010

REGISTERED MAIL

The Orion Foundation
c/o Cummings, Cooper, Schusheim, and Berliner LLP
Suite 408, 4100 Yonge Street
Toronto ON M2P 2B5

BN: 11921 3122RR0001
File #: 0723478

Attention: Ms. Evelyn Schusheim

Subject: Notice of Intention to Revoke
The Orion Foundation

Dear Ms. Schusheim:

I am writing further to our letter dated May 28, 2009 (copy enclosed), in which you were invited to submit representations as to why the Minister of National Revenue (the Minister) should not revoke the registration of The Orion Foundation in accordance with subsection 168(1) of the *Income Tax Act* (the Act).

We have now reviewed and considered your written response dated July 30, 2009. However, notwithstanding your reply, our concerns with respect to The Orion Foundation's non-compliance with the requirements of the Act for registration as a charity have not been alleviated. Our position is fully described in Appendix "A" attached.

Conclusion:

The Canada Revenue Agency's (CRA) audit has concluded that from January 1, 2005, to December 31, 2007, The Orion Foundation (the Organization) issued in excess of $91 million in receipts for medicine units received through the Canadian International Aid Program tax shelter arrangement. However, it is our position that receipts were issued for amounts far in excess of the actual value of the property. The Organization's records fail to substantiate that the values recorded on the receipts were accurate, or that the property was actually received, used, or distributed in the quantities reported by it.

For its participation and tax-receipting abilities the Organization received approximately $1 million in cash. Of this amount, the majority was paid to another registered charity as compensation for its role in the arrangement, to related third

party companies as administrative fees, and was also used for the personal benefit of directors. The Organization devoted only $70,000 to its own charitable purposes.

Our audit has also revealed insufficient separation between the Organization's operations and the personal business and financial interests of those responsible for its operation. In particular, the Organization has entered into collusive contractual arrangements with directors and related parties who are themselves promoting the tax shelter programs. These arrangements have resulted in substantially all of the actual cash received being diverted into the hands of the promoters and related companies rather than used for charitable purposes.

It is our position that the Organization has operated for the non-charitable purpose of promoting tax shelter arrangements and for the private benefit of its directors and the tax shelter promoters. The Organization has issued receipts for transactions that do not qualify as gifts; issued receipts otherwise than in accordance with the *Income Tax Act* and its Regulations; and has failed to meet its annual disbursement quota. For all of these reasons, and for each of these reasons alone, it is the position of the CRA that the Organization's registration should be revoked.

Consequently, for each of the reasons mentioned in our letter dated July 30, 2009, I wish to advise you that, pursuant to the authority granted to the Minister in subsections 168(1) and 149.1(2) of the Act, which has been delegated to me, I propose to revoke the registration of the Organization. By virtue of subsection 168(2) of the Act, revocation will be effective on the date of publication of the following notice in the *Canada Gazette*:

> *Notice is hereby given, pursuant to paragraphs 168(1)(b), 168(1)(c), 168(1)(d) and paragraph 149.1(2)(b) of the* Income Tax Act, *that I propose to revoke the registration of the organization listed below and that the revocation of registration is effective on the date of publication of this notice.*

Business Number	**Name**
119213122RR0001	The Orion Foundation Stouffville ON

Should you wish to object to this notice of intention to revoke the Organization's registration in accordance with subsection 168(4) of the Act, a written Notice of Objection, which includes the reasons for objection and all relevant facts, must be filed within **90 days** from the day this letter was mailed. The Notice of Objection should be sent to:

Tax and Charities Appeals Directorate
Appeals Branch
Canada Revenue Agency
250 Albert Street
Ottawa ON K1A 0L5

A copy of the revocation notice, described above, will be published in the *Canada Gazette* after the expiration of 30 days from the date this letter was mailed. The Organization's registration will be revoked on the date of publication, unless the CRA receives an order, **within the next 30 days**, from the Federal Court of Appeal issued under paragraph 168(2)(b) of the Act extending that period.

Please note that the Organization must obtain a stay to suspend the revocation process, notwithstanding the fact that it may have filed a Notice of Objection.

Consequences of Revocation

As of the effective date of revocation:

a) the Organization will no longer be exempt from Part I Tax as a registered charity and **will no longer be permitted to issue official donation receipts.** This means that gifts made to the Organization would not be allowable as tax credits to individual donors or as allowable deductions to corporate donors under subsection 118.1(3), or paragraph 110.1(1)(a), of the Act, respectively;

b) by virtue of section 188 of the Act, the Organization will be required to pay a tax within one year from the date of the Notice of Intention to Revoke. This revocation tax is calculated on prescribed form T-2046, *Tax Return Where Registration of a Charity is Revoked* (the Return). The Return must be filed, and the tax paid, on or before the day that is one year from the date of the Notice of Intention to Revoke. A copy of the relevant provisions of the Act concerning revocation of registration, the tax applicable to revoked charities, and appeals against revocation, can be found in Appendix "E", attached. Form T-2046, and the related Guide RC-4424, *Completing the Tax Return Where Registration of a Charity is Revoked*, are available on our website at www.cra-arc.gc.ca/charities;

c) the Organization will no longer qualify as a charity for purposes of subsection 123(1) of the *Excise Tax Act* (ETA). As a result, the Organization may be subject to obligations and entitlements under the ETA that apply to organizations other than charities. If you have any

questions about your GST/HST obligations and entitlements, please call GST/HST Rulings at 1-800-959-8287.

Finally, I wish to advise that subsection 150(1) of the Act requires that every corporation (other than a corporation that was a registered charity throughout the year) file a *Return of Income* with the Minister in the prescribed form, containing prescribed information, for each taxation year. The *Return of Income* must be filed without notice or demand.

Yours sincerely,

Cathy Hawara
A/Director General
Charities Directorate

Attachments:

- CRA letter dated May 28, 2009;
- Your letter dated July 30, 2009;
- Appendix "A", Comments on Representations; and
- Appendix "B", Relevant provisions of the Act

c.c.: Mr. Grant Young
Executive Director

CANADA REVENUE AGENCY | AGENCE DU REVENU DU CANADA

REGISTERED MAIL

The Orion Foundation
4926 Cherry Street
Stouffville ON L4A7X4

BN:11921 3122RR0001
File #:0723478

Attention: Mrs. Helen Arion

May 28, 2009

Subject: Audit of the Orion Foundation

Dear Mrs. Arion:

This letter is further to the audit of the books and records of the The Orion Foundation (the Charity) conducted by the Canada Revenue Agency (the CRA). The audit related to the operations of the Charity for the period from January 1, 2005 to December 31, 2007.

This letter is intended to advise you that the CRA has identified specific areas of non-compliance with the provisions of the *Income Tax Act* (the Act) and/or its *Regulations* in the following areas:

AREAS OF NON-COMPLIANCE:		
	Issue	**Reference**
1.	Failure to Devote Resources to Charitable Activities Providing Personal Benefits to a Member of the Charity	149.1(1), 168(1)(b)
2.	Failure to Accept Valid Gifts in Accordance with the Act	118.1
3.	Failure to Issue Receipts in Accordance with the Act	149.1(2), 168(1)(d)
4.	Failure to Maintain Adequate Book and Records	149.1(2), 168(1)(b), 230(2)
5.	Failure to File an Accurate T3010 Return	168(1)(c)
6.	Failure to Meet its Disbursement Quota	149.1(2)(b), 168(1)(d)

The purpose of this letter is to describe the areas of non-compliance identified by the CRA during the course of the audit as they relate to the legislative and common law requirements applicable to registered charities, and to provide the Charity with the opportunity to make additional representations or present additional information. In order for a registered charity to retain its registration, legislative and common law compliance is mandatory, absent which the Minister of National Revenue (the Minister) may revoke the Charity's registration in the manner described in section 168 of the Act.

The balance of this letter describes the identified areas of non-compliance in further detail.

Identified Areas of Non-Compliance:

1. Failure to Devote Resources to Charitable Activities:

The Charity is registered as a charitable organization. In order to satisfy the definition of a "charitable organization" pursuant to subsection 149.1(1) of the Act, "charitable organization" means an organization..."All the resources of which are devoted to charitable activities".

To qualify for registration as a charity under the Act, an organization must be established for charitable purposes that oblige it to devote all its resources to its own charitable activities. This is a two-part test. First, the purposes it pursues must be wholly charitable and second, the activities that a charity undertakes on a day-to-day basis must support its charitable purposes in a manner consistent with charitable law. Charitable purposes are not defined in the Act and it is therefore necessary to refer, in this respect, to the principles of the common law governing charity. An organization that has one or more non-charitable purposes or devotes resources to activities undertaken in support of non-charitable purposes cannot be registered as a charity.

a) Tax Shelter Involvement:

It is our view, based on our review, that the Charity does not operate for wholly charitable purposes and the activities it undertakes on a day-to-day basis do not support its charitable purposes in a manner consistent with charitable law. As outlined below, by engaging in an artificial series of transactions this appears to have resulted in the Charity receipting over 91 million dollars of donations while actually receiving and devoting a comparatively insignificant amount of resources to actual charitable activities.

The Charity was registered effective January 1, 1986 as The Aryan Foundation. The Charity was registered to conduct the following activities:

- To engage in activities whereby it assists children in distress;
- To set up and operate an orphanage in an effort to assist young children to properly integrate into society as progressive and stable individuals; and
- To engage from time to time, in other services that benefit the community as a whole, such as assisting other charitable organizations in their various efforts.

Since registration, the Charity has changed its name to The Orion Foundation[1] and amended its registered objects. In 2003, the Charity eliminated its long-term goal of setting up and operating an orphanage and added it will endeavour to support international humanitarian relief as an object in 2005. In 2006, the Charity began its relationship with and participation in the Canadian International Aid Program, a registered tax shelter, promoted by Canadian Organization for International Philanthropy (COIP). In 2006, the Charity received over $550,000 as a result of its participation in this tax shelter and when the Charity's role in the tax shelter changed in 2007, received and receipted over $91 million.

[1] Effective July 1, 2005

Based on the Canadian International Aid Program promotional materials, the donation program purportedly operates as follows:

- A participant purchases AIDS medicine units (the medicine units) from COIP at $11.50/unit on 100% credit;
- The participant then must repay COIP either the amount of medicine units purchased or their cash value within 36 months with a 6.02%[2] interest rate;
- The participant must also pre-pay the interest on their loan to COIP; and
- The participant pledges to "gift" the medicine units COIP will acquire on their behalf to the Charity; and
- The participant receives a charitable receipt from the Charity for the cash value of the medicine units.

