

Decision (Penalty) and Reasons

File No. 201952



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: Manjit Singh Cheema

Heard: November 8, 2019 and January 8, 2020 in Vancouver, British Columbia
Decision (Misconduct): November 8, 2019
Decision (Penalty) and Reasons: April 28, 2020

DECISION (PENALTY) AND REASONS

Hearing Panel of the Pacific Regional Council:

Joseph A. Bernardo
Michelle Leung
Richard Sydenham

Chair
Industry Representative
Industry Representative

Appearances:

Sakeb Nazim)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
Manjit Singh Cheema)	Respondent, in person
)	
)	

I. OVERVIEW

1. The Respondent was registered as a dealing representative with Peak Investment Services Inc. (Peak), a Member of the Mutual Fund Dealer's Association of Canada (MFDA).
2. On August 15, 2019, the staff of the MFDA (Staff) issued a Notice of Hearing alleging that the Respondent had failed to cooperate with an investigation into his conduct, contrary to section 22.1 of MFDA By-Law No.1.
3. A hearing into the merits of the allegation took place on November 8, 2019. After considering the evidence and submissions tendered by the parties, the Hearing Panel ruled that the Respondent had committed the misconduct.
4. On January 8, 2020, the Panel received further evidence and submissions relating to sanction and reserved its penalty decision.

II. THE EVIDENCE

5. The evidence admitted into the record consists of:
 - a) an affidavit sworn by the most recent MFDA investigator assigned to the file;
 - b) the investigator's testimony, which essentially amounts to an endorsement of her affidavit evidence;
 - c) tax documents, an affidavit sworn by the Respondent, and two letters from a physician, all tendered by the Respondent; and
 - d) the testimony of the Respondent.
6. The investigator's affidavit attests to the following facts, which the Respondent does not dispute:
 - a) In November 1989, the Respondent became registered in British Columbia as a mutual fund salesperson.
 - b) In August 2015, the Respondent commenced employment with Peak.
 - c) On June 6, 2017, Staff became aware of allegations that the Respondent might be implicated in a "gifting circle", an arrangement whereby in return for recruiting

additional participants and paying a participation fee a person is promised a larger amount of money.

- d) By a letter dated June 28, 2017, Staff directed Peak to conduct an internal investigation into the Respondent's purported involvement in the gifting circle.
- e) The Member's review found that in February 2017 one of the Respondent's clients had attended a promotional meeting, but did not contribute money or participate in the gifting circle. There was no evidence that any other clients had been exposed to the promotion.
- f) The Respondent left the industry in early August 2017. Subsequently, Staff made attempts to obtain information from the Respondent.
 - i. In a letter dated August 9, 2017, a MFDA Senior Case Assessment Officer asked the Respondent to answer a number of questions about the gifting circle, which he characterized as a pyramid scheme.
 - ii. The Respondent provided a cursory reply in a letter dated August 23, 2017, stating that he had not started, belonged or earned any money from any pyramid scheme and that he was unaware of any client having been involved in such a scheme.
 - iii. In letters dated February 26, 2018 and April 10, 2018, a MFDA investigator directed the Respondent to contact the MFDA to schedule an interview. The Respondent received these letters, but did not respond to them.
 - iv. A letter dated April 10, 2018 informed the Respondent that a failure to respond would result in an interview being scheduled by default for 10 a.m. on July 9, 2018 at the MFDA's Vancouver offices. The Respondent received this letter but did not reply to it.
 - v. The Respondent did not attend the interview.

7. The Respondent testified that:

- a) He had not participated in a pyramid scheme or any other outside business activity, and denied investing in a gifting circle or encouraging any of his clients to do so. He emphasized that none of his clients had invested any funds in any outside activity.

- b) He has been retired since August 1, 2017.
- c) He had been an Approved Person for over twenty-seven years, during which time he had done his best to follow the MFDA's rules and had never been subject to disciplinary action.
- d) He had not responded to Staff's correspondence because he was under considerable mental and emotional stress arising from the breakdown of his marriage in late 2016.
- e) He had likewise failed to attend the July 9, 2018 interview because of continuing emotional difficulties he was experiencing due to his marriage breakdown.
- f) Canadian Pension Plan and Old Age Security benefits are his only source of income, and his only assets are a used car and some second hand furniture.

8. In order to support his contention that he has only a modest income, the Respondent tendered into evidence his Notice of Assessment for the 2017 tax year and T4As in respect of his Canadian Pension Plan and Old Age Security earnings in 2018.

9. The Respondent also tendered two letters from his physician, dated November 22 and 25, 2019, respectively, stating that he is suffering from depression and referring him to a psychiatrist.

