



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: King Kwong Clement Chow

Heard: June 10 and August 25, 2021 by electronic hearing in Edmonton, Alberta

Decision (Penalty): August 25, 2021

Reasons for Decision (Penalty): January 18, 2022

REASONS FOR DECISION (PENALTY)

Hearing Panel of the Prairie Regional Council:

Sherri Walsh
Adam Dudley
Greg Wiebe

Chair
Industry Representative
Industry Representative

Appearances:

Sakeb Nazim)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
King Kwong Clement Chow)	Respondent
)	
)	

I. INTRODUCTION

1. On October 7, 2020 the Mutual Fund Dealers Association of Canada (“the MFDA”) issued a Notice of Hearing regarding King Kwong Clement Chow (“the Respondent”) which set out the following allegation:

Allegation #1: Commencing in November 2018, the Respondent failed to cooperate with an investigation by MFDA Staff into his conduct, contrary to section 22.1 of MFDA By-Law No. 1.

2. The Hearing on the Merits took place on May 3, 2021. The Respondent attended the hearing and was self-represented.

3. At the end of the hearing, the Panel determined that the allegation in the Notice of Hearing had been proven and a date was scheduled for the Panel to consider the issue of penalty.

4. The Penalty Hearing commenced on June 10, 2021. The Respondent attended the hearing and again acted on his own behalf.

5. It became apparent during the course of that hearing that the Respondent wished to continue to make submissions about the Panel’s finding of misconduct, rather than to address the issue of penalty.

6. The Panel decided to adjourn the hearing to allow us to issue our written Reason for Decision on the issue of misconduct. We felt that doing that would help the Respondent be better prepared for making his submissions on the issue of penalty.

7. On July 14, 2021 we issued our written Reasons for Decision on the issue of misconduct and the Penalty Hearing resumed on August 25, 2021.

8. At the conclusion of that hearing, after taking a recess to deliberate, the Panel issued an Order which imposed the following penalty:

- a) The Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-Law No. 1;
- b) The Respondent shall pay a fine in the amount of \$50,000.00, pursuant to s. 24.1.1(b) of MFDA By-Law No. 1; and
- c) The Respondent shall pay costs in the amount of \$7,500.00, pursuant to s. 24.2 of MFDA By-Law No. 1

9. These are our reasons for that decision.

II. EVIDENCE

10. On May 27, 2021, in advance of the Penalty Hearing that was to take place on June 10, 2021, Staff provided the Panel with a Written Submission, a Bill of Costs and a Book of Authorities. On June 8, 2021 Staff provided a Supplementary Written Submission and a Supplementary Book of Authorities.

11. The Respondent provided the Panel with three separate written submissions dated May 31, June 6 and June 7, 2021 respectively, to which he attached a number of documents.

12. The Respondent's submission dated May 31, 2021 primarily focused on matters relating to the Panel's finding of misconduct.

13. His submission dated June 6, 2021, however, did address matters set out in Staff's submissions on penalty.

Proceedings on June 10, 2021

14. At the commencement of the hearing on June 10, 2021 Staff expressed concern that some of the documents which the Respondent had attached to his submissions were in fact not only evidence but new evidence which had not been previously put before the Panel.

15. Enforcement Counsel asked the Panel whether, pursuant to procedural fairness, it would make sense for the Respondent to testify on the record so that Staff had an opportunity to object to or cross-examine the Respondent on whatever new evidence he intended to introduce.

16. The Panel agreed with this proposal.

17. Accordingly, the Respondent was sworn in so that he could testify about the significance of the documents that he had attached to his submissions dated May 31 and June 6, 2021 and the documents themselves were entered into evidence.