As part of the donation program and at the time of the purchase of medicine units from COIP,

- There is an optional step that involves making a 2% cash donation to another participating Canadian registered charity;
- Upon making this "donation" the participant qualifies to purchase additional medicine units from PanAggregate Financial Corp. (PFC);
- If the participant decides to take advantage of this option, PFC sells to the participant medicine units with a fair market value equal to the COIP loan;
- The units are purchased 100% on credit;
- The terms of this new loan with PFC are: interest rate of 4%, an amortization period of 84 months and repayable in medicine units <u>not dollars</u>;
- The participant does not receive an official charitable donation receipt for the amount of this second payment as he/she is deemed to have received an advantage associated with the "gift" - a reduction in the interest rate applicable and extended amortization period on the promissory note payable;
- PFC transfers the medicine units to COIP on the instructions of the participant and the units are used to satisfy the participant's loan with COIP;
- Any unearned prepaid interest held by COIP is then transferred to PFC to be applied against this new loan.

As an example, a participant would purchase 674 medicine units valued at $7,750 on credit, contribute $1,400 in prepaid interest on the debt to COIP and pledge to "gift" all the medicine units to the Charity. If the participant chooses to make a donation to the second participating charity, he/she contributes an additional 2% of the purported value of the medicine units or $155 for a total cash outlay of $1,555. The 2% or $155 is "gifted" to another participating Canadian registered charity. COIP then retains 2 months of the prepaid interest, or $78, and transfers the remaining prepaid interest, $1,322, to PFC. The amount transferred to PFC will allegedly pay the participant's interest owing on their new debt with PFC for approximately 5 years. PFC allegedly pays off the participant's loan with COIP using the medicine units it sold to the participant and the participant is left with a loan with PFC payable in 7 years in medicine units.

---

[2] Interest rate fluctuates throughout the year depending on when the donor contributes to the program. Per 2008 Donation Schedule, amount ranges from 6.48% in June to 8.05% in December. Interest rate of 6.02% advertised in promotional material example.

It is our opinion, viewed as a whole, the primary purpose of this arrangement is to allow participants participating in this arrangement to profit from making a "donation" through the claiming of a donation credit. Based on the above, participants are actually out of pocket no more than 20% of the total receipted value. The promotional material indicates that participants will receive an immediate "cash on cash" return of approximately 116% in tax credit.

The Charity began participating in this program in 2006 by agreeing to accept participant "gifts" equivalent to 2% of the participant's original cash donation, i.e. by being the second charity in this program. Of this 2% "gift" received, the Charity was required to pay 40% to PFC for promotional services and 25% to the other participating charity, All Saints Greek Orthodox Church (ASGOC) as a "donation". Our audit has revealed, of the 35% the Charity was able to retain for its own charitable programs, it disbursed over 20% of its net fundraising proceeds to the directors of the Charity. Refer to our discussion below on compensation of directors. The Charity has stated it does not have agreements between itself and PFC, ASGOC or its directors; however, our audit reveals the Charity consistently pays the amounts due to each party upon receipt of the 2% "gifts" received from participant donors.[3]

Of the $550,840 the Charity received in 2006, it paid over $231,000 in fundraising fees to PFC as well as over $87,000 to the directors of the Charity for services. The Charity reports spending $161,497 on its own charitable programs; however, per our discussion above, the Charity was compelled to transfer $138,221 to ASGOC and spent only $7,276 on its own purposes. We do not consider the amounts transferred to ASGOC as a gift made to a qualified donee as the amounts were not made voluntarily and were made as a result of the Charity's participation in the tax shelter.

In 2007, the Charity began receipting for the participant's "gifts" of medicine units. The Charity receipted over $91 million for medicine units and reported shipping nearly $17 million worth of medicine units through Direct Relief International (DRI). The Charity also received cash "gifts" from other participating charities in the tax shelter from the 2% "gifts" they received. Of the at least $540,000 received as "gifts" from the other participating charities in 2007, the Charity reports spending $202,603[4] in management fees to companies held by the Charity's directors, $35,056 in marketing fees to PFC and over $97,000[5] in expenses considered personal in nature. The Charity's records indicate it spent $47,761 on its own charitable purposes; however, review of the expenses show that at least $11,000[6] was transferred to non-qualified donees.

---

[3] CRA audit evidence indicates that, based on historical and consistent payments made, an agreement exists (written or verbal) requiring the Charity to transfer a pre-determined percentage of funds to PFC and ASGOC. In fact, the Charity's management acknowledged to its auditors on June 27, 2007 that for every dollar raised by COIP, $0.40 was to be paid to PFC and $0.25 to ASGOC. Our audits revealed that an agreement exists in 2007 requiring the second participating charity to transfer 35% of funds received to the Charity.

[4] In fact, $230,958 was traced to invoices for management fees; 144,106 to Descon, $54,792 to Younggr Consulting Inc. and $32,060 to 891031 Ontario Inc.

[5] Travel expenses of $26,686 included travel to Santa Barbara to meet representatives of DRI but ended in Las Vegas and a trip to Cuba that included each director and staff member as well as their spouses and children; home renovation costs of $66,498 were for leasehold improvements to a building owned by the Arion's and over $4,000 for legal, meal and liquor expenses.

[6] Of the gifts to qualified donees reported, we note the Charity reports gifting $6,000 to themselves and $5,000 to The Eden Foundation, an unregistered organization.

In conclusion, during the two years of participation in the tax shelter program, the Charity spent approximately $44,000 on its own charitable activities compared to over $791,000 on fundraising and administrative payments. As per below, we do not consider the $19 million reported as charitable distributions in 2007 to be activities of the Charity's own undertaking and thereby incurred to counteract our findings that the Charity has devoted substantially all of the cash contributions made to it for non-charitable purposes.

b) Failure to Devote all of its Resources to its own Charitable Activities:

As stated above, in order for an organization to be recognized as a charity, it must be constituted and operated exclusively for charitable purposes, and it must devote all of its resources to charitable activities carried on by the organization itself.

Focusing on "devotion of resources", a registered charity may only use its resources (funds, personnel and/or property) in two ways, both inside and outside Canada – for charitable activities undertaken by the charity itself, under its continued supervision, direction and control; and for gifting to "qualified donees" as defined in the ITA.

CRA acknowledges that it is not always practical for a registered charity to become directly involved in charitable activities because of limited financial resources, the size of the project or because the charity lacks the necessary expertise to operate effectively in a particular area of interest. Accordingly, CRA will consider that a registered charity is involved in its own charitable activities if the charity demonstrates that it maintains the same degree of control and responsibility over the use of its resources by another entity as it would if its activities were conducted by the charity itself.

Where a registered charity chooses to operate through an appointed agent or representative (intermediary), it must be able to substantiate, generally through documentary evidence, that it has arranged for the conduct of certain specific activities on its behalf, and has not simply made a transfer of resources to a non-qualified donee. A charitable organization is not at liberty to transfer funds or resources to other individuals or entities unless the recipient is an employee of the charity, an agent of the charity under contract, or a qualified donee. To this end, the charity must be able to demonstrate to the CRA's satisfaction that it maintains control over, and is fully accountable for, the use of resources provided to the intermediary, at all times.

The existence of an arrangement that demonstrates sufficient and continuing direction and control over, and full accountability for, all resources and related activities, is critical. The arrangement must establish that the activities in question are, in fact, those of the Charity.

As above, the Charity has engaged DRI to distribute the medicine units received by the Charity on its behalf. Our review of the letter of intent between the Charity and DRI clearly states that DRI, not the Charity, has control of the distribution of the medicine units. The letter states: "Orion wishes to donate to Direct Relief, medical supplies as outlined in Schedule "A"." and "Direct Relief will distribute the donated medical supplies as it wishes". No further documentation or representations have been presented suggesting that the Charity provided DRI instructions or guidance on the distribution of the medicine units. It is therefore CRA's position that the Charity has relinquished control and gifted the medicine units to a non-qualified donee. It is further our position the Charity has failed to satisfied subsection 149.1(6) of the Act with regards to devoting resources to its own charitable activities.

It is the position of the CRA that the Charity was simply working as a conduit for the tax shelter program as the Charity has not demonstrated its actions in selecting DRI as a qualified agent capable of receiving and distributing the medical goods or in confirming that the medicine units were in fact used for charitable purposes. Rather, it is our opinion, the Charity chose to abide by the pre-determined transactions established by the tax shelter in order to participate in this arrangement and did not seek to inquire or operate outside of its agreement with the parties involved. The transactions were established prior to the Charity's involvement in the acceptance and alleged distribution of the medicine units and remain unaltered as a result of the Charity's participation.

We find the Charity's participation in this tax shelter arrangement to be problematic, as, in our view, the Charity appears to be facilitating an arrangement designed to avoid the application of the provisions of the *Income Tax Act* and may be designed to create improper tax results. In our view, the Charity is operating primarily for the purpose of promoting a tax shelter program as the Charity has not shown or otherwise indicated it is conducting any other activities aside from the small portion of gifts made to qualified donees. The Charity is an integral part of the arrangement being paid to circulate funds, as directed, in an artificial manner in an attempt to facilitate and lend legitimacy to the overall arrangement.

Given the manner in which the Charity allegedly structured and conducted its activities to accommodate the tax shelter, and the proportional levels of involvement in the arrangement, it is our view that a collateral purpose, if not primary purpose of the organization is, in fact, to support and promote a tax shelter arrangement. In this regard, it appears that the Charity enthusiastically lent its physical, financial and human resources (not to mention tax receipting privileges and registered charity status) to support the tax shelter arrangement, with little regard for the mandate and best interests of the Charity itself. Operating for the purpose of promoting tax shelters is not a charitable purpose at law. It is further our view, therefore, that by pursuing this non-charitable purpose, the Charity has failed to demonstrate that it meets the test for continued registration under 149.1(1) as a charitable organization "all the resources of which are devoted to charitable activities".

It is our view that by failing to demonstrate the Charity's on-going direction and control of its distribution of medicine units and permitting other organizations to use the Charity's registered status to flow donations through it, the Charity has failed to demonstrate that it meets the test for continued registration under 149.1(1) as a charitable organization "...All the resources of which are devoted to charitable activities". For this reason, it appears to us that there may be grounds for revocation of the charitable status of The Orion Foundation.

c) Personal Benefit:

Paragraph 149.1(1)(b) of the Act stipulates that no part of a charity's income is payable or otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settler thereof. The CRA considers the meaning of the term "trustee", for registered charity purposes, to include those persons who stand in a fiduciary relationship to the charity, having general control and management of the administration of a charity, including directors of corporations established for charitable purposes. This is, essentially, a rule against self-dealing, reflecting the general rule of equity that a trustee must not profit out of his position of trust, nor must he place himself in a position where his duties as a trustee conflict with his own interests. It is also a statutory embodiment of the common law test that individuals with ties to a charity should not profit from their association with the charity.

