

Decision and Reasons (Motion)

File No. 201925



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Mohammad Movassaghi and Kindle Briten Megan Blythe

Heard: October 10, 2019 in Vancouver, British Columbia
November 15, 2019 by Teleconference
Decision and Reasons (Motion): November 20, 2019

**DECISION AND REASONS
(Motion)**

Hearing Panel of the Pacific Regional Council:

Ian H. Pitfield
Nova Aitchison
Richard Sydenham

Chair
Industry Representative
Industry Representative

Appearances:

Shelly Feld)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
Owais Ahmed and Kirsten Rogerson)	Counsel for the Respondent, Kindle Blythe
)	
)	
Bobak Movassaghi)	Counsel for the Respondent,
)	Mohammad Movassaghi
)	

Introduction

1. The Mutual Fund Dealers Association of Canada (“MFDA”) initiated disciplinary proceedings, particulars of which are set forth in a Further Amended Notice of Hearing (“FANH”) against the Respondents, Mohammad Movassaghi (“Movassaghi”) and Kindle Blythe (“Blythe”). The FANH alleges that Movassaghi “and/or” Blythe falsified a client’s signature on 9 account forms; submitted 3 Know-Your-Client (“KYC”) update forms to the Member with whom the Respondents were associated without the client’s knowledge or authorization; processed at least 197 trades in the client’s investment accounts without the client’s knowledge or authorization; and created false notes to record instructions received from the client that had not in fact been received.

2. The Notice further alleges that the Respondent, Blythe, failed to conduct adequate due diligence prior to signing the KYC update forms, trade forms and account forms as an Approved Person to determine whether authorization had been received from the client with respect to the foregoing.

3. Finally, the Notice alleges that the Respondent, Movassaghi, failed to disclose actual or potential conflicts of interest to the Member. Those alleged conflicts appear to pertain to a client or clients other than the client in respect of which the account improprieties are alleged.

4. The Respondents have applied by separate Notices of Motion for Orders that the allegations made against each of the Respondents, other than in relation to alleged conflicts of interest, be struck or alternatively, that Staff of the MFDA (“Staff”) be required to provide further and better particulars of the allegations made against each of the Respondents. In sum, the principal objections are that the evidence does not support a finding of misconduct by either individual, and use of the phrase “and/or” in particularizing the allegations against the Respondents deprives each of them of procedural fairness by placing a reverse onus on the Respondents to prove that neither of them engaged in improper conduct.

5. Counsel on behalf of the MFDA opposes the applications saying that the Hearing Panel does not have the authority to strike out all or portions of the FANH or to stay the proceeding; if the Hearing Panel has such authority then it should not be exercised in this case; and it is premature

for the Hearing Panel to evaluate the quality or sufficiency of the evidence and legal arguments on the merits.

6. But for the request for particulars above and beyond those already provided, the applications seek a remedy that amounts to final judgment in respect of the matters that are the subject of the applications. For that reason, the applications were heard by the entire Hearing Panel rather than a single member thereof.

7. For the reasons that follow, the Hearing Panel has concluded that the applications to dismiss the complaints against each of the Respondents should be dismissed, but Staff will be required to better particularize the basis of liability alleged against each Respondent without resorting to the phrase “and/or” wherever it appears in the FANH.

Background

8. The Hearing Panel does not make any finding of fact in relation to the substance of the allegations against the Respondents and will refrain from reviewing evidence, except as necessary to understand the disposition of the applications.

9. Each of the Respondents was registered with the MFDA as a dealing representative, formerly known as a mutual fund salesperson, first with Investors Group Financial Services Inc., and latterly with Harbourfront Wealth Organization, a dealer member of the Investment Industry Regulator Organization of Canada (IIROC).

10. The Respondents acted under a “joint representative code” in relation to the client to whom the allegations in the FANH relate. While the precise character of a joint representative code relationship will undoubtedly be the topic of evidence and argument at a hearing on the merits, suffice to say that it appears that dealing representatives operating under such a code each have and share responsibilities in relation to the client’s affairs, and share in any commissions generated by the account.

11. In the course of the MFDA investigation, neither Respondent admitted to any impropriety in relation to their management of the client’s account, as it was their prerogative to do. It appears that in the absence of any admission, MFDA Staff concluded it was appropriate to allege in the

FANH that the improper conduct, should it be shown to be such, was occasioned by one Respondent or the other, or by the Respondents acting together.

12. In the course of Staff submissions, Enforcement Counsel submitted that in this instance liability for contravening MFDA By-laws could be grounded on the basis that one of the Respondents was solely responsible for some or all of the contraventions, or that the Respondents were engaged in a common enterprise such that each bore responsibility for any contravention, by whomever it was committed. It should be readily apparent that any conclusion in relation to the alleged basis of liability will depend upon the evidence adduced at a hearing, the Hearing Panel's findings of fact having regard for the evidence, and the submissions of counsel with respect to the legal principles by reference to which a Respondent's liability should be determined in the context of a joint representative code.