18. Those documents were:

- A copy of the 2012 edition of Forbes Magazine which mentioned the Respondent's name together with an advertisement in the magazine from Member WFG saluting its outstanding associates, one of whom was the Respondent;

- A letter dated August 27, 2010 from the President and CEO of World Financial Group to the Respondent congratulating him on having been recognized as a WFG Hero;
- A notice of termination information from WFG Securities Inc. which identified the reason for the Respondent’s termination as: “resigned – voluntary”;
- A copy of a letter dated November 19, 2018 from the MFDA to the Respondent re: “*MFDA File No. 06838/18/10/ON*”;
- A copy of a letter dated December 13, 2019 from the MFDA to the Respondent re: “*Escalation to Enforcement Counsel, MFDA File No. 06838/18/10/AB*”;
- The news release regarding these proceedings which was issued by the MFDA on March 17, 2021;
- An application form from CRA addressed to the Respondent regarding his ability to apply for the Guaranteed Income Supplement;
- An Honours Certificate from the Northern Alberta Institute of Technology issued to the Respondent in recognition of the successful completion of a prescribed program of studies in cooking dated October 1, 1992; and
- A WFG Mutual Fund Leverage Worksheet dated August 17, 2013.

19. With respect to these documents which he entered into evidence, the Respondent testified that:

- The excerpts from Forbes Magazine demonstrated the recognition he has received for his achievements in the mutual fund industry;
- The correspondence he received from the MFDA relating to its investigation of the matter which is the subject of these proceedings, used different descriptions to identify the matter — noting that the MFDA file number ended in “ON” on one occasion and “AB” on another occasion; and that this confused him;
- He voluntarily resigned from his work with WFG as a mutual fund dealing representative;
- The CRA assessed his income low enough to advise him to apply for the Guaranteed Income Supplement, in March 2020; and
- He was recognized from the Northern Alberta Institute of Technology because he helped them in preparing more than 600 meals over a period of time.

20. When Enforcement Counsel cross-examined the Respondent on these documents the Respondent admitted that the WFG Mutual Fund Leverage Worksheet and the explanation he provided in his written submissions for the Penalty Hearing about that document, were never provided by him, to MFDA Staff.

21. He confirmed that all the explanations he made in his written submissions for the Penalty Hearing were never provided to MFDA Staff during the investigation of this matter and that the very first time he provided any of those explanations was either at the Misconduct Hearing or as part of his submissions at the Penalty Hearing.

22. He acknowledged that the confusion which he said in his submissions was created from the last two letters in the MFDA file number changing from “ON” to “AB”, was not something he had ever mentioned to MFDA Staff prior to making submissions to the Panel at the Penalty Hearing.

23. He denied ever receiving a letter sent from the MFDA which explained that the file number regarding the matter at issue in these proceedings, had changed.

24. He confirmed that he has been employed with WFG as an insurance agent since 2010 and is still employed in that capacity.

25. He testified that he is part owner of the apartment in which he lives and confirmed that the 2020 CRA document which he provided did not indicate:

- a) His current income; or
- b) Whether he has any savings.

26. Enforcement Counsel called Patricia West to testify in response to the evidence adduced by the Respondent at the Penalty Hearing.

27. Ms. West explained that the reason the description of the file number in the MFDA’s correspondence changed from “ON” to “AB” simply reflected a change in the provincial designation associated with the file.

28. Her evidence was that when this file was first opened, because the Member’s office was located in Ontario, the file was identified with an Ontario designation – “ON”.

29. However, when the file was escalated to her in her role as Senior Investigator, in January of 2019, it was identified as an Alberta file – “AB”.
30. She testified that it is not uncommon for a file extension number to change during an investigation but that the change in designation as to provincial jurisdiction does not have any bearing on the subject matter of the investigation. She said it was just an identifier which helped to identify the region and office the file went to once it had been determined the matter would be investigated.
31. She further testified that the Respondent never contacted her or to her knowledge, anyone else at the MFDA, regarding any apparent confusion on his part, caused by the change in the file number.
32. The Respondent cross-examined Ms. West about the process she followed in conducting the investigation, and why she pursued him when he was no longer licensed by the MFDA.
33. Ms. West answered the Respondent’s questions in a straightforward, patient and comprehensive way providing a clear explanation in plain language about the nature of the MFDA’s process and mandate in conducting an investigation.
34. Ultimately, the Respondent’s cross-examination became repetitious, at times argumentative and crossed over into the realm of making submissions on the issue of the appropriate penalty.
35. It was after the Panel had observed the Respondent’s cross-examination of Ms. West, together with our review of his three written submissions most of which focused on matters relating to misconduct rather than to penalty, that the Panel determined that out of fairness, we should adjourn the hearing, and issue our written reasons for our decision on misconduct so that the parties could make their submissions with respect to penalty, with full understanding of the reasons why we had made our determination on that issue.

