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: Everest Nicholas Louis D'Souza

Heard: September 28, 2022 by electronic hearing in Toronto, Ontario
Decision: September 28, 2022
Reasons for Decision: December 9, 2022

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Emily Cole	Chair
Cas Litwin	Industry Representative
Craig Woolford	Industry Representative

Appearances:

Alan Melamud	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Justin Papazian	)	Counsel for Respondent
Everest D'Souza	)	Respondent

I. INTRODUCTION

1. This was a hearing pursuant to sections 20 and 24 of By-Law No.1 of the Mutual Fund Dealers Association of Canada (the "MFDA") to determine liability, the appropriate penalty, and costs, if any, to be imposed upon Everest Nicolas Louis D'Souza (the "Respondent").

2. An Agreed Statement of Facts signed by Staff and the Respondent on July 13, 2022 (the "ASF") was filed for our consideration. In the ASF, the Respondent admitted to engaging in the following misconduct:

> The Respondent admits that between February 2014 and September 2015, he engaged in securities related business that was not carried on for the account of the Member or conducted through its facilities by recommending, selling, or facilitating the sale of syndicated mortgage investments, contrary to the Member's policies and procedures and MFDA Rules 1.1.1, 2.1.1, 2.5.1, and 1.1.2.

3. The Respondent also filed a signed statement regarding his impecuniosity with a note from his oncologist, the Respondent's Notices of Assessment for the last three years, 2019, 2020 and 2021, his bank statements for 2021 and 2022 and his recent credit card statements (the "Respondent's Statement Re Impecuniosity"). The parties agreed the Respondent's Statement Re Impecuniosity could be admitted for the truth of its contents.

4. After hearing submissions from Staff, the Hearing Panel found the Respondent breached MFDA Rules 1.1.1, 2.1.1, 2.5.1, and 1.1.2 based on the facts set out in the ASF and his admission above. We then considered the appropriate penalty.

5. We carefully reviewed the ASF and the Respondent's Statement Re Impecuniosity and considered the submissions made by the parties at the hearing and reached a decision regarding penalty.

6. We advised the parties of our decision. We asked the parties to provide us with a payment plan on consent and requested the parties appear on October 20, 2022.

In the circumstances of this case, we decided the appropriate penalty is:

i) A permanent prohibition of the Respondent's authority to conduct securities related business in any capacity while in the employ of or affiliated with a Member of the MFDA, pursuant to section 24.1(e) MFDA By-law No 1.

ii) A fine in the amount of at least $30,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

iii) Costs in the amount of $2,500 pursuant to s. 24.2 of MFDA By-law No. 1.

7. The hearing was reconvened on October 20, 2022. The parties advised the panel that they were unable to reach agreement.

8. Staff's position was that the Respondent pay $2,500 immediately and $30,000 over 30 monthly installments. Counsel for the Respondent's position was that the panel should follow the precedent set in *Jenkins*. The panel agreed with counsel for the Respondent.

9. We determined that these amounts may be paid in 60 monthly installments of $541.67 each, without interest, on the first day of each month, with the first instalment commencing November 1, 2022. If any installment is not paid when due, the unpaid balance of the fine and costs award shall become due and payable unless the MFDA agrees otherwise.

10. These are the reasons for our decision:

II. AGREED FACTS

Registration History

1. From July 10, 2001, to December 31, 2019, the Respondent was registered in Ontario as a dealing representative with Keybase Financial Group Inc. (the "Member"), a Member of the MFDA.

2. On December 31, 2019, the Member terminated the Respondent, and he is not currently registered in the securities industry in any capacity.

3. At all material times, the Respondent conducted business in the Markham, Ontario area.

Securities Related Business Outside the Member

4. At all material times, the Member's policies and procedures required that its Approved Persons conduct all securities related business on behalf of the Member and through the facilities of the Member.

5. Tier 1 Transaction Advisory Services Inc. ("Tier 1") is a real estate and development company that was engaged in the distribution of syndicated mortgage investments in real estate development projects to retail investors.

6. Between July 2014 and September 2015, the Respondent recommended, sold, and facilitated the sale of investments in syndicated mortgages associated with Tier 1 development projects. As a result of the Respondent's

activities, the Respondent received compensation from Tier 1 totalling $17,974 in connection with the purchase of $230,800 of syndicated mortgage investments by clients of the Member whose investment accounts were serviced by the Respondent and other individuals (the "Investors").