The CRA's position regarding the remuneration of directors is that *bona fide* payments for actual services rendered do not constitute a "personal benefit" of the type prohibited by the Act for the directors of registered charities. Accordingly, a registered charity may remunerate its directors or entities controlled by its directors for other services actually perform on behalf of the charity, as long as those payments are reasonable under the circumstances, and in the normal course of operations. The Charity has entered into agreements with various corporations who share common ownership with the directors and ex-directors of the Charity whereby the corporations are remunerated for administrative and fundraising services rendered.

On July 22, 2005, the CRA confirmed a request to change the Charity's name from The Arion Foundation to The Orion Foundation. The Board of Directors at that time included Mr. James Arion, Mr. Grant Young, Mr. Raymond Warren, Mr. Terry Bey and Mr. Steve Arnold. Per our records and research, we have found that a number of the Charity's current and former directors have close ties to the tax shelter program. For example, Mr. Arnold is the sole shareholder of PFC, a corporation established as of July 27, 2005 and a promoter of the tax shelter program; Mr. Bey is a sales agent for COIP and Mr. Alfred Gembicki, the sole shareholder of COIP[7], was also on the Board of Directors in 2005.

Our audit has found that the following individuals, through corporations held by the Charity's directors, received the following payments in the following years:

Director	Related Corporation	2006	2007	Description of fees
James and Helen Arion	Descon Corporation	$55,618	$144,105	Management fees
Grant Young	Wealthcare/Younggr Consulting	$27,750	$54,792	Management fees
Bert Levy[8]	891031 Ontario Inc.	$4,500	$32,060	Management fees
Steve Arnold	PanAggregate Financial Corporation	$232,518	$0	Fundraising fees

The Charity claims to have paid each of the director's corporations for services rendered to it. Per the Charity representations, Mrs. Arion's and Mr. Young's fees were based on a percentage of the funds raised, 10% and 5% respectively, by the Charity through its participation in the tax shelter whereas Mr. Levy was paid an agreed upon fixed amount.

Our review of the information provided indicates there has not been sufficient separation between the director's affairs and the financial and business interests of individuals responsible for administration and management of the Charity's programs and that the Charity's programs have been operated in such a way as to benefit those interests. The Charity exists as little more than a shell with the capacity to issue receipts for income tax purposes, and that this capacity has been exploited as a means by which cash contributions received are paid out as fees to corporations owned by the Charity's directors.

---

[7] COIP was established on December 8, 2005 and Mr. Gembicki was a director of the Charity until December 31, 2005.

[8] Mr. Levy, individually or through his company, received an additional $10,927 in travel expenses. $10,000 was invoiced to the Charity over 4 invoices for $2,500 each with a simple description of travel and mileage allowance as agreed. It is the opinion of the CRA that these payments were not for *bona fide* expenses incurred as no agreement was provided and the amount was unsupported.

We do not consider the payments to be *bona fide* payments for services rendered or reasonable. The amounts paid to the above noted corporations are such that, of the actual cash contributions received, substantially all is siphoned off as fundraising and administrative expenses. Per above, Mr. Arnold's company, PFC, was paid $0.40 for every dollar raised according to documents provided to the Charity's auditors, Render & Partners. Combined with the requisite gift of 25% to ASGOC and at least 15% allocated to management fees, the Charity retains at a maximum 20% of the cash contributions to devote to its own charitable activities.

We are further of the opinion that the remuneration received is not reasonable based on the services provided. The Charity was largely dormant until its participation in the tax shelter arrangement and had very few activities outside the tax shelter for the years audited. We note that management fees for all directors have at least doubled since 2006 yet cash contributions have not. For example, Mr. Levy's monthly management fees increased from $500/ month in early 2006 to $3,340/ month in 2007 while his role and responsibilities remained the same. Mrs. Arion's fees increased from $55,000 to $144,000 yet the funds raised by the Charity remained consistent. These findings contradict statements made by Mr. Arion that directors and/or their corporations were paid on a percentage of cash income. Rather it appears the directors and/or their corporations were remunerated in such a manner as to ensure the majority of the funds actually received by the Charity were paid to themselves.

It is our view, that by transferring charitable assets for the private gain of a director, the Charity has failed to demonstrate that it meets the test for continued registration under 149.1(1) as a charitable organization that "no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof". For this reason, it appears to us that there are grounds for revocation of the charitable status of The Orion Foundation.

2. Failure to Accept Valid Gifts in Accordance with the Act

It is our position that the cash donations received by the Charity from "donor" participants and the other participating charity are not valid gifts under section 118.1 of the Act. We offer the following explanations to support our position.

a) No *Animus Donadi* -

Under the common law, a gift is a voluntary transfer of property without consideration. However, an additional essential element of a gift is *animus donandi* - that the donor must be motivated by an intention to give. As stated in Grant McPherson v. HMQ *(2007 DTC 326)*:

> "[20] There is an element of impoverishment which must be present for a transaction to be characterized as a gift. Whether this is expressed as an animus donandi, a charitable intent or an absence of consideration the core element remains the same."

Justice J. Bowie further clarifies in 2004 UDTC 148, Dwight Webb (Appellant) v. Her Majesty the Queen (Respondent):

> "These cases make it clear that in order for an amount to be a gift to charity, the amount must be paid without benefit or consideration flowing back to the donor, either directly or indirectly, or anticipation of that. The intent of the donor must, in other words, be entirely donative." [Emphasis added]

It must be clear that a donor intends to enrich the donee, by giving away property, and to generally grow poorer as a result of making the gift. It is our view, based on the transactions described above, that the primary motivation of the participant donor was not to enrich the Charity, but through a series of transactions and a minimal monetary investment, to make a profit through the tax credits so obtained. We recognized that the charitable tax credits available with respect to donations are not usually an advantage or benefit that would affect whether a gift is made. However, it is our position that mass-marketed donation arrangements promising participant donors that they will be able to claim tax credits for charitable donations far in excess of the expenditures actually made (i.e. the actual cash outlay and subsequent reduction in the donor's net worth), lack the requisite *animus donandi* for the transactions to be considered gifts. It is further our position, that the series of events allegedly entered into by the participant donor, were done in a manner to create the illusion that no benefit or advantage was received by the participant.

In support of this position, we note the promotion materials primarily focus on the participant's substantial "cash on cash return" as a result of participation with greater returns offered to participants "donating" early within the calendar year.[9] Minimal investment is required of the participant in order to acquire medicine units from COIP and the participant is lead to believe the loan held with COIP or PanAggregrate will be repaid without further cash outlay. The participants rely upon COIP to acquire the medicine units and transfer title of the medicine units to the Charity without using or seeing the property. The medicine units are purportedly acquired by COIP within days of a participant paying his pre-paid interest to the Charity although the loan agreement allows COIP to acquire the medicine units on or prior to the end of the calendar year. Minimal information is provided to the prospective participants as to how the medicine units will benefit the Charity, what the Charity will do with the medicine units or the activities of the Charity aside from its participation in the tax shelter arrangement. Transactions are pre-arranged and handled entirely by promoters or other pre-arranged third parties. Participant's in the arrangement is merely expected to put forward a minimal investment to receive generous tax receipts in return.

As such, it is our position that there is no intention to make a "gift" within the meaning assigned at 118.1 of the Act. Participants in this donation arrangement are primarily motivated by the artificial manipulation of the tax incentives available rather than a desire to enrich the participating charities. In our view, these transactions, given the combination of the tax credits and other benefits received, lack the requisite *animus donandi* to be considered gifts.

---

[9] The program also offered participants in a prior year or month, a promotion whereby they could participate in the current year program under more favourable terms. Per the promotional materials, donors who participated in the 2008 program (pre-August), could acquire $11,000 worth of medicines on credit whereas donors who had yet to participate in the program could acquire only $6,500 worth of medicine units. Each participant would be required to pay $1,400 in pre-paid interest but the applicable interest rates were 4.25% for a prior participant and 7.07% for a new participant. This avails the prior participant a "cash on cash" return of $187.9% after making the "optional" 2% cash contribution to the second participating charity.

b) *Transfers* not gifts – Benefit Received

Additionally, we are of the opinion that the transactions themselves lack the necessary elements to be considered gifts at law. The participants receive some form of advantage or benefit that is linked to their participation in the tax shelter program. It is clear, based upon our audit and the promotional materials of Canadian International Aid Program that there was a clear expectation of financial return with respect to the donation made to the Charity. Participants are able to acquire medicine units on 100% credit and have the option to repay their promissory note in medicine units not dollars. The medicine units acquired by PFC to satisfy the participants' promissory note are bought on the international market, at amounts significantly less than the alleged fair market value of the medicine units originally bought on credit. As per the tax shelter's promoters, PFC acquires medicine units of equivalent type (i.e. generics) on the international market at an average price of $0.30/units whereas the medicine units "donated" to the Charity are reported to have a value of $11.50/unit.

In our view, it is clear that the medicine units transferred to the Charity were not gifts in the sense understood at law and that the Charity was not entitled to issue official donation receipts for the overstated value of the medicine units. In our findings, the Charity has issued in excess of $91 million in donation receipts for transactions that did not qualify as gifts and for amounts clearly in excess of the medicine units' factual fair market value. It is clear from our audit and the promotional materials of COIP, which the Charity engaged as fundraisers that the Charity knew, or ought to have known that there was discrepancy in value of the units "donated" to it and value of the units acquired to satisfy the participants' promissory notes. The Charity knew, or ought to have known, that it was not entitled to issue donation receipt for these transactions.

c) Application of the Proposed Legislation

Even without reference to the common law definition of a gift, it is clear that proposed section 248(32) of the Act applies to these transactions as well. While this legislation is still proposed, once passed into law, it applies to all transactions covered by the audit period under review. In our view, the refinancing of the COIP loan, through the transactions involving PFC, is an advantage received in consideration[10] for the gift made to the Charity or is otherwise related to this gift[11]. As per above, the participant is able to refinance their COIP loan and become eligible to repay their first loan in medicine units bought at a price that is significantly lower that the medicine units originally acquired. The Charity was therefore required by the Act to reduce the value reflected on the receipts issued by the value of the advantage. There is no indication whatsoever that the Charity took these provisions into account when issuing receipts on behalf of the tax shelter arrangement.

Paragraph 248(35)(a) deems the fair market value of property acquired by a taxpayer under a gifting arrangement that is a tax shelter as defined by subsection 237.1(1) to be the lesser of the fair market value (FMV) otherwise determined or the cost of the property. It is our view the fair market value otherwise determined is approximately $0.30/medicine unit as per the documentation provided and the participant's actual cost of the medicine units is nil. As such, the FMV of the medicine units is deemed, by virtue of proposed subsection 248(35), to be no more then zero. Consequently the amount that the Charity was required under the

[10] See proposed sub-paragraph 248(32)(a)(i)
[11] See proposed sub-paragraph 248(32)(a)(iii)

Income Tax Act to record on its official donation receipts as the deemed FMV of the gift is significantly lower than what was actually recorded by the Charity.