Proceedings on August 25, 2021

36. When the Panel adjourned the Penalty Hearing on June 10, 2021, we advised the Respondent that we would not receive any further evidence.

37. When the hearing resumed on August 25, 2021, however, Staff advised the Panel that the Respondent had provided further written materials and submission that had not yet been forwarded to the Panel by the Corporate Secretary's office because Staff objected to the admission of those materials on the following grounds:

- a) The material was contrary to the Panel's directions regarding not accepting any new evidence;
- b) The submission focused entirely on refuting evidence relating to the Panel's Reasons for Decision on misconduct; and
- c) The submission made allegations that Staff was guilty of discrimination on the basis of race in its dealings with the Respondent. Staff's position was that this was not the appropriate forum to address such an allegation.

38. The Panel gave the Respondent an opportunity to respond to Staff's objection. He said that his submission related to the issues of both misconduct and penalty in the sense that he was submitting that the penalty should not be imposed in the first place.

39. After hearing from the parties, the Panel asked to be provided with a copy of the Respondent's submission and we took a brief recess to consider whether we would accept it.

40. Upon our return, we advised that having reviewed the Respondent's submission, we were of the view that in substance it constituted an appeal of our decision on misconduct. We were not, therefore, prepared to accept it.

41. In making that determination we confirmed to the Respondent that he could make whatever submissions he wanted to make before the Panel regarding Staff's request for and submissions about the appropriate penalty but that we were not going to be reconsidering our decision relating to the issue of misconduct.

III. THE PARTIES' SUBMISSIONS

42. Staff's written submission began by confirming that the Hearing Panel has determined that the Respondent failed to cooperate with an investigation by MFDA Staff into his conduct. More specifically, Staff stated, the Respondent failed to comply with his obligation to provide information requested by Staff or to attend an interview to give information during an investigation of his conduct, contrary to his obligations set out in s. 22.1 of MFDA By-Law No. 1.

43. Enforcement Counsel pointed out that pursuant to s. 24.1.1(i) of MFDA By-Law No. 1, if in the opinion of a Hearing Panel an Approved Person has failed to comply with the provisions of any By-Law, Rule or Policy of the MFDA, the Hearing Panel can impose any of the penalties set out in s. 24.1.1(a)-(f).

44. Enforcement Counsel in this case proposed that the following penalties be imposed against the Respondent:

- a) A permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;
- b) A fine of at least \$50,000.00; and
- c) Costs in the amount of \$7,500.00.

45. With respect to the issue of costs, Staff submitted a Bill of Costs which indicated total costs were incurred in the amount of \$10,275.00.

46. The Respondent made it clear in his written and oral submissions to the Panel that he did not believe the finding of misconduct was appropriate and that therefore, no penalty should be imposed on him.

47. For the most part he repeated the submissions he had made to the Panel with respect to the issue of misconduct again explaining why he had not participated in Staff's investigation although we acknowledge that in his written submission, he did respond to some of Staff's written submissions on the issue of penalty.

48. For example, regarding Staff's submissions about the nature of the misconduct and the fact that the conduct which was the subject of the investigation – leveraging - can be a very risky investment strategy, the Respondent attached the WFG Mutual Fund Leverage worksheet, referenced above to his submission, to refute Staff's submission about the risk associated with this conduct.