7. Without the knowledge or authorization of the Member, the Respondent engaged in the following activities to facilitate the purchase of syndicated mortgage investments by the Investors:

a) he introduced the Investors to the opportunity to invest in the syndicated mortgage investments;
b) he recommended that the Investors purchase the syndicated mortgage investments;
c) he recommended that clients redeem mutual funds to purchase the syndicated mortgage investments;
d) he provided the Investors with promotional materials regarding the syndicated mortgage investments;
e) he provided blank subscription agreements to the Investors to facilitate the purchase of investments by the Investors in the syndicated mortgage investments;
f) he discussed the terms and features of investing in the syndicated mortgage investments with the Investors; and
g) he attended meetings between the Investors and representatives of Tier 1 to enable the Investors to obtain further information about the Tier 1 syndicated mortgage investments.

8. The Member had not approved any syndicated mortgage investments in real estate development projects offered by Tier 1 for sale by its Approved Persons and the Respondent did not request or obtain authorization from the Member to recommend syndicated mortgage investments offered by Tier 1 to the Investors.

9. None of the purchases by the Investors of syndicated mortgage investments offered by Tier 1 that were facilitated by the Respondent's conduct were executed for the account of the Member or processed through the facilities of the Member.

10. On October 20, 2016, the Financial Services Commission of Ontario ("FSCO")[1] issued an interim order requiring that Tier 1 cease and desist from dealing in syndicated mortgages investments without a license. On October 27, 2016, the Ontario Superior Court of Justice (Commercial List) appointed a trustee to protect the interests of investors in the syndicated mortgage investments that had been offered by Tier 1 (the "Trustee"). On January 23, 2018, FSCO issued a permanent order that Tier 1 cease and desist from dealing in syndicated mortgage investments.

11. The Trustee sold some of the properties underlying the syndicated mortgage investments that Tier 1 had offered to investors subject to the supervision and approval of the court and distributions were made by the Trustee to investors who had invested in the syndicated mortgage investments to the extent that money was recovered from the sale of the assets that could be distributed to investors. However, the proceeds from the sale of assets purchased with money invested in the syndicated mortgage investments have not been sufficient to recover the principal amounts invested. In addition, the Trustee has also commenced and settled litigation against various

[1] Note: Effective June 8, 2019, the Financial Services Regulatory Authority assumed the regulatory functions of the FSCO and the Deposit Insurance Corporation of Ontario.

individuals involved with the real estate development projects and the syndicated mortgage investments to try to recover some additional amounts for the benefit of investors in the syndicated mortgage investments that were offered by Tier 1.

12. The Investors described above who were solicited by the Respondent to invest in syndicated mortgage investments have collective losses of approximately $169,000.

Additional Factors

13. The Respondent has not previously been the subject of a MFDA disciplinary proceeding.

14. As described above at paragraph 6, the Respondent earned $17,974 from his activities in relation to syndicated mortgage investments. As described above at paragraph 12, the Investors suffered losses of approximately $169,000 attributable to the syndicated mortgage investments purchases that were facilitated by the Respondent.

15. To the extent the syndicated mortgage investments failed because of any wrongdoing, there is no evidence that the Respondent had any knowledge or involvement in such wrongdoing or any involvement in the operations of the real estate developments or the issuers of the investments.

16. On August 8, 2019, after learning of the Respondent's misconduct from the Staff, the Member sent audit letters to each of the clients with accounts serviced by the Respondent, asking whether the Respondent had ever discussed any real estate investment opportunities with the clients. Three clients responded to the Member's letter, who complained that the Respondent had recommended, sold, and facilitated the sale of syndicated mortgage investments to them, resulting in significant losses.

17. In addition, between August 22, 2019, and August 25, 2019, the Member attempted to contact all clients whose accounts were serviced by the Respondent and who had redemptions more than $10,000 between 2014 and 2019. None of the clients called indicated that they had purchased syndicated mortgage investments offered by Tier 1 with the proceeds of redemption.

18. By entering this Agreed Statement of Facts, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a fully contested hearing with respect to the allegations of misconduct in the Notice of Hearing.

III. ANALYSIS

11. In determining the appropriate penalty to impose upon the Respondent, we considered the primary purpose of securities regulation which is the protection of investors, including ensuring efficient capital markets and public confidence in the industry. An appropriate penalty is one which restrains future misconduct but does not punish the Respondent.