Additionally, it appears that the Charity participated in an arrangement designed to avoid the application of proposed subsection 248(35). We would note that proposed subsection 248(38) states that where it can be reasonably concluded that the particular gift relates to a transaction or series of transactions one of the main purposes of which is to avoid the application of subsection 248(35), the eligible amount of the property so gifted is nil. As such, it is our view that even if the property received by the Charity is a "gift", which, as described above, given the motivation of the donors, is unlikely, the property so received by the Charity was not eligible for tax receipts reflecting a value greater than zero.

d) Fair Market Value

"Fair market value" is not defined by the Act; however, a standard definition generally accepted is, the highest price, expressed in dollars, obtainable in an open and unrestricted market between informed, prudent parties dealing at arm's length and under no compulsion to buy or sell[12].

As outlined by Rothstein, J.A. in *AG (Canada) v Tolley et al 2005 FCA 386*, in applying the Henderson definition of FMV, the first step is to accurately define the asset whose FMV is to be ascertained. Rothstein, J.A. discusses the relevance of donating a group of items versus an individual item and states that because the items were only acquired and donated in groups, the relevant asset was the group of items, and not the individual items in the group.

It is our position the conclusion made by Rothstein, J.A. also applies to the donation of medical units. Based on the quantities donated, the relevant asset is considered to be the group of goods donated, not the individual items within each group. Rothstein, J.A. continues by stating it is wrong to assume that the FMV of a group of items is necessarily the aggregate of the price that could be obtained for the individual items in the group.

The second step in applying the Henderson definition is to identify the market in which the merchandise was traded. Rothstein, J. A. identifies this group of items might not be sold in the same market as individual items, and highlights this distinction through a comparison of the wholesale versus retail markets.

In Klotz v The Queen 2004 TCC 147, Bowman, A.C.J. stated "It is an interesting questions that I need to consider here whether the price paid for something is truly indicative of fmv [sic-fair market value] where the predominant component in the price paid is the tax advantage that the purchaser expects to receive from acquiring the object."

Based on our findings, the FMV on the donation receipts issued is not indicative of the factual FMV of the goods donated. The FMV recorded on the official donation receipts is based upon the Canadian retail market and based upon the individual pills included in one medicine unit[13]. The valuation method used by the Charity's appraiser claimed that the Ontario Drug Benefit Formulary (ODBF) was an appropriate standard for establishing the price of the medicine units. The ODBF[14] generally establishes prices for individual pills bought

---

[12] *Henderson Estate & Bank of New York v M.N.R. 73 D.T.C. 5471 et 5476.*
[13] One medicine unit is comprised of 1-150mg lamivudine, 1-300mg zidovudine and 1-200mg nevirapine.
[14] The ODBF permits a 10% mark-up.

by individual Ontario consumers for individual consumption. We are of the opinion the retail market is not the relevant market as the individual pills included in a medicine unit are manufactured, sold and distributed outside of Canada; acquired in bulk; and were never intended to be used for personal consumption in Canada. We do note that the Charity's appraiser reduced his projected FMV of a medicine unit slightly to account for the bulk nature of the transactions[15]; however, it is our opinion the resulting FMV recorded on the official donations receipts remains overstated for the reasons above.

We note with interest that COIP, according to the engagement letter from the valuator, retained Corporate Valuation Services Limited (CVS) to determine the FMV of the drugs used in its program. Per our audits, COIP purchases the drugs from a manufacturer in India yet chose to obtain a valuation to support the alleged FMV of the drugs when purchased by a participant in the tax shelter program. The CRA questions why COIP would not simply record the purchase price of the drugs to be the actual FMV of the drugs allegedly transferred to the Charity.

Additionally, our review of the audit report from Whiting Partners to the Charity clearly indicates that the purchase price including shipping is no more than $0.32[16] per medicine unit. The Charity acknowledged that it was aware that the medicine units were being purchased outside of Canada[17] on the world pharmaceutical market[18].

Under paragraphs 168(1)(d), the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration if it issues a receipt otherwise than in accordance with the Act and its Regulations. It is our position that the Charity has issued receipts otherwise than in accordance with the Act and the Regulations. For each reason identified above, there may be grounds for revocation of The Orion Foundation's charitable status.

e) Due Diligence

We note with concern, with respect to this particular issue, that it appears that the Charity's directors have demonstrated a lack of due diligence with respect to receipting practices. In fact, and as above, we feel that the duty of the directors to operate in the best interests of the Charity has been sidetracked by its collusion with the tax shelter arrangement.

As above, we note a failure by the Charity to demonstrate its due diligence in verifying the authenticity of the tax shelter. By failing to do so the Charity has allowed official donations receipts to be prepared on its behalf by COIP for transactions that are not valid gifts which

---

[15] This reduction in FMV was subsequently overturned by the Charity when it chose to adjust its gross income to reflect the FMV stated in the Corporate Valuation Services Report. As noted below, the Charity issued receipts valuing medicine units at $11.50/medicine unit but adjusted gross income to reflect receiving medicine units valued at $14.41/medicine unit.

[16] Included in the audit report are several invoices from Hetero Drugs Limited, the manufacturer of the drugs. The April 28, 2007 invoice totals $109,630 USD for 388,800 tablets each of Nevivir and Zidolam; one of each tablet is required to produce one medicine unit. When converted using the Bank of Canada mid day rate on April 30, 2007, the value of the medicine unit is $0.3121 CDN ($121,327/388,800).

[17] Included in the valuation report by CVS was the fact that the name drugs commonly known as the "Aids Cocktail" are still under patent protection by GlaxoSmithKline in Canada.

[18] The Charity had access to the information contained in the WPSR which stated the actual cost of the generic tablets.

has resulted in the Charity issuing receipts for property it did not even see or receive and has operated as a conduit for the tax shelter program.

Under paragraphs 168(1)(d), the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration if it issues a receipt otherwise than in accordance with the Act and its *Regulations*. It is our position that the Charity has issued receipts otherwise than in accordance with the Act and the *Regulations*. For each reason identified above, it appears to us that there may be grounds for revocation of the charitable status of The Orion Foundation under 168(1)(d) of the Act.

3. Issuing Receipts Not in Accordance with the Act

The law provides various requirements with respect to the issuing of official donation receipts by registered charities. These requirements are contained in *Regulations* 3500 and 3501 of the Act and are described in some detail in Interpretation Bulletin IT-110R3 *Gifts and Official Donation Receipts*.

The audit reveals that the donation receipts issued by the Charity do not comply with the requirements of *Regulation* 3501 of the Act and IT-110R3 as follows:

- Receipts issued to acknowledge goods received as a result of the Charity's participation in the tax shelter were not valid gifts under section 118.1 of the Act. Under the *Income Tax Act*, a registered charity can issue official donation receipts for income tax purposes for donations that legally qualify as gifts. Our findings are explained above.
- Receipts issued to acknowledge goods received as a result of the Charity's participation the tax shelter were not independently appraised by the Charity. The Charity used the valuation report commissioned by COIP as support for the values recorded on the official donation receipts issued. The Charity did not seek to obtain an independent valuation report. As above, we are of the view that the amounts recorded on the tax receipts are not reflective of the FMV of the property donated.

Additionally, we would like to inform you that certain amendments to the Act were introduced as part of Bill C-33 tabled in Parliament on March 23, 2004, that came into force May 13, 2005. As part of the amendments, a registered charity that issues an official donation receipt that includes incorrect information is liable to a penalty equal to 5% of the eligible amount stated on the receipt. This penalty increases to 10% for a repeat infraction within 5 years.

A registered charity that issues an official donation receipt that includes false information is liable to a penalty equal to 125% of the eligible amount stated on the receipt, where the total does not exceed $25,000. Where the total exceeds $25,000, the charity is liable to a penalty equal to 125% and the suspension of tax-receipting privileges. We do not believe that either of these sanctions are an appropriate alternative, given the serious nature of the matter of non-compliance.

Under paragraphs 168(1)(d) of the Act, the Minister may, by registered mail, give notice to the registered charity that the Minister proposes to revoke its registration if it issues a receipt otherwise than in accordance with the Act and its Regulations. It is our position the Charity issued receipts for transactions that do not qualify as gifts at law. For this reason

alone, there may be grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(d) of the Act.

4. Failure to Maintain Adequate Books and Records:

The Act, per subsection 230(2), requires that every registered charity shall keep records and books of account at an address in Canada recorded with the Minister or designated by the Minister containing:

- Information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under the Act;
- A duplicate of each receipt containing prescribed information for a donation received by it; and
- Other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under the Act.

In addition, subsection 230(4) also states "every person required by this section to keep books of account shall retain:

a) The records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and

b) All other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the date of the last taxation year to which the records and books relate".

Our audit indicated the books and records kept by the Charity were inadequate for the purposes of the Act. In the course of the audit, the following deficiencies were noted concerning the Charity's records regarding the receipt and distribution of the medicine units:

- The scope of the Whiting Partners Shipping Report (WPSR) states: "Report on the number of cartons and dates shipped for import and export of Nevivar & Zidolam into and out of custody of Southern Cross Freight Logistics on behalf of the Orion Foundation as engaged by James J. Arion". Our review of this report indicates that the first seven transactions do not belong to the Charity.
- According to donation receipt #2007-10001, the Charity claims to have received medicine units as of April 30, 2007; however, our review of the WPSR clearly indicates that purchase order (PO) 1029[19] was ordered in January 2007 and received by Southern Cross Freight Logistics February 15, 2007.
- The Charity provided summary of the total quantity of pharmaceuticals received by the Charity by type of pharmaceutical. A reconciliation of this summary to PO 1029, 1041 and 1071 and quantities listed therein to the WPSR identified discrepancies. Refer to Appendix "A".

[19] PO 1029 is, per the listing provided by the Charity, the first shipment received and referred to on donation receipt # 2007-1001.

- Per documentation provided from COIP to Southern Cross Freight Logistics, the medicine units for POs 1035 and 1041 together totaled 752,480 units; however, as per Appendix "A", Southern Cross Freight Logistics received and shipped 777, 600 medicine units solely for PO 1041, which exceeds the combined quantity of both orders.
- The WPSR does not give any comfort to the CRA that the Charity ever had ownership of the medicine units for which it receipted. According to the WPSR auditor's working papers "no stock was held in bond as at 28th August, 2008". It is the opinion of the CRA that, given the fact that no invoice is in the name of the Charity or its agent COIP, that none of the POs tested and included in the WPSR report balance to those of the Charity, and that it appears no other medicine units were ordered past March 18, 2008, the Charity was not the owner nor did it receive ownership of the medicine units.
- According to the WPSR, PO 1029, 1035 and 1041 were exported on March 20, 2008; however review of a certificate of gift donation from DRI shows no receipt of PO 1035; delivery of PO 1029 and 1041 were on March 6, 2008 before they were ever shipped from the UK. Furthermore, the certificate is addressed "To Whom It May Concern", again do not give any comfort to the CRA that the Charity ever had ownership of the medicine units.