49. We address the parties' respective submissions in more detail, in our analysis, set out below.

IV. ANALYSIS

Factors concerning the appropriateness of the proposed penalty

50. The primary goal of securities regulation is protection of the investor and the public.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 SCR 557 (SCC)
at paras 59 and 69

51. In addition to protection of the public, the goals of securities regulation include fostering public confidence in the Markets and in the securities industry.

52. As the Panel in *Popovich* stated:

The most important objective in arriving at an appropriate penalty is protection of the investing public. The penalty imposed must serve to prevent and discourage future misconduct by the Respondent (specific deterrence) as well as by others (general deterrence.) The penalty should serve to improve industry compliance with applicable By-laws, Rules and Policies. It should also promote respect for and confidence in the securities industry and its participants, the integrity of securities markets, and the regulatory system. At the same time, the penalty must be proportionate to the misconduct, and take into consideration any extenuating or mitigating circumstances, all within the overall context of ensuring that the public is protected.

Popovich, MFDA File No. 201240, Central Regional Council, Reasons for
Decision (Penalty) dated May 27, 2015

53. When determining whether a penalty is appropriate, a Hearing Panel should therefore consider:

- a) Protection of the investing public;
- b) Integrity of the security market;
- c) Specific and general deterrence;
- d) Protection of the MFDA's membership; and
- e) Protection of the integrity of the MFDA's enforcement process.

Tonnies (Re), 2005 LNCMFDA7 at para 46

54. Hearing Panels also frequently consider the following factors when determining the appropriateness of a proposed penalty:

- a) The seriousness of the allegations proved against the Respondent;

- b) The Respondent's experience in the Market;
- c) The level of the Respondent's activity in the Market;
- d) The harm suffered by investors as a result of the Respondent's activity;
- e) The benefits received by the Respondent as a result of the improper activity;
- f) The risk to investors and the Markets in the jurisdiction, were the Respondent to continue to operate in Markets in the jurisdiction;
- g) The damaged caused to the integrity of the Markets in the jurisdiction by the Respondent's improper activity;
- h) The need to deter not only those involved in the case being considered, but also any others who participate in the Markets, from engaging in similar improper activities;
- i) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the Markets; and
- j) Previous decisions made in similar circumstances.

Breckenridge (Re), MFDA File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para 77

MFDA Sanction Guidelines

55. On November 15, 2018, the MFDA issued Sanction Guidelines to assist Staff and Respondents in conducting disciplinary proceedings and negotiating settlement agreements as well as to assist Hearing Panels in imposing fair and efficient sanctions in settled or contested disciplinary proceedings.

56. The Guidelines are not mandatory but as their name suggests, they provide guidance to a Hearing Panel in determining an appropriate penalty.

57. In cases involving the type of misconduct that occurred in the present case, the following factors which are set out in the Sanction Guidelines are relevant to the Panel's decision:

- a) General and specific deterrence;
- b) Public confidence;
- c) The seriousness of the allegations proved against the Respondent;
- d) Whether the Respondent recognizes the seriousness of the misconduct;
- e) The benefits received by the Respondent as a result of the misconduct;
- f) The harm suffered by investors as a result of the Respondent's misconduct;
- g) The Respondent's past conduct;

- h) The Respondent's ability to pay; and
- i) Previous decisions made in similar circumstances.

58. In arriving at our decision as to the appropriate penalty, we have considered all of these factors.

Application of the Above Factors in the Present Case

The Seriousness of the Misconduct

59. In our Reasons for Decision on the issue of misconduct, we confirmed that in October 2018 Staff commenced an investigation into the suitability of the Respondent's leveraging recommendations to clients and into his use, without obtaining the Member's written approval, of leverage risk acknowledgment letters. In those letters, the clients were to acknowledge that they were aware of and were prepared to accept the risks associated with borrowing to invest. The leverage risk acknowledgement letters did not specify what risks were explained to or understood by the clients.