III. MISCONDUCT

10. The Respondent acknowledges having received Staff's letters seeking to set up an interview. If he was not healthy enough to be questioned, the Respondent could have replied to explain his situation to the Staff. He did not do so.

11. Section 22.1 of MFDA By-law No.1 states, among other things, that:

For the purpose of any examination or investigation pursuant to this By-law, [an]... Approved Person... under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation... to attend and give information[.]

12. Further to section 24.1.4 of MFDA By-law No. 1, an individual remains subject to this obligation for a period of five years from the date they ceased to be an Approved Person.

13. The undisputed evidence is that the Respondent was aware of the interview Staff scheduled for July 9, 2018 and that he failed to attend it without offering a valid excuse. This was a breach of section 22.1 of MFDA By-law No. 1.

IV. PENALTY

Respondent's position

14. According to the Respondent, no monetary penalty whatsoever should be ordered because of three mitigating factors:

a) No clients were harmed.

The Respondent is correct to identify this as a mitigating factor. It is also true, however, that the Notice of Hearing does not allege harm to clients. Any harm in this case was to the investigative process. The Respondent did not address this point in his submissions.

b) He is not in a financial position to pay a fine.

The Respondent entered his tax documents into the record on November 8, 2019. The Hearing Panel explained to the Respondent that these were not sufficient by themselves to establish an inability to pay, and that more comprehensive and verifiable information about his overall financial position was required. One of the reasons the hearing was adjourned was to give the Respondent an opportunity to compile this information. He declined to provide supplemental financial information at the January 8, 2020 appearance.

c) The Respondent's failure to co-operate was the result of psychological distress.

Another reason the hearing was adjourned was to give the Respondent an opportunity to assemble objective evidence regarding his psychological state. He provided this in the form of the physician's letters previously mentioned. The letters do not speak to his condition in July 2018 when he was scheduled to be interviewed. Rather, they establish that he was suffering from depression in November 2019, over a year later. This condition did not prevent the Respondent from participating at the first appearance on October 1, 2019, or at the hearing on November 8, 2019 and January 8, 2020.

Staff's position

15. Staff's position is that the sanctions in this case should reflect the gravity of the misconduct, and that the Respondent's failure to co-operate represents the most serious type of misconduct possible for an Approved Person. On that basis, Staff proposes a permanent prohibition, a fine of between \$50,000 to \$75,000, and an order for costs in the amount of \$7,500.

16. Staff's assessment of the misconduct is summarized in its written submissions as follows:

There was evidence that the Respondent was involved in a gifting circle pyramid scheme, and invited at least one client to participate in it. This is a very egregious form of outside activity, with the potential to cause great harm to investors and the general public. However, MFDA Staff was unable to determine the full nature and extent of the Respondent's conduct in relation to the gifting circle because the Respondent failed to provide Staff with relevant information, and did not attend an interview as requested by Staff.... General deterrence is of paramount importance in this case.

17. This overstates what can be properly inferred from the evidence.

18. The Respondent's purported involvement in a pyramid scheme is not an element of the misconduct. Rather, it is particularized in the Notice of Hearing to provide narrative context. To establish this background, the investigator's affidavit includes a transcript of an interview Staff conducted of one of the Respondent's clients on July 18, 2018 and an undated report from Peak that summarizes the findings of its internal investigation. This evidence does not meet the standard of proof required in the circumstances.

19. Asserting the Respondent had a part in promoting a pyramid scheme is the same as saying he participated in promoting a fraud. This is an extremely serious claim. Even as a background fact, it requires proof on a balance of probabilities established by compelling evidence:

Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

Anderson v. British Columbia (Securities Commission), 2004 BCCA 7, at para. 29.

20. The fact that hearsay evidence is admissible in MFDA proceedings does not immunize it from the inherent frailties of such evidence.

- a) In the interview transcript, the client claims that the Respondent invited her to a meeting at which a pyramid scheme was promoted.
 - i. The client also admits to finding it difficult to recall certain details, makes complaints that disclose a pre-existing animus against the Respondent arising from other unrelated investment advice, and admits to being drunk at the meeting.
 - ii. In stating that a pyramid scheme was promoted at the meeting, the client is not reporting an event but rather providing an opinion. There is no evidence in the record that corroborates the client's interpretation of the meeting's character.
- b) The claim in Peak's investigation report that one of the Respondent's clients attended a gifting circle promotional meeting is derived from an internal interview of the Respondent conducted by telephone on July 13, 2017.
 - i. The investigator's affidavit includes two notes from the person who interviewed the Respondent. The notes contain conflicting information about how long the Respondent was involved with the gifting circle. This creates uncertainty about what the Respondent may or may not have said during the interview.
 - ii. Peak's report does not include a transcript of the interview.
 - iii. The report says nothing about whether or not the gifting circle was a pyramid scheme.
- c) The Respondent was not able to test the reliability of the information in the transcript and Peak's report, because neither the client nor the author of the report was made available for cross-examination during the hearing.