In the course of the audit, the following deficiencies were noted concerning the Charity's records:

- The Charity could not provide contracts to substantiate the payments made to the corporations identified above that stipulated the specific tasks to be performed by the corporations and the basis for fees received. Per above, it is our opinion the amounts paid were designed to benefit the directors of the corporations from the net cash proceeds the Charity received as a result of participating in the tax shelter program.

Under paragraph 168(1)(e) of the Act, the Minister may, by registered mail, give notice to the charity that the Minister proposes to revoke its registration because it fails to comply with or contravenes section 230 of the Act dealing with books and records. It is our position The Orion Foundation has failed to comply with and has contravened section 230 of the Act. For this reason alone there may be grounds to revoke the registered status of The Orion Foundation.

5. Failure to File an Accurate Registered Charity Information Return

Pursuant to subsection 149.1(14) of the Act, every registered charity must, within six months from the end of the charity's fiscal period (taxation year), without notice or demand, file a T3010 with the applicable schedules.

It is the responsibility of the Charity to ensure that the information that is provided in its Return, schedules and statements, is factual and complete in every respect. A charity is not meeting its requirement to file an Information Return if it fails to exercise due care with respect to ensuring the accuracy thereof.

The Charity improperly completed the T3010 for the fiscal period ending December 31, 2006 in that items reported were omitted or inaccurate. Specifically:

- Reported at section C11 that no gifts were made to qualified donees. The Charity gifted over $145,000 to qualified donees including "gifts" required to be made to ASGOC.
- Failed to complete section D regarding remuneration paid to full-time and part-time employees. The Charity compensated directors and a bookkeeper in 2006.
- Failed to disclose at section E1 what basis the financial information is prepared.
- Reported the $550,840 received as fundraising revenue as other revenue at line 4650 which corresponds to the Charity's claim on line 5450.

The Charity improperly completed the T3010 for the fiscal period ending December 31, 2007 in that items reported were omitted or inaccurate. Specifically:

- Failed to complete section D regarding remuneration paid to full-time and part-time employees. The Charity compensated directors and a bookkeeper in 2007.
- At line 4650 of the T3010, the Charity reports receiving "Other Gifts" of $23,529,596. This amount reflects the alleged difference in fair market value of the medicine units as recorded on the official donation receipts issued and the value at a point in time. For example, the Charity issued official donation receipts to donors reflecting medicine units valued at $11.50/unit but the valuator determined the value to be $14/unit at a later date in the fiscal period. The Charity then recorded the $2.50/unit difference as "Other Income" at line 4650 regardless of the fact that it did not actually receive any additional income.
- The Charity failed to report total gifts received from other charities at line 4510 of the T3010. Per the tax shelter promotional material and our audit findings, participants made a 2% cash gift to another registered charity participating in the tax shelter. Of this 2% gift, the other registered charity "gifts" 35% of the gross receipts received to the Charity. As a result, the Charity should have reported receiving at least $600,000 in gifts from other charities.
- The Charity has failed to report, at line 5400 of the T3010, its total expenses incurred outside of Canada. Per the Charity's representations, it distributes the medicine units it receives from participants to sub-Saharan Africa yet has failed to report any such distributions on the T3010 filed.
- Omitted Ms. Arion from the list of directors.

6. Failure to Meet its Disbursement Quota

In the tax shelter arrangement, all medicine units donated to the Charity are to be distributed in sub-Saharan Africa. As outlined above, we do not view these "gifts" as valid gifts under section 118.1 of the Act. First, the "gifts" fail to meet the definition of a gift as they lack an element of voluntariness and second, the Charity has not established that the goods were in fact received or distributed as part of their charitable programs. Therefore, the Charity is not spending sufficient funds towards its disbursement quota.

7. Charity's Options:

a) No Response

You may choose not to respond. In that case, the Director General of the Charities Directorate may give notice of its intention to revoke the registration of the Charity by issuing a Notice of Intention in the manner described in subsection 168(1) of the Act.

b) Response

Should you choose to respond, please provide your written representations and any additional information regarding the findings outlined above **within 30 days** from the date of this letter. After considering the representations submitted by the Charity, the Director General of the Charities Directorate will decide on the appropriate course of action.

If you appoint a third party to represent you in this matter, please send us a written authorization naming the individual and explicitly authorizing that individual to discuss your file with us.

If you have any questions or require further information or clarification, please do not hesitate to contact the undersigned at the numbers indicated below.

Yours sincerely,

Neil Nicholls
Audit Advisor
Charities Directorate
320 Queen Street
Ottawa ON K1A 0L5
Ph: 613-957-2174
Fax: 613-946-7646

Enclosure:
Appendix "A"

cc: Grant Young, director
Evelyn Schusheim, Cummings, Cooper, Schusheim & Berliner LLP

Appendix "A"

Summary of Pharmaceuticals Received per the Charity and per the WPSR:

	Quantity Per		
PO # and pharmaceutical	Orion Foundation	Audit report	Discrepancy
PO #1029 - Nevivir	91,080	259,200	168,120
PO # 1029 - Zidolam	91,140	259,200	168,060
PO #1041 - Nevivir	194,400	388,800	194,400
PO # 1041 - Zidolam	194,400	388,800	194,400
PO #1071 - Nevivir	759,660	1,555,200	795,540
PO # 1071 - Zidolam	759,660	1,555,200	795,540
	2,090,340	4,406,400	2,316,060

APPENDIX "A"

The Orion Foundation

Comments on Representations of July 30, 2009

In the letter of July 30, 2009, The Orion Foundation (the Organization) makes a number of representations and notes that the Canada Revenue Agency (CRA) is relying on information from 2008, despite the fact that the audit period in question is restricted to January 1, 2005, to December 31, 2007. We concur that the initial audit plan was for the fiscal period from January 1, 2005 to December 31, 2007. However, the auditor has the discretion to expand the audit if doing so would help address concerns that arise during an audit. In this case, the auditor decided to also review the Organization's annual information return for the fiscal period ending December 31, 2008. Our findings and positions are based on the fiscal periods audited.

The Organization has represented that, having contracted a third-party audit, a high level of assurance can be placed on the financial statements submitted by the Organization. Notwithstanding, the CRA is mandated by law to conduct compliance audits of registered charities, regardless of whether their financial statements have been audited by external accounting firms or not, to determine whether the Organization complies with the requirements of the *Income Tax Act* (the Act) and common law relating to charities.

After considering the Organization's representations, we remain of the position that our audit has identified a number of serious contraventions to the Act and to the common law applicable to registered charities, and that each of these contraventions constitutes grounds for revocation. We discuss each area below.

Failure to Devote Resources to Charitable Activities

Our audit has revealed that the Organization primarily operates for the purpose of furthering the Canadian International Aid Program, a registered tax shelter promoted by the Canadian Organization for International Philanthropy (COIP), by agreeing, for a fee, to act as a receipting agent in the tax shelter. *Per* our letter of May 28, 2009, it is the CRA's position that the Organization's charitable purposes have been side-tracked for the purpose of participating in and promoting the tax shelter. Our position is based not solely on the Organization's part in the solicitation of donations, but also on the Organization's overall conduct – particularly the manner in which the Organization has restructured its charitable objects to accommodate the program.

After several years of inactivity, the Organization changed its name, governing purposes, and Board of Directors in 2005. The Organization subsequently entered into agreements with persons associated with the tax shelter program, including corporations owned by the Organization's directors and, to date, has conducted very few activities of its own outside this donation arrangement.

During the period under review, the Organization entered into agreements with persons associated with the tax shelter program to accept and receipt property contributed by participants in the tax shelter. The vast majority of the property received by the Organization is directed in a manner that benefits the tax shelter promoters, with proportionally insignificant amounts being expended on the Organization's own charitable programs. As detailed in our letter of May 28, 2009, we are aware that the Organization has been registered for several decades. However, it remained inactive until 2006 when it changed its objects to operate with the tax shelter program. Since then, the Organization has issued receipts in excess of $91.5[1] million for cash contributions and medicine units (MU) earmarked for international programs.

For its role in the tax shelter, the Organization was financially compensated from the cash contributions[2] made by participants to the Organization or to other participating charities[3]. In 2006, the Organization earned net revenue of 35% of the total cash contributions received, after paying fundraising fees (40%) and compensating the other participating charity (25%)[4]. In 2007, the Organization was the beneficiary of 35% of the cash contributions made by participants to the other participating charities.

Our audit has revealed that the Organization utilizes these funds to primarily pay for administrative and fundraising fees. In your response, you contend that the $369,221[5] in fundraising fees paid in 2006 by the Organization represented less than 1% of the $91 million in donations it received. However, we would note that the $91 million in donations of pharmaceutical units occurred in 2007. Therefore, these fundraising fees should be compared to the $550,840 in revenues received during the 2006 Fiscal Year End (FYE). Thus, the Organization actually devoted 67% of the revenues received in 2006 to its role in the tax shelter. Furthermore, the Organization incurred $87,868, or 15.9% of the total revenues received in 2006, for management fees made to corporations related to the Organization's directors. Thus, in 2006, a mere $92,233 was left available for use in charitable programs, of which only $10,750 could be reasonably said to be disbursed for charitable purposes.

---

[1] As per above, we recognize the receipts issued for the cash contributions were nil official donation receipts but this does not alter the fact that receipts were issued and cash contributions were made to the Organization.

[2] Participants make a cash contribution equivalent to 2% of the medicine units (MU) purported fair market value (FMV) and purchase price to the Organization or another participating charity.

[3] In 2007, the other participating charities were Healing and Assistance Not Dependence (HAND) and Healing and Assistance Not Dependence (HAND) Canada.

[4] In 2006, the other participating charity was All Saints Greek Orthodox Church (ASGOC).

[5] *Per* our previous letter, $232,518 was paid to PanAggregate and $138,221 was paid to ASGOC. We consider each of these payments to be fundraising fees incurred by the Organization to participate in the tax shelter and are therefore not considered charitable expenses.