60. In its written submission, Enforcement Counsel referred the Panel to several cases which confirmed that leveraging can be a risky investment strategy and is only suitable for certain clients who have the requisite knowledge and sophistication to understand the risks that they are undertaking when they agree to borrow to invest. In order to ensure that such a strategy is suitable, the cases say, Approved Persons must complete the suitability process.

Lamoureux, [2001] A.S.C.D. No. 613 at paras 14-15

Yahn, MFDA File No. 201746, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated December 6, 2017 at paras 22-23

61. It is therefore imperative, Enforcement Counsel submitted, that a regulatory body have the means to ensure proper oversight whenever Approved Persons make leverage recommendations to clients. Staff went on to submit that when clients are asked to sign standard form letters acknowledging their awareness and acceptance of the risks of a leveraging strategy, it is critical that Staff be able to investigate and determine whether the content of such letters is accurate.

Yahn, supra, at para 54

62. In this case, Enforcement Counsel submitted that when Staff discovered that the Respondent had asked his clients to sign letters acknowledging their alleged awareness and understanding of the risks of leveraging, it became necessary to investigate the matter to ensure

the investors were protected and to investigate potential client harm. Counsel submitted that the Respondent's failure to cooperate with Staff frustrated the MFDA's efforts to effectively investigate the full nature and extent of the Respondent's conduct and the impact, if any, on his clients, regarding the leveraged investment recommendations that he made to them.

63. The Respondent refuted Staff's submissions about the risk associated with the underlying conduct relating to leveraging. In making this submission he acknowledged that this was the first time he was raising any issues relating to the leverage risk acknowledgement letters and that neither the Leverage Worksheet which he entered into evidence at the Penalty Hearing nor his submissions about the suitability of the leverage recommendations he had made to clients, were ever communicated to Staff in response to its investigation.

64. Overall, Staff submitted that the misconduct in the present case was very serious. In its written submission it stated that the "power of staff to conduct fulsome regulatory investigations is essential to facilitate effective oversight of the mutual fund industry" and that the Respondent's refusal to provide information to Staff and answer questions about his conduct that were addressed to him during a regulatory investigation, hindered Staff's ability to determine the full nature, extent and consequences of his conduct.

65. The Panel agrees with Staff's submission that the misconduct in this case was serious. The MFDA's regulatory system consists of By-Laws, Rules and Policies, all of which are aimed at protecting the client and at fostering public confidence in the Markets and the securities industry.

66. The privilege of membership in the MFDA is conditional on agreeing to comply with and be bound by these By-Laws, Rules and Policies.

67. Enforcement is a fundamental part of any regulatory scheme and in particular the regulatory scheme put in place by the By-Laws, Rules and Policies of the MFDA.

68. When a Member or Approved Person refuses to fully comply with their obligation to cooperate with Staff's enforcement efforts to investigate complaints and concerns, they prevent the MFDA from performing its obligation to ensure the regulatory system achieves its goals of protecting the investor and fostering public confidence in the Markets and the securities industry as a whole.

69. This is why a failure to cooperate is typically considered to be serious misconduct. In most cases it is also evidence that the Member or Approved Person does not take their regulatory

obligations seriously and is not interested in protecting the best interests of the client – the very individual whom the system is designed to protect.

70. As the Panel in *Cudmore* stated:

The privilege of operating in a regulated securities industry requires that each participant conduct themselves in a manner that is in the public interest. Although not a true fiduciary standard, the Approved Person must expect to be held to higher standard. That required standard does not allow nor contemplate conduct that would cause investors and the general public to question the integrity of the Approved Person or Member of the MFDA. By failing to cooperate and ignoring repeated communications from Enforcement Staff the Respondent demonstrated a disregard for the obligations he had undertaken by virtue of his membership and registration as an Approved Person. Such a demonstration is in the opinion of the panel a clear breach of the high standard and ethical conduct of business, conduct unbecoming and contrary to the public interest. It is evidence of an unwillingness to be regulated in accordance with industry practice and standards... [and is] detrimental to the public and industry interest.