Analysis

13. In support of her application, the Respondent Blythe, tendered a lengthy affidavit of 337 pages sworn by a legal assistant to counsel for the Respondent. The affidavit appears to contain all of the material documentation generated in the course of the MFDA investigation of the complaints including statements and transcripts of statements made or provided by the Respondent Blythe in the course of the investigation.

14. The Hearing Panel has concluded that the portions of the affidavit attempting to adduce the evidence of the Respondent Blythe is not admissible for purposes of the Respondent's application, seeking as it does, dismissal of all claims against the Respondent. It is an indirect means of adducing evidence by hearsay in addition to being self-serving. The Hearing Panel has disregarded the portions of the affidavit purporting to be evidence of the Respondent.

15. The Respondent Movassaghi tendered no evidence on the application, choosing instead to rely on the evidence and to adopt the submissions of the Respondent Blythe.

16. MFDA Staff's primary argument on this application is that the Hearing Panel lacks authority to strike out all or portions of the FANH or to stay the proceeding. It is not a stay that the

Respondents seek. Rather, they urge that the contents of the FANH be struck and that the proceeding against them, as it pertains to the client, be dismissed.

17. The Hearing Panel is not a court of inherent jurisdiction. It is a quasi-judicial panel that is bound to exercise the powers and duties conferred upon it by its constating documents, namely the MFDA By-laws and the MFDA *Rules of Procedure*. In so acting, the Hearing Panel must respect the basic principles of administrative law, among which are a requirement to ensure procedural fairness and a right to be heard.

18. The MFDA By-laws stipulate that the Hearing Panel can exercise its power to impose a penalty upon a dealing representative or any other person subject to the jurisdiction of the MFDA in the event that the Hearing Panel is of the opinion that the person has failed to carry out any agreement with the MFDA; failed to comply with the provisions of any MFDA By-law, rule or policy; engaged in any business conduct or practice which the Hearing Panel in its discretion considers unbecoming or not in the public interest; or is not qualified whether by integrity, solvency, training or experience: MFDA By-law 24.1.1.

19. The MFDA *Rules of Procedure* stipulate that the Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with requirements of fairness: Rule 1.3. The primary charge that a proceeding be determined on its merits is wholly inconsistent with the premise that a proceeding may be dismissed other than by reference to its merits, a requirement that contemplates that the MFDA will adduce evidence at a hearing, an opportunity to cross-examine will be accorded the person against whom the proceeding has been initiated, and each of the MFDA and the subject party will be afforded an opportunity to present argument in support of or against a finding of actionable impropriety.

20. There is nothing in the MFDA By-laws or *Rules of Procedure* to support the Respondents' claim that the Hearing Panel is empowered to make a summary determination in respect of a contested proceeding. In the result, this proceeding will be resolved following a hearing on the merits.

21. Rule 1.5 stipulates that the Hearing Panel may exercise any of its powers under the Rules on its own initiative or at the request of a party and issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.

22. In this instance, the Respondents say that as a matter of practice and fairness, the assertion of liability on the basis that either Respondent Movassaghi or Respondent Blythe or both committed the defaults alleged is deficient.

23. It is generally accepted that alleging liability on the basis that a transgression was committed by “A or B or both” should be avoided. Rather, the basis upon which liability is alleged should be pleaded. The fact that one does not know with certainty who engaged in the impugned conduct does not compel the making of a choice. All of the evidence adduced at a hearing may allow the Hearing Panel to conclude that a single individual was responsible for any transgression that has been proved on a balance of probabilities. If the evidence does not permit a finding in that regard, then the question will be whether by reference to some principle applicable to those carrying on business in a “joint representative code” relationship, the Respondents should be found jointly liable for the conduct in question.

24. The Hearing Panel is of the opinion that the MFDA is not prevented from asserting misconduct against each Respondent individually. In addition, it should be able to particularize the principle or principles on which it asserts joint liability in the event that by reference to all of the evidence an individual transgressor cannot be identified.

25. While not strictly necessary to address the point, the Hearing Panel rejects the Respondents’ claim that advancing allegations on the basis of joint liability has the effect of placing a reverse onus on the Respondents. The burden to prove the allegations on a balance of probabilities remains with the MFDA throughout the proceeding. Depending upon the evidence adduced by Staff of the MFDA at the hearing, it will be for the Respondents to decide whether to adduce any evidence and to make submissions with respect to the appropriate principles to be applied by the Hearing Panel in deciding upon the question of liability in the context of a joint code relationship.

26. It follows that the application to strike all allegations against each Respondent is dismissed. Staff of the MFDA shall amend the FANH to separate the allegations of misconduct against each individual Respondent and the allegation of joint liability in the context of the operating relationship between the Respondents.

DATED this 20th day of November, 2019.

“Ian H. Pitfield”

Ian H. Pitfield
Chair

“Nova Aitchison”

Nova Aitchison
Industry Representative

“Richard Sydenham”

Richard Sydenham
Industry Representative

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