	2006	% of Cash	2007	% of Cash
Total donations under the tax shelter				
Cash (2%) + Other income (Not Receipted)	$550,840	100%	$540,229	100%
Medicine Units			$91,103,100	
Less:				
Fundraising Fees:				
PanAggregate	$232,518	42.21%	$35,056	6.49%
All Saints Greek Orthodox Church	$138,221	25.09%		
	$370,739		$35,056	
Management Fees	$87,868	15.95%	$218,458	40.43%
Personal Expenses			$97,613	18.07%
Balance remaining for Charitable programs	$92,233	16.74%	$176,602	32.69%
Charitable expenses as per Orion	$161,497		$47,761	
Non Charitable expenses per audit	$150,747		$11,000	
Total Charitable expenses	$10,750	1.95%	$36,761	6.80%

After further review, we have determined that for the two years under audit, the Organization paid a total of $809,734[6] (or 74.2% of total cash received) on fundraising and management fees to corporations controlled and operated by its directors from other charities participating in the tax shelter. It remains our position that the $91 million reported by the Organization as charitable donations in 2007 is overvalued. Further, the Organization has not demonstrated to the CRA that these pharmaceuticals were actually received, used or distributed in the quantities as reported by the Organization.[7]

In rebutting the CRA's position that the Organization is operating for the purpose of promoting a tax shelter arrangement, the Organization submits that "It should be emphasized that [the Organization] has no involvement in preparing these promotional materials or marketing the COIP program to participants. The only involvement of [the Organization] is to receive the donations of pharmaceuticals, to ensure that the donation tax receipts are issued for the fair market value of the pharmaceuticals and to arrange for the distribution of the pharmaceuticals, as promised, to medical clinics in sub-Saharan Africa."

We do not disagree with the Organization's statement that it was not involved in preparing the promotional materials. We are not alleging that the members of the Organization themselves *directly* promoted the tax shelter scheme. However, we

---

[6] In our original letter dated May 28, 2009 we stated an amount of $791,000 as paid by the Organization for fundraising and management fees as well as personal expenses of directors. We have since revised this amount to reflect the $218,458 in fees actually paid and traced to invoices in 2007 for management fees rather than the $202,000 per the financial statements.

[7] We note also that a review of Direct Relief International's 2008 published financial statements and the Organization's records reveal serious discrepancies. For instance, the Organization has provided documents stating 2,618,100 treatments (otherwise referred to as MU) were shipped to Kenya in 2008 via Direct Relief International (DRI) yet DRI's financial statements report 1,693,419 courses of treatment (or MU) sent to Kenya, leaving nearly 1 million treatments unaccounted for.

disagree with the Organization's characterization of its lack of involvement and knowledge of the donation arrangement. The Organization has reported and incurred fundraising fees payable to PanAggregate Financial Corporation (PFC) and All Saints Greek Orthodox Church involved in the 2006 promotion of the scheme. Given that the Organization devotes significantly more resources towards the facilitation of this program than it does on its own charitable programs, we find it difficult to view the predominant purpose of the Organization to be anything other than promoting this tax shelter.

Further, the Organization has relinquished almost total control over its purported activities to the tax shelter promoters. The Organization has no interaction with the investors in the tax shelter beyond the issuance of receipts; it did not see or physically receive the pharmaceuticals that it purports to distribute; it only received information as to the value of the property purportedly donated to it and given instructions as to whom and in what amounts to issue receipts. The Organization took no steps to determine how participation in this program furthered its mandate, beyond receiving payments for its participation. In this regard, the Organization's primary function appears to be simply to structure its operation to facilitate the tax shelter and act as the receipt issuing entity in a tax shelter arrangement.

Accordingly, and as per our letter of May 28, 2009, we remain of the view that the Organization fails to meet the definition of charitable organization as laid out in subsection 149.1(1) of the Act. It is operated primarily, or at least collaterally, for the purposes of promoting an abusive tax shelter arrangement and cannot be considered to be devoting all of its resources to charitable activities carried on by it. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(b) of the Act.

Failure to Devote Resources to Charitable Activities (Control and Direction)

As noted in our letter of May 28, 2009, a charity must always be in control of its resources in order to demonstrate that it is satisfying the definition of a charitable organization that devotes all of its resources to charitable activities *carried on by the organization itself.*

The Organization states that, at the time the audit was conducted, the CRA only reviewed a letter of intent and that a "more comprehensive agency agreement was entered into subsequently". However, we note that the agency agreement was signed on May 8, 2008, and, as such, does not seem to apply to the audit period under review. We also note that, apart from the mere existence of an agency agreement, the Organization has not provided information to demonstrate that it in fact exercised control and direction over its resources. It is well established in law that, while a charity may engage agents to carry out its activities, it must be in a position at all times to demonstrate that it authorized, exercised control and maintained oversight over these

activities.[8] Based on the documentation and representations provided during the audit, it is clear that Direct Relief International (DRI) was free to distribute the gifted medical units "as it wishes" and no evidence was provided to demonstrate how or if the Organization directed the activities of its agent or monitored such activities. As such, we remain of the view that the Organization did not maintain control and direction over its resources during the period in question.

Accordingly, it is our position the Organization has failed to demonstrate that it devotes all of its resources to charitable activities carried on by the Organization itself. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(b) of the Act.

Personal Benefit

It remains our position the Organization has operated for the private gain of its directors. The Organization has entered into contracts with, and paid out management fees to various corporations owned by the Organization's directors and we find the amounts paid inappropriate, unsubstantiated and/or unreasonable.

In your response, the Organization disagrees with the conclusion that the directors personally benefited from the assets of the Organization. *Per* our letter of May 28, 2009, the CRA's position regarding the remuneration of directors is that *bona fide* payments for actual services rendered do not constitute a "personal benefit" of the type prohibited by the Act for the directors of registered charities. However, we note that in 2007 the Organization incurred:

- $26,686 in travel expenses for a trip to Cuba that included all the directors and employees, their spouses and children and a trip purportedly to meet representatives of DRI in Santa Barbara, that included a stop in Las Vegas;
- $66,498 for leasehold improvements to a building owned by the Arions; and
- Over $4,000 in legal, meal and liquor expenses.

Thus, it is difficult for the CRA to agree with the Organization's position that no director or persons related to the directors benefited from the Organization's assets.

As detailed in our letter, Mr. Grant Young, a director, received compensation in excess of $80,000, payments which were recorded as management fees. Mr. Arion, in his email of December 28, 2007, indicates that Mr. Young was responsible for the selection of beneficiaries in relation to the Organization's programs for the disabled, as well as meeting with disability organizations and similar activities. However, given that the Organization's total grants towards relief of the disabled during this period was

[8] *Canadian Magen David Adom for Israel v. Canada* (Minister of National Revenue) (2002 FCA 323), 2002-09-13

$70,361[9], it is the CRA's view that such payments were unreasonable. This position is further emphasized by the fact that, despite seemingly having the role of administering the Organization's programs relating to the disabled, and no involvement in the raising of funds, Mr. Young's compensation is based on a percentage of the funds raised.

There is a similar concern with respect to Mr. and Mrs. Arion's compensations and the fees paid to Descon Corporation. Mr. and Mrs. Arion, through Descon, were compensated at a rate of 10% of the amounts raised by the Organization ($199,723 between 2006 and 2007) despite the fact that their duties were restricted to administration. As confirmed by the Organization, fundraising, although contracted out by the Organization, is functionally handled by COIP. Further, the Organization neither sees nor physically receives the pharmaceuticals and, as confirmed by Mr. Arion, warehousing and distribution of the pharmaceuticals are handled by other organizations. As such, the CRA remains of the view that the payments to Mr. and Mrs. Arion are excessive, inappropriate and unsubstantiated.

It should be noted that, the Organization paid a total of $318,825 in management fees over the two year period audited for the administration of an organization that has granted a mere $70,361 – grants which include disbursements to organizations related to directors and employees of the Organization as well as to a number of non-qualified donees.

Your representations state that Messrs. Gembecki, Bey and Arnold were not voting members of the Board and indicate these directors had resigned from the Board prior to the Organization signing on with COIP to participate in the tax shelter program. However, our audit indicates that these persons, who stood to gain personally from the situation, were involved in the planning phases of the Organization's involvement in the tax shelter program. Specifically, we note that in October 2005, Mr. Bey and Mr. Arnold submitted a request on behalf of the Organization to change objective "c" in its constitutional documents in order to participate in "international humanitarian relief". Some short time thereafter, following the resignation of Mr. Arnold, the Organization entered into the COIP promoted program and a contract with Mr. Arnold's company. As in our letter of May 28, 2009, we note that the Organization paid over $231,000 in fundraising fees to PFC in respect of revenues of $550,000 – of which an additional $138,221 was earmarked for transfer to another participating charity. As such, we remain of the position that these payments were neither appropriate nor reasonable.

---

[9] For the purpose of this analysis, the CRA has not included the gifts made to All Saint's Greek Orthodox Church, given that these were required as a result of its participation in the tax shelter arrangement. The CRA has also not recognized the payment of $5,000 to the Eden Foundation – a related corporation created by Mr. Arion, or the $6,000 payment to Mrs. Arion relating to the trip to Cuba for the reasons noted in this section. Also not included in this total is the $91,000,000 in pharmaceuticals purportedly distributed by the Organization. These are not included as – the values represented are disputed by the CRA, and the Organization has not satisfied the CRA as to the existence, quantity, receipt or distribution of this property.

It remains our view that the Organization has failed to demonstrate that services were rendered by the corporations at fair market value for similar services or for *bona fide* services rendered by the directors.

As such, it remains our position that the Organization has operated for the private gain of its directors and has failed to demonstrate that it meets the test for continued registration under subsection 149.1(1) of the Act as a charitable foundation "operated exclusively for charitable purposes" or as a charitable organization that "no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof". For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(b) of the Act.

Failure to Accept Valid Gifts in Accordance with the Act

Animus Donandi

Your representations state that donative intent is not required to make a gift for tax purposes. It is the CRA's position that it is incumbent on a charity to determine whether a transaction qualifies as a gift at law before issuing a tax receipt[10]. This necessarily involves understanding the nature of the transactions to which it participates - particularly where a charity engages and pays fundraisers to solicit donations on its behalf. Your representations contend that "The state of mind of the donor is irrelevant and impossible to determine." Again, we disagree with this statement. The scheme in which the Organization participated promised a number of significant benefits to the donor through a series of artificial transactions, which were designed to create a "profit" for participants. Information regarding the program was readily available to the Organization, especially in view of the fact that it engaged the promoter of the tax shelter as a fundraiser to solicit "donations" on its behalf.

The representations further state "[s]ince [the Organization] did not provide the donor with any incentive or any consideration for the gift, the transfer of property to [the Organization] in each case involving a tax shelter, qualified as a gift. The fact that there were donation tax credit receipts received by the donor is irrelevant to the charity. That is the law and to suggest otherwise is plainly wrong." It is our position the representations erroneously consider the only benefit received by a participant in the tax shelter to be the charitable tax credit.