The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in Re Mithras Management Ltd. et al. (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:

> ... [T]he role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently, or temporarily as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

Tonnies (Re), 2005 LNCMFDA 7 at para. 45

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

Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132 at para. 42.

12. In exercising our discretion to impose a penalty, we also considered:

a) the protection of the investing public;
b) the integrity of the securities market;
c) specific and general deterrence;
d) the protection of the MFDA's membership; and
e) the protection of the integrity of the MFDA's enforcement processes.

Tonnies (Re), supra at para. 44 and 46.

13. In determining the appropriate penalty, we considered the following additional factors:

i. the seriousness of the allegations proved against the Respondent;
ii. the Respondent's past conduct, including prior sanctions;
iii. the Respondent's experience and level of activity in the capital markets;
iv. whether the Respondent recognizes the seriousness of the improper activity;
v. the harm suffered by investors because of the Respondent's activities;
vi. the benefits received by the Respondent because of the improper activity;
vii. the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
viii. the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;

ix. the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

x. the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and

xi. previous decisions made in similar circumstances.

Tonnies (Re), supra at para. 48.

Breckenridge (Re), 2007 LNCMFDA 38 at para 77.

Selling unapproved products without the knowledge of the Member is Serious Misconduct

14. The Respondent's misconduct is serious and requires a penalty commensurate to the egregious nature of his misconduct. The Respondent abused his position of trust to sell syndicate mortgage investments without the knowledge or approval of the Member. Engaging in securities related business outside the Member undermines the regulatory regime, exposes clients to potential harm, and can bring the mutual fund industry into disrepute.

> Conducting securities related business or outside business activity without the approval or knowledge of the Member is serious misconduct. The Member loses its ability to supervise the transactions and to assess the suitability of the transactions for the investors. The misconduct can have dire consequences for the investors involved as the off-book investments may not be suitable for the investors or even legitimate investments. The misconduct may bring the Member or the mutual fund industry into disrepute.

Qi (Re), 2013 LNCMFDA 87 at para. 11.

Chang (Re), 2016 LNCMFDA 59 at paras. 10 and 24.

Kowalsky (Re), *supra* at paras. 15 and 19.

15. Specifically, where individuals do as the Respondent did in this case and sell products that have not been vetted and approved by the Member there is a substantial risk of investor harm. In this case that harm was unfortunately realized.

The Respondent was an Experienced Rep who Ought to have Known Better

16. The Respondent had an unblemished career for approximately 13 years before he engaged in this misconduct. He should have known better than to engage in selling unapproved products outside the Member's platform and their approved products list.

The Respondent's Misconduct caused Investors Harm

17. The investors lost approximately $169,000 because of the failure of the syndicated mortgage investments. We agree with Staff that the Respondent is not responsible for the failure of the syndicated mortgages however; the investors would not have invested in the syndicated mortgages but for the Respondent's actions including:

a) introducing the Investors to the opportunity to invest in the syndicated mortgage investments;
b) recommending that the Investors purchase the syndicated mortgage investments;
c) recommending that clients redeem mutual funds to purchase the syndicated mortgage investments;
d) providing the Investors with promotional materials regarding the syndicated mortgage investments;
e) providing blank subscription agreements to the Investors to facilitate the purchase of investments by the Investors in the syndicated mortgage investments;
f) discussing the terms and features of investing in the syndicated mortgage investments with the Investors;
g) attending meetings between the Investors and representatives of Tier 1 (a real estate and development company that was engaged in the distribution of syndicated mortgage investments) to enable the Investors to obtain further information about the Tier 1 syndicated mortgage investments.

The Respondent Benefitted from his Misconduct

18. The Respondent received $17,974 compensation for his role in recommending, selling, and facilitating the sale of syndicated mortgage investments to the Investors.

A significant penalty is required to achieve General and Specific Deterrence

19. The penalty we impose must deter the Respondent from engaging in similar misconduct in the future (specific deterrence) and deter others who may contemplate engaging in similar misconduct in the future (general deterrence).

> The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". 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 under s. 162. 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 with breaching the Act.
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> *Cartaway Resources Corp. (Re),* 2004 SCC 26 at para. 61, SBA, Tab 1. For a more general discussion, see paras. 52-62.