Cudmore, MFDA File No. 201737, Decision of the Hearing Panel of the Atlantic Regional Council, Reasons for Decision June 13, 2018 at para 7

71. For these reasons, a determination that an Approved Person has breached their obligation to cooperate with an MFDA investigation attracts significant penalties including, in most instances, a permanent ban on their ability to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member.

72. Such is the case in this matter.

73. It is unfortunate that the Respondent focused his arguments at both the Misconduct Hearing and the Penalty Hearing on trying to convince the Panel that he was confused about what was being investigated or about why he was being asked by Staff to contact them or that he thought he was not allowed to respond to Staff and that those explanations somehow validated his refusal to cooperate with Staff's investigation.

74. As we indicated in our Reasons for Decision on the issue of misconduct, the simplest action for the Respondent to have taken would have been to reply to Staff and explain his concerns to them. At that point they could have confirmed his ability to respond to them and his obligation to cooperate with their investigation.

Respondent's Past Conduct

75. Staff pointed the Panel to a letter dated September 26, 2018 relating to a separate investigation, which the Respondent entered into evidence at the Hearing on the Merits relating to misconduct. In that letter Staff had warned the Respondent that his failure to respond to

correspondence from them about his conduct in that separate matter, would support a finding of a breach of s. 22.1 of MFDA By-Law No. 1. The letter went on to say that although Staff considered that the Respondent's breaches of the Rules referenced in that letter were serious, it had decided that it would not initiate formal disciplinary proceedings against him at that time.

76. The letter said, however, that it constituted a "warning to ensure that there will be no similar breaches of MFDA's By-laws, Rules and Policies, Provincial Securities Legislation, and any other applicable legislation in the future".

77. It also warned that if "disciplinary action is taken regarding subsequent breaches of a similar nature, this Warning Letter may be introduced as evidence at the hearing and considered when assessing the severity of the penalty that might be sought ...".

78. Enforcement Counsel noted that in spite of these explicit warnings the Respondent did not respond to any correspondence from Staff concerning the investigation of the conduct that gave rise to these proceedings. He submitted that the Respondent's failure to respond to correspondence from Staff concerning the investigation of this matter, despite having received the warning letter dated September 26, 2018 constituted a pattern of not cooperating with Staff.

79. In Staff's submission, this demonstrated the need for a penalty which would achieve specific deterrence.

80. We agree. In making our decision, we have considered the fact that the Respondent received the warning letter of September 26, 2018 and find that his conduct in this matter constitutes a pattern of not cooperating with Staff that demonstrates the need for a penalty that promotes specific deterrence.

81. We find that all of the circumstances of this matter demonstrate that the Respondent is ungovernable and would pose a risk to investors and the Markets were he allowed to continue to operate in the Markets.

Respondent's Experience in the Securities Industry

82. Staff submitted that because the Respondent had been an Approved Person since June 2012, he ought to have been aware of his regulatory obligations to cooperate with the MFDA's enforcement process.

83. We agree. We find that as an experienced Approved Person, the Respondent ought to have been aware of his regulatory obligations to cooperate with the MFDA's enforcement process. His explanation as to why he failed to cooperate falls short of demonstrating such awareness.

Respondent's Recognition of the Seriousness of the Misconduct

84. Staff submitted that the Respondent has consistently failed to acknowledge the seriousness of his misconduct or even the fact that his conduct constituted a contravention of the standard of conduct Rule.

85. In making this submission, Enforcement Counsel noted that while in circumstances where a Respondent acknowledges wrongdoing, reveals a recognition of the seriousness of any misconduct they have engaged in, and expresses a credible commitment to avoid engaging in similar conduct in the future, a Hearing Panel is entitled to treat such demonstration of remorse as a mitigating factor, a Respondent's decision to oppose and defend himself against allegations of misconduct does not constitute an aggravating factor.