We agree that the charitable tax credit available with respect to a donation is not usually an advantage or benefit that would affect whether a gift is made[11]. However, it is our position that mass-marketed donation arrangements promising participants that they will be able to claim tax credits for charitable donations far in excess of the expenditures actually made (i.e. the actual cash outlay and subsequent reduction in the participants' net worth), lack the requisite *animus donandi* for the transactions to be considered gifts.

---

[10] *Grant McPherson v. HMQ* 2007 DTC 326; *Dwight Webb v. HMQ* 2004 DTC 326

[11] *The Queen v. Friedberg*, 92 DTC 6031 (F.C.A.) at 6032

The courts have agreed that an element of charitable intent or *animus donandi* must be present and therefore we do not agree with your representations that the participants in the tax shelter, who solely made donations to the Organization as a result of their participation in this tax shelter with an intent to profit from the scheme, made these donations with charitable intent or *animus donandi*.

Again we note that participants in this scheme are provided with the opportunity to profit from the making of donations and the subsequent filing of their income tax returns through a series of purportedly unrelated transactions. The participants purportedly receive a quantity of pharmaceuticals, which they never see or physically receive, and donate these to the Organization which neither physically receives or sees the pharmaceuticals. In a recent tax court case Justice Archibald remarked on the subject of gifting tax shelters:

> "The technique in all these tax shelters is the same: you write off more than the amount you have paid or are liable to pay. In this fashion, you make a profit with the tax benefit alone, so no one cares how the money is being spent."[12]

In our view, the transactions in the program in which the Organization participated lack the requisite *animus donandi* to be considered gifts. As explained below, the participants do, in fact, receive consideration. The CRA remains of the opinion that the transactions are not such that the participants give of themselves to enrich a charity, but through a series of artificial transactions and a minimal monetary investment, to enrich themselves with comparatively insignificant amounts actually being devoted to charity. In our view, the Organization was fully aware of the scheme in which it participated.

Accordingly, it is our position that the Organization was not entitled to issue an official donation receipt under these circumstances. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(d) of the Act.

<u>Transfers are not gifts, as benefits received in return</u>

The response provided in your letter, respectfully, misinterprets the position expressed by the CRA in this section. *Per* our letter of May 28, 2009, we outlined the benefits a participant received as a result of participating in the Canadian International Aid Program. As explained, participants acquire MU on 100% credit and have the option to repay their promissory notes in MU, not dollars. The MU acquired by PFC to satisfy the participants' promissory notes are bought on the international market, at amounts significantly less than the alleged fair market value of the MU originally bought on credit. *Per* the tax shelter's promoters, PFC acquires MU of equivalent type (i.e. generics) on the international market at an average price of $0.30/units, whereas the alleged value of the MU "donated" to the Organization are $11.50/MU.

---

[12] *Patricia Norton v Her Majesty The Queen* 2008 TCC 91

It is not the CRA's contention that the donation receipt was the sole benefit received by a participant in the tax shelter. In our view, the participants also benefited from the financing arrangements whereby they acquire MU by way of promissory notes (with generous terms for repayment). The participants received an opportunity to acquire on credit MU at a high value ($11.50/MU) and were subsequently able to discharge and extinguish this promissory note by acquiring similar MU at a substantially lower value ($0.30/MU). In our view, this type of arrangement is a benefit which must be taken into consideration when determining whether consideration flowed to the participant in return for a gift made to a charity[13].

For the reasons expressed above, it is our position that these transactions do not qualify as gifts. The Organization is aware, or ought to have been aware, that participants are fully knowledgeable that they will receive, and do receive, a benefit from participating in the tax shelter program and that this financial benefit is realized upon "donating" the MU to the Organization. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(b) of the Act.

Application of the proposed legislation

Proposed subsections 248(32), (35) and (38) of the Act apply to the transactions described in our May 28, 2009 letter. Regardless that the legislation remains proposed, once passed into law it will apply to all transactions covered by the audit period under review. The CRA's expectation of these provisions was that, once announced, donors and charities alike should have begun to follow this legislation as, when passed, it would be applied retroactively and therefore provides grounds for the revocation of a registered charity.

The Organization has not addressed our findings that the refinancing of the COIP loan, through the transactions involving PFC, is an advantage received in consideration[14] for the gift made to the Organization or is otherwise related to this gift[15]. The participant is able to refinance their COIP loan and become eligible to repay their first loan in MU at a price that is significantly lower than the initial price paid to COIP. The Organization was therefore required by the Act to reduce the value reflected on the receipts issued by the value of the advantage. Thus, our position remains that, even if a portion of the transactions could be considered a gift which, as above is not the CRA's position, the Organization was required by the Act to reduce the value reflected on the official donation receipt by that of the advantage received regardless of whether the advantage was received directly from the Organization or from another third party.

Your representations contend that "as far as [the Organization] was concerned, the donor was required to repay the loan which the donor had borrowed to acquire the medicine units donated to [the Organization]. [The Organization] is not aware of any

---

[13] *F. Max E. Marechaux v. HMQ* 2009 TCC 587
[14] See proposed sub-paragraph 248(32)(a)(i)
[15] See proposed sub-paragraph 248(32)(a)(iii)

assurances as to the cost of medicine units that may be required in the future for the purposes of repaying the loan." Again, we note that the Organization engaged these companies as fundraisers and was required to determine the entirety and legitimacy of the transactions in which it engaged before issuing a receipt. The Organization has stated that it was aware the MU were purchased on the world market. By reviewing the promotional materials or attending the information sessions, it knew or ought to have known, that the original loan was repayable solely in MU. Furthermore, the Organization should have known the average price of a MU on the world market was $0.32, as this amount was clearly indicated in COIP's promotional material and on the invoices in the Whiting Partners report.

The Organization states it prepared its receipts in accordance with paragraph 248(35)(a) as the fair market value of the MU was $11.50, as this was the amount paid by the participant. We disagree with this statement. *Per* our letter of May 28, 2009, it is our position the fair market value otherwise determined was approximately $0.30/MU. Further, it is our view that the purpose of these transactions (acquiring the MU with a promissory note and discharging it through a subsequent acquisition) is an attempt to avoid the application of subsection 248(35). As such, proposed subsection 248(38) applies to these transactions and the eligible amount of the gift is deemed to be nil.

Accordingly, it is the CRA's position that the Organization issued receipts for transactions that do not qualify as gifts at law and breached Regulation 3501. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(d) of the Act.

Fair Market Value

We remain of the position that the fair market value (FMV) expressed on the donation receipts issued does not accurately reflect the factual FMV, even without reference to the proposed legislation. The courts have repeatedly opined that the valuation of property must be reflective of the asset being valued and in the applicable market[16].

It is the CRA's position that the $91 million receipted by the Organization do not reflect the actual FMV of the MU. It is our position that the Organization issued official donation receipts at the value constructed by the tax shelter promoters. The Organization has provided an audit report from Whiting Partners indicating the MU used in the tax shelter program were generic drugs purchased from Hetero Drugs in India for approximately $0.32/MU. The Organization also provided a copy of a valuation report obtained from Corporate Valuation Services Limited (CVSL) stating the fair market value of the MU is between $14 and $15/MU despite the fact that the world market price of the MU ranges from $0.3395 and $0.7086/MU.

[16] *Russell v. The Queen* 2009 TCC 548; *AG (Canada) v Tolley et al* 2005 FCA 386; *Klotz v The Queen* 2004 TCC 147

The Organization has relied upon the valuation report obtained from CVSL and has, in fact, re-adjusted its total 2007 income to account for an alleged increase in the MU value[17]. The Organization issued official donation receipts to participants reflecting a value of $11.50/MU, yet it subsequently adjusted its financial statements to report the MU at $14 to $15/MU. Aside from creating an inconsistency between the total amounts receipted and the reported total revenues, the adjustment seemingly permits the Organization to artificially inflate the value of its alleged distributions and thereby creates disbursement quota excesses when the distributions are reported as charitable activities of the Organization.

We acknowledge that the Organization received a valuation report. However, it remains the CRA's opinion the valuation report has not been prepared to value the actual gifts made to the Organization. The report was sought to support the values reported on the receipts to be issued by the Organization despite the Organization's submission that the participants actually purchased the MU for $11.50/unit. It remains questionable why the Organization would need a valuation to support this purchase price if the purchase price was in fact at FMV and the MU were acquired through *bona fide* transactions. *Per* our letter of May 28, 2009, the FMV recorded on the official donation receipts is based upon the Canadian retail market and based upon the individual pills included in a medicine unit[18]. The valuation method used by the Organization's appraiser claimed that the Ontario Drug Benefit Formulary (ODBF) was an appropriate standard for establishing the price of the MU. The ODBF[19] generally establishes prices for individual pills bought by individual Ontario consumers for personal consumption. We are of the opinion the retail market is not the relevant market as the individual pills included in a MU were manufactured, sold and distributed outside of Canada; they were acquired in bulk and were never intended to be used for personal consumption in Canada. We note that the Organization's appraiser slightly reduced his projected FMV of a MU to account for the bulk nature of the transactions[20]. However, it is our position the resulting FMV recorded on the official donations receipts remains overstated for the reasons above and *per* our letter of May 28, 2009. As such, we are of the position the Organization received and relied upon a valuation based on an analysis of the wrong market.

As such, for the reasons set out herein and in our letter of May 28, 2009, we remain of the position that the appraised values relied upon by the Organization are not accurate reflections of the FMV of the property. Accordingly, it is the CRA's position that the Organization issued receipts for transactions that do not qualify as gifts at law and breached Regulation 3501. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(d) of the Act.

---

[17] A similar increase was also reported on the 2008 annual return.
[18] One MU is comprised of two tablets: one tablet containing 150 mg of Lamivudine and 300 mg of Zidovudine as well as a second tablet containing 200 mg of Nevirapine.
[19] The ODBF permits a 10% mark-up.
[20] This reduction in FMV was subsequently overturned by the Organization when it chose to adjust its gross income to reflect the FMV stated in the Corporate Valuation Services Report. As per our previous letter, the Organization issued receipts valuing MU at $11.50/MU but adjusted gross income to reflect receiving MU valued at $14.41/MU.

Due Diligence

Your representations have failed to provide any new information that would change our position regarding the Organization's due diligence prior to its involvement with the tax shelter arrangement. The Organization has failed to demonstrate its due diligence in verifying the legitimacy of the tax shelter. By failing to do so, the Organization has allowed official donations receipts to be issued based on the information provided by COIP for transactions that are not valid gifts. This has resulted in the Organization issuing receipts for property it did not even see or receive and the Organization has operated as a conduit for the tax shelter program.