21. Following *Anderson, supra*, the claim that the Respondent's breach blocked Staff's ability to investigate his involvement in a pyramid scheme cannot be asserted as an aggravating factor unless there is clear and convincing evidence that the scheme actually existed and the Respondent was aware of its fraudulent nature. The witness transcript and Peak's report do not meet this standard. At most, they establish that Staff had a rational basis for suspicion that justified conducting an investigation.

22. Similarly, the Respondent cannot to be faulted for failing to supply information he was not asked to provide.

23. Section 22.1 of MFDA By-law No.1 provides as follows:

For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

- a) to submit a report in writing with regard to any matter involved in any such investigation;
- b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
- c) to attend and give information respecting any such matters;
- d) to make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

24. Staff's overtures to the Respondent consisted of a series of letters that commenced on February 26, 2018. While it is true the Respondent failed to respond to the letters, section 22.1 of MFDA By-law No. 1 does not obligate an Approved Person to respond to scheduling correspondence. It requires persons under the jurisdiction of the MFDA to provide information in written form upon request or to attend an interview to answer questions. None of the letters asked the Respondent questions about the gifting circle. Instead, they were solely concerned with arranging an interview. On the evidence, therefore, the Respondent's misconduct under section 22.1 of MFDA By-law No. 1 was limited to a single episode of failing to attend an interview.

25. A further difficulty with Staff's position on penalty in this case is its contention that the Respondent's failure to co-operate rendered Staff "unable to determine the full nature and extent of the Respondent's conduct".

26. This claim is not supported by the record. There is no evidence about what Staff did, if anything, to advance the investigation in the roughly 13 months between July 18, 2018 when the client was interviewed and August 15, 2019, the date the Notice of Hearing was issued. In the

absence of any evidence about the practical effect of the Respondent's failure to cooperate, no claims can be made one way or the other about the materiality of his misconduct.

V. ANALYSIS

27. The limited factual context in this case constrains the Hearing Panel's penalty analysis to a consideration of first principles.

28. The starting point for such an analysis is to recall that in MFDA proceedings the function of enforcement penalties is to serve the larger goals of securities regulation generally, namely, protecting the investing public and fostering public confidence in the capital markets and the securities industry. This means the discretion of a hearing panel to order a penalty must always be exercised with a view towards preventing likely future harm and should be forward looking, not retrospective or punitive in orientation.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, at paras. 59, 68.

29. Effective enforcement cannot take place unless industry participants and their actions are fully transparent to the MFDA. That is why member firms are obligated to maintain comprehensive records and must satisfy many other prescriptive operational requirements. It is also why section 22.1 of MFDA By-law No.1 exists: co-operating with investigations is a strict and fundamental condition of registration because it is crucial for transparency. Any failure to cooperate, therefore, is by definition serious misconduct.

30. Specific deterrence is not an issue in this case because the Respondent has already left the industry and there is no indication that he intends to ever seek registration again. Staff is thus correct to assert that general deterrence is the paramount sanctioning consideration.

31. General deterrence is one of the cardinal objectives of securities regulatory enforcement.

A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction[.]

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672 at para. 61.

32. In articulating this principle, the Supreme Court of Canada also qualified it in one crucial respect, noting that the “importance of general deterrence as a factor will vary according to the breach... and the circumstances of the person charged”.

Cartaway, supra.

33. That is, the weight to be given to general deterrence will very much depend on the specific circumstances of a case. It is a given that stern sanctions will always offer the best prospect of general deterrence, but that does not justify meting them out reflexively in every case. On the contrary, a penalty order that considers general deterrence in isolation from the facts is by definition unreasonable.

Cartaway, supra, at para. 64.

34. To be reasonable, a penalty order must do more than serve a valid regulatory purpose. It must also be rational and fair, which is to say the result of “an internally coherent and rational chain of analysis”. Among other things, this means a penalty decision must rationally connect the penalty to the facts such that it is demonstrably proportional to the misconduct.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paras. 14, 85 The more difficult issue in this case is determining the appropriate penalty.

35. At the Hearing Panel’s request, Enforcement Counsel brought forward a number of previous MFDA penalty decisions in which failing to cooperate was the sole allegation. In each of these cases, the orders included a permanent prohibition. In 5 cases the monetary penalty was \$50,000, in 3 cases it was \$75,000, and in one instance \$125,000 was ordered.