Walton v. Alberta (Securities Commission), 2014 ABCA 273 at para 155

86. In this case, Staff submitted that the Respondent had failed to demonstrate that he appreciates the nature and seriousness of the misconduct that he engaged in and accordingly, there was no conduct on the Respondent's part which could be considered by the Panel to be a mitigating factor.

87. The Panel agrees with Staff's submission on this point.

Client Harm and Benefits Received by the Respondent

88. Enforcement Counsel submitted that because of the Respondent's failure to cooperate with Staff's investigation, Staff was unable to ascertain: whether or not the leveraged investment recommendations the Respondent made to clients were suitable; whether the Respondent adequately described the risks associated with those recommendations; and whether the leverage risk acknowledgement letters that he asked clients to sign, were false or misleading. Enforcement Counsel submitted that because of the Respondent's misconduct in failing to cooperate with Staff's investigation, therefore, Staff was unable to determine whether or not clients suffered harm.

89. There was no evidence of any specific benefits having been received by the Respondent as the result of his misconduct but again, Enforcement Counsel submitted, the Respondent's failure to co-operate prevented Staff from making a determination on this point.

90. We agree with Staff's submission on these points, as well.

Risk to Investors and the Markets

91. Staff submitted that due to the Respondent's failure to cooperate with Staff's investigation, the Respondent has demonstrated that he is ungovernable and would therefore pose a risk to investors and the Markets were he to continue to operate in those markets. As identified above, we agree with this submission.

Deterrence

92. Staff submitted there is a strong need for both general and specific deterrence in this case. The proposed penalties, Enforcement Counsel submitted, are necessary in order to demonstrate to other Approved Persons that failing to cooperate with an MFDA investigation has no place in the mutual fund industry, as well as to foster confidence among the public as to the effectiveness of the MFDA's regulatory regime.

93. We agree that there is a strong need for the penalty in this matter to promote both general and specific deterrence. A self regulatory regime cannot function effectively and fulfill its regulatory mandate if its registrants refuse to provide information when requested.

94. Both the Supreme Court of Canada and MFDA Hearing Panels have held that deterrence is an appropriate factor to be taken into account when determining the appropriate penalty.

Cartaway Resources Corp. (Re), [2004] 1 SCR 672 (SCC) at paras 52-62

Tonnies (Re), *supra* at para 47

95. As the Supreme Court of Canada identified, the effect of general deterrence should advance the goal of protecting investors. The penalty levied should be sufficient to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry:

A penalty that is meant to generally deter is a penalty designed to keep an occurrence from happening; it discourages similar wrong doing 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 ... the respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged ...

96. The Panel notes, as well, that securities commissions have recognized that the “pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual applicant”.

Walton, supra at para 154

97. In our view, the penalty we are imposing will satisfy the need for both specific and general deterrence having regard to the facts of this matter.

Previous Decisions Made in Similar Cases

98. Staff provided the Panel with the following cases:

- *Cudmore*, MFDA File No. 201737;
- *Armani*, MFDA File No. 201701;
- *McBurney*, MFDA File No. 201522;
- *Zhang*, MFDA File No. 201309;
- *Kim*, MFDA File No. 201930;
- *Hylton*, MFDA File No. 201829;
- *Dixon*, MFDA File No. 201728;
- *Theroux*, MFDA File No. 201307;
- *Latour*, MFDA File No. 201561; and
- *Szekely*, MFDA File No. 2018132.

99. In many of these decisions, a failure to cooperate was the only allegation and client harm was either unknown or nonexistent. A permanent prohibition was ordered in every case. The fines imposed ranged from \$125,000 to \$50,000. In the majority of the decisions, costs were awarded in the amount of \$7,500.00.

100. The seriousness of the misconduct which was the subject of the investigation in each of these decisions, varied from case to case.

The Respondent’s Ability to Pay

101. In its written submission, Staff pointed out that the MFDA Sanction Guidelines state that while a Respondent’s ability to pay a fine may be a consideration in determining the appropriate

monetary sanction to be imposed, it is only one of the factors to be weighed in relation to all other applicable factors including: general and specific deterrence; and the need to ensure public confidence in the MFDA's disciplinary processes.