Issuing Receipts Not in Accordance with the Act

The representations of July 30, 2009, do not alter our findings and our position that the official donation receipts, nil and otherwise, issued by the Organization to acknowledge cash contributions and MU received respectively from participants in the Canadian International Aid Program tax shelter are not valid gifts under section 118.1 of the Act. We have fully discussed our position on this subject above.

Accordingly, it is the CRA's position that the Organization issued receipts for transactions that do not qualify as gifts at law and breached Regulation 3501. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(d) of the Act.

Failure to Maintain Adequate Books and Records

Per our letter of May 28, 2009, we noted the records maintained by the Organization were inadequate to support the information reported on its Registered Charity Information Return (T3010) and its financial statements. The underlying concern identified in our audit was the fact that the records provided did not confirm the Organization had ownership to the MU and therefore could not establish the number of units in inventory or distributed. We also found the records provided were conflicting and irreconcilable to other records provided thereby creating difficulties in establishing what, if any, MU belonged to the Organization. This is of concern to the CRA, and should be to the Organization, given the vast quantities of MU purportedly involved and reported as distributed to sub-Saharan Africa.

In order to clarify the following three points in your representations, we acknowledge; 1) Footnote 19 of our May 28, 2009, letter was a typographical error and the receipt number should have read 2007-10001 (and not 2007-1001); 2) COIP is not the Organization's agent in connection with the purchase of MU but is its agent for soliciting participants for the tax shelter program; and 3) The Organization does not order MU but rather receives MU from participants in the tax shelter program.

Per the above, we concur the Organization was audited by, and received a clean report from an independent third party chartered accounting firm. Also, as discussed above, the mere fact that the financial statements were audited does not guarantee nor

provide confirmation that all information reported is factual and in accordance with the Act or common law applicable to registered charities. Upon review of your response and the records reviewed during the course of our audit, the CRA is not convinced that the Organization's auditors confirmed the valuation, existence and quantities of the MU. Your representations state, "It only stands to reason that the inventory existed, and has been valued using General Accounting and Auditing Principals in order that a clean audit opinion could be issued." It is standard practice for the auditor firm to mandate a third party to perform testing on their behalf, which includes determining procedures for testing, materiality, and sample size; however, the third party audit, conducted by Whiting Partners, was mandated and directed by Mr. Arion, not the accounting firm. The CRA has received information that indicates the scope of the mandate did not include the testing of the inventory for ownership nor did it require Whiting Partners to retrieve export shipping documents to determine the final destination and use of the property[21]. In fact, we note that the Organization's 2007 financial statements were signed by the accounting firm on March 31, 2008; however, the final Whiting Partners report was issued on August 28, 2008. We also obtained documentation indicating that the accounting firm queries to Whiting Partners regarding ownership and export documents, or lack of, were received only after the signing of the financial statements. As *per* our letter of May 28, 2009, the Whiting Partners report has raised many questions about quantity and existence of the MU.

With regards to the existence of the inventory, we note that the accounting firm did not and could not perform an inventory count on December 31, 2007, as there are no drugs held in Canada. The financial statements indicate that the inventory reported is based on the FMV established in the valuation report prepared by CVSL. Furthermore, the Whiting Partners report was inconclusive. As stipulated in our letter of May 28, 2009, the scope of the mandate did not include an inventory count, the testing for ownership, nor did it require the Whiting Partners auditor to retrieve export shipping documents to determine the final destination. Furthermore, no drugs were actually on hand in August 2008, a fact of which the Organization was fully aware. The CRA to date has not been supplied with sufficient documentation to prove the existence and valuation of the 2007 MU inventory.

We provide the following comments on your representations regarding the discrepancies we identified in our letter of May 28, 2009:

- Your representations confirm the first seven purchase orders (PO) reported on the Whiting Partners shipping report were those belonging to All Saints Greek Orthodox Church. We question why another organization's inventory was included in an audit report sanctioned by Mr. Arion. Furthermore, it is unclear whether this information was shared with the chartered accounting firm when they based their conclusion of the MU existence and quantities.

[21] The scope of the Whiting Partners Shipping Report states: "Report on the number of cartons and dates shipped for import and export of Nevivar & Zidolam into and out of custody of Southern Cross Freight Logistics on behalf of the Orion Foundation as engaged by James J. Arion" This statement of scope does not discuss confirming ownership, existence, valuation and ultimate use.

- The Organization states that only a portion of the MU on PO 1029 were donated to them and that only this portion was included in its books. The timing of the transactions is plausible; however, it is impossible to accurately determine which MU were those of the Organization and those of All Saints Greek Orthodox Church. The Organization has submitted to the CRA a certificate of donation from DRI that indicates a total of 4320 bottles of each component of the MU, or 259,200 doses, was shipped. Additionally, our reconciliation of receipts 2007-10001 to 2007-10089 (total receipts issued for MU purchased on PO 1029) indicates that the total receipted value was $2,385,600[22], representing 207,444[23] MU. According to your representations, the Organization only received 91,080 MU; a discrepancy of 116,364 MU.
- We disagree that we "counted the same pills twice." The document produced by the Organization, for which you claim represents medical units, not individual pills, clearly indicates in the heading that the quantity in question is tablets. For example, PO 1029 indicates 1518 bottles of Nevivir and 1519 bottles of Zidolam were shipped March 20, 2008. It also indicates that each bottle consists of 60 tablets, therefore we have concluded that 91,080 (1518 multiplied by 60) MU were donated to the Organization. *Per* above, the Organization receipted for 207,444 MU on April 30, 2007.
- Your representations have failed to clarify the variance in MU calculated for POs 1035 and 1041 between the amount receipted by the Organization and the amount reported in the Whiting Partners shipping report.
- We also have concerns regarding the legitimacy of the donation of MU from a participant to the Organization and the Organization's distribution of the MU in sub - Saharan Africa. COIP prepares an excel spreadsheet of participants containing a dollar value per donation receipt to be issued; the spreadsheet does not contain the number of MU "donated" per participant. As such, we are unable to reconcile the total MU donated to other supporting documents. The Organization has provided, as proof the MU were received by it, one fax from COIP advising Southern Cross to notify the Organization that the MU were received. The Organization has not produced any confirmation from Southern Cross that the MU were in fact received, were in storage nor were any reports or shipping documentation provided confirming the MU were shipped to a warehouse in India or to their final destination.
- We acknowledge shipping of MU reported on POs 1029, 1035 and 1041 are beyond the period audited; however, we will address your representations to this transaction. You state the MU were received into its inventory on March 6, 2008 and were shipped to African charities on March 20, 2008. Per the documentation provided, the Whiting Partners report shows POs 1029, 1035 and 1041 exported on March 20, 2008; however a review of DRI's certificate of gift donation shows no receipt of PO 1035 and delivery of POs 1029 and 1041 on March 6, 2008; the same date the MU were allegedly received by the Organization. Accordingly, your

[22] This amount is confirmed on the Organization's donor listing from COIP to Southern Cross.
[23] $2,385,600/$11.50

representations have not clarified this transaction nor have they provided comfort in the reliability of the documents provided to verify the existence of the MU received, receipted and distributed by the Organization.

- As per above, the Organization has not provided contracts to substantiate the payments made to the related corporations that would stipulate the specific tasks to be performed by the corporations and the basis for fees received. Additionally, contracts were not provided with the representations. Your representations repeat that payments were made to the corporations in respect of services performed by officers of the Organization and not as directors. You also state that "such payments were made out of funds received by [the Organization] that were not receipted donations." Regardless of your assertion that the payments were made from non-tax receipted income, it remains our position that the directors of the Organization have financially benefited from their association with the Organization, that the payments were for unsubstantiated services provided and that the payments were unreasonable.

Accordingly, it is our position the Organization has contravened section 230 of the Act for failing to maintain complete records to verify the information contained within its Registered Charity Information Returns and financial statements. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(e) of the Act.

Failure to File an Accurate Registered Charity Information Return

We accept your representations regarding the errors and omissions identified on the 2006 and 2007 Registered Charity Information Return with the exception of the amount reported as "Other Income". You state that "this amount is the difference between the fair market value of the medicine units and the amount for which donors were issued tax receipts." If the Organization believes this statement, which we find contradictory to your own representations, it alludes to the fact that the Organization has seemingly inflated its total revenues based on a favourable valuation report rather than on factual revenues earned. Your representations state "[the Organization] received $91,000,000 worth of medicine units"; "the obligation of [the Organization] is to ensure that the donation receipts are issued...at the fair market value of the pharmaceuticals"; and "it is submitted that the cost of the medicine units was the $11.50 paid by the donor for each unit which was also the fair market value of such units as determined by qualified appraisal" yet you booked an amount as "Other Income" to reflect a value of $14.41/MU.

Accordingly, it remains our position the Organization has filed an inaccurate Registered Charity Information Return by including amounts that are unsubstantiated and inflated. As per above, regardless of the valuation report utilized by the Organization, it is our position the FMV utilized by the Organization was not reflective of the correct market and was being directed by the tax shelter promoter. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(c) of the Act.

Failure to meet its Disbursement Quota

Per our letter of May 28, 2009, and *per* our discussion above, we remain of the position that the Organization has failed to meet its annual disbursement quota. It is our position the vast quantities of pharmaceuticals donated to the Organization are not valid gifts under section 118.1 of the Act and the Organization has failed to prove the MU were distributed as part of its own programs. If the Organization had provided sufficient documentation to confirm the shipment and distribution of the MU as part of its own programs, the CRA would have recognized the distributions of the MU at a factual FMV of $0.32/MU.

As per above, it remains our position that the primary motivation of the participants was not to enrich the Organization, but to enrich themselves from the aggregate tax credits available. It is also our position that the Organization's motivation was to enrich itself by agreeing to the pre-established terms of the tax shelter arrangement. The Organization was not obligated by the Act to acknowledge all MU contributions by issuing an official donation receipt. Simply issuing official receipts containing the prescribed information contained in Regulation 3501 does not deem the MU contributions to be valid gifts under section 118.1 of the Act.

Your representations allude to detailed reports received from DRI regarding the distribution of MU; however, no such documents were provided to CRA during the audit or as part of the representation letter. Also, the Organization did not report any activities outside Canada; an omission which demonstrates the Organization's involvement in the distribution of the MU. As discussed above, the Organization has failed to demonstrate its involvement in or direction and control exerted over the distribution of the MU by third party agents. Of the materials provided, we note that documentation provided contained conflicting dates, quantities, valuation and ownership.

Accordingly, it remains our position that the Organization has not met its disbursement quota as per paragraph 149.1(2)(b) of the Act. For this reason alone, there are grounds for revocation of the charitable status of The Orion Foundation under paragraph 168(1)(b) of the Act.