Re: Jay Kim, MFDA File No. 201930, January 6, 2020.

Re: Walter Saveth, MFDA File No. 201885, April 12, 2019.

Re: David Hamilton Cudmore, MFDA File No. 201737, June 13, 2018.

Re: Rhilyn St. George Hylton, MFDA File No. 201829, October 30, 2018.

Re: Arash Gabriel Armani, MFDA File No. 201701, August 3, 2017.

Re: Walter John Dixon, MFDA File No. 201728, November 13, 2017.

Re: Michael Raymond McBurney, MFDA File No. 201522, December 29, 2015.

Re: Alain Armand Joseph Theroux, MFDA File No. 201307, April 1, 2014.

Re: Wei William Zhang, MFDA File No. 201309, October 30, 2013.

36. All of the precedents provided to the Panel are distinguishable from the present case.
- a) In all but *Kim, supra*, the respondent failed to attend the hearing. This resulted in the hearing panel accepting as proved the respondent's involvement in the underlying suspected misconduct particularized in the Notice of Hearing.
 - b) For example, in each of *Saveth, Hylton, and Dixon, supra*, a monetary penalty of \$50,000 was ordered and justified by a finding of harm to investors. The respondents in those decisions were found, respectively, to have falsified client signatures in know your client documentation, borrowed funds from clients, and privately charged extra fees to clients over and above those authorized by the member firm.
 - c) In *Kim, supra*, the hearing panel made a finding of fact that the respondent had submitted a \$200,000 loan application on behalf of a client that relied on fabricated documents. Moreover, the respondent was found to have actively misled Staff. A monetary penalty of \$50,000 was ordered.

37. Two useful conclusions may be drawn from the case precedents. First, in the vast majority of cases where an individual has been charged with a single allegation of failing to co-operate, Staff's case is proved by default because the respondent typically fails to attend the hearing. Second, previous hearing panels have considered monetary penalties of \$50,000 or above as warranted only when the evidence supports the conclusion that the failure to cooperate hindered an investigation into misconduct that resulted in tangible harm. Neither of these conditions applies in this case.

38. The MFDA's Sanction Guidelines issued on November 15, 2018 state, among other things, that:

- a) Public confidence requires sanctions to be proportionate to the misconduct.
- b) Distinctions should be drawn between negligent and deliberately deceptive conduct and between isolated and repeated incidents.
- c) Sanctions should reflect whether or not the misconduct resulted in the respondent receiving benefits or investors sustaining harm.

- d) A respondent's prior disciplinary history should be considered when determining sanctions.

VI. ORDERS

39. The Sanction Guidelines are consistent with *Cartaway, supra*, and *Vavilov, supra*, in emphasizing that a penalty must reflect the real world significance of the misconduct.

40. In this case, the Hearing Panel has only limited information from which to assess the objective gravity of the Respondent's failure to attend the July 9, 2018 interview.

- a) The Respondent had close to thirty years of experience in the industry. He was therefore necessarily aware of the MFDA's role and the importance of co-operating with its investigations. His failure to cooperate with the investigation was by definition serious misconduct, and he has not offered a persuasive excuse for it. A person who refuses to be transparent to the MFDA is not suitable to be entrusted with the responsibilities of an Approved Person. This justifies a permanent prohibition.
- b) The evidence confirms that none of Peak's clients sustained harm and says nothing about the extent to which the investigation was hindered. Against this stands the need to uphold strict compliance with investigations, which is absolutely essential if the MFDA is to have a meaningful enforcement capability. A monetary penalty is necessary in the interests of general deterrence.

41. Staff submitted an itemized bill to support its request for a costs order in the amount of \$7,500.

42. The Hearing Panel orders that:

- a) Under section 24.1.1(e) of MFDA By-law No.1, the Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member.
- b) Under section 24.1.1(b) of MFDA By-law No.1, the Respondent pay a fine of \$25,000.

- c) Under s. 24.2 of MFDA By-law No. 1, the Respondent pay costs of this proceeding in the amount of \$7,500.
- d) The amount of the monetary penalty in this case is lower than that typically ordered in other cases. This reflects the atypical circumstances established by the evidence. The Hearing Panel shares the view expressed in previous cases that breaches of section 22.1 of MFDA By-law No.1 strike at the very heart of the MFDA’s public protection mission, and that failures to co-operate with MFDA investigations necessarily require disciplinary responses of the utmost firmness.

DATED this 28th day of April, 2020.

“Joseph A. Bernardo”

Joseph A. Bernardo
Chair

“Michelle Leung”

Michelle Leung
Industry Representative

“Richard Sydenham”

Richard Sydenham
Industry Representative

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