102. The Guidelines state that the burden is on the Respondent to raise the issue and to provide evidence of their inability to pay such as tax returns or audited financial statements. Enforcement Counsel submitted there must be strong evidence of a true inability to pay in order to justify a reduction or waiver of a fine.

103. In this case, as set out above, the only evidence the Respondent submitted in support of his position that he was unable to pay a fine was a one-page document taken from a form dated March 2020 which showed that Service Canada had determined he was eligible for the Guaranteed Income Supplement at that time.

104. On cross-examination, the Respondent confirmed that this document did not provide any information with respect to his income as of March 2020 or at any other time. The Respondent did not submit any other evidence to the Panel regarding his financial circumstances, beyond that one-page document and confirmed that he continues to be employed in the insurance industry.

105. Staff provided the Panel with a number of MFDA decisions where the Hearing Panel held that a Respondent's inability to pay a fine is outweighed by other factors when determining the appropriateness of a penalty, including the need to have a penalty that reflects the seriousness of the Respondent's misconduct and a penalty that takes into account the benefit to the Respondent and loss to the client.

Brauns, MFDA File No. 201203, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 15, 2013

Latour, MFDA File No. 201561, Hearing Panel of the Central Regional Council, Decision and Reasons dated June 7, 2016

Popovich, *supra*

106. In this case, Staff submitted that any consideration of the Respondent's ability to pay should not be outweighed by the need for the penalty to achieve specific and general deterrence and reflect the seriousness of the Respondent's conduct.

107. The Panel agrees with Staff's submission. Further, we are not satisfied on the evidence that the Respondent would be unable to pay a fine.

108. Like the Panel in *Drysdale*, while we gave some consideration to the Respondent's financial situation in determining the amount of the monetary sanction, it was not a significant factor when considering all of the circumstances of the case.

Drysdale, MFDA File No. 2018105, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007

109. With respect to the amount of the appropriate monetary sanction to impose in this case, as noted above, we were provided with cases which involved a range of penalties, the majority of which imposed a fine of \$50,000.00. The nature of the seriousness of the underlying conduct in those cases varied. Decisions which imposed penalties at the higher end involved underlying conduct which, in the Panel's view, was of a more serious nature such as allegations of misappropriation of funds, than the conduct which prompted the MFDA to commence an investigation in this case.

Costs

110. Staff submitted a Bill of Costs indicating that the costs of conducting the investigation and hearing of this matter exceeded \$10,275.00. It requested that an Order for costs be made against the Respondent in the amount of \$7,500.00 which amount would permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and prosecution of this matter. The amount was consistent, Staff submitted, with the amounts awarded by MFDA hearing panels in the decisions listed above.

111. We agree.

V. CONCLUSION

112. It is unfortunate that while the Respondent ultimately participated in the proceedings before the Panel, he chose not to participate in any of Staff's prior attempts to investigate and communicate with him in carrying out the enforcement process which is fundamental to the MFDA's goal as a regulator.

113. Having considered all of the evidence and the parties' submissions – both written and oral, we impose the following penalty:

- a) The Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-Law No. 1;

- b) The Respondent shall pay a fine in the amount of \$50,000.00, pursuant to s. 24.1.1(b) of MFDA By-Law No. 1; and
- c) The Respondent shall pay costs in the amount of \$7,500.00, pursuant to s. 24.2 of MFDA By-Law No. 1

114. For all of the reasons set out above, we are of the view that this penalty is reasonable and proportionate, having regard to the Respondent's misconduct and the circumstances of this case and will deter the Respondent and other MFDA Approved Persons from engaging in this type of misconduct in the future.

DATED this 18th day of January, 2022.

"Sherri Walsh"

Sherri Walsh
Chair

"Adam Dudley"

Adam Dudley
Industry Representative

"Greg Wiebe"

Greg Wiebe
Industry Representative

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