20. We are of the view that a permanent prohibition of the Respondent's authority to conduct securities related business in any capacity while in the employ of or affiliated with a Member of the MFDA and a fine of $30,000 will protect investors, deter the Respondent from engaging in this type of misconduct and send a strong message to the industry that abusing the client trust relationship and conducting outside business will not be tolerated.

Mitigating factors

21. We considered the following mitigating factors:

a) The Respondent has not been the subject of any prior MFDA disciplinary proceedings.
b) The Respondent recognizes the seriousness of his misconduct. The Respondent accepts responsibility for his misconduct. He admitted his misconduct and entered an ASF saving the MFDA the time and expense of a fully contested hearing.

Inability to Pay

22. MFDA Sanction Guidelines provide that a Respondent's ability to pay a fine may be considered in determining the appropriate monetary sanction to be imposed.

> MFDA Sanction Guidelines, p. 5, para. 11.

23. Inability to pay however 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.

> MFDA Sanction Guidelines. *supra*.

24. We are not satisfied that the Respondent has established a *bona fide* inability to pay.

25. The Respondent did not provide a complete financial picture including all his assets. The Respondent provided information about his income and his liabilities. He stated he has no investment accounts.

26. Staff expressed concern that the Respondent failed to disclose that he has a RIF. Staff advised the panel at the hearing that in reviewing the Respondent's Statement Re: Impecuniosity, they discovered the Respondent has a RIF. In answer to further inquiries from Staff, the Respondent disclosed he has a RIF with an approximate value of $70,000-$80,000.

27. The Respondent was silent about any assets he may have accumulated in his marriage. He stated he has been estranged from his wife since January 2021 when he was diagnosed with cancer. He did not disclose whether they own a home or jointly hold any assets.

28. With respect to his living arrangement, the Respondent stated that since January 2021, he has been living with his mother in her apartment. He stated his mother supports him from her savings.

29. The Respondent disclosed his income for the past three years. In 2019, he had a taxable income of $3,738. In 2020, he had a taxable income of zero. In 2021 he had a taxable income $18,809. The Respondent explained his 2021 income was derived from three main sources: small residual trailers from several insurance companies, monthly CPP payments of approximately $600 and monthly OAS payments of approximately $530.

30. The Respondent's future ability to earn income appears limited. He is 71 years old. The Respondent has not worked since 2019 when the Member terminated him. He also suffers from multiple myeloma. A note from his oncologist states that the Respondent "has completed most of his treatment but has ongoing maintenance therapy that continues for years. He is interested in returning to work but has not yet reached the point in recovery that is practical and may require some accommodation with shorter hours when he does return."

31. The Respondent provided credit card statements showing a small amount of credit.

32. We considered the Respondent's Statement Re: Impecuniosity and his failure to disclose the RIF and concluded that there was insufficient evidence to support his claim of impecuniosity.

33. In any event, even if the Respondent is impecunious, inability to pay is just one factor that we can consider. Inability to pay should not be overemphasized, particularly in cases where clients have suffered harm.

> This Hearing Panel did not disagree with those principles, but as noted in paragraph 11 above, the principles mean that punishment of the Respondent should not be the objective of the sanction,

> even though it may be a result thereof. **In this case, the primary factor in determining an appropriate sanction should be general deterrence; specific deterrence of the Respondent is a lesser factor since, as noted in paragraph 26 above, a substantial fine will have a minimal punitive effect on him due to his already dire financial situation and a ban has been agreed to.**
>
> Respondent's counsel also submitted that the Hearing Panel should consider the ability to pay, not only for its "unjust" effect on the Respondent, but also "because…in failing to do so it would untether its ability to sanction from reality, and thereby diminish its power to both denounce and deter."
>
> This Hearing Panel disagrees with that proposition. Industry participants, other than the Respondent, to whom the principle of general deterrence is addressed, will (or should) recognize that they are at substantial risk if they engage in misconduct because they have the ability to pay, even though this Respondent may have little to lose because of his inability to pay. This applies as well to a permanent ban (or a suspension); even if such sanctions would have little or no effect on this particular Respondent, they would still be effective as a means of general deterrence on other industry participants who want to remain in the industry.
>
> In oral reply to Respondent counsel's submission, MFDA counsel noted that the Guidelines state, "If a sanction is less than…the public would reasonably expect for the misconduct under consideration, it may undermine the goals of the disciplinary process…. Any sanction …should be proportionate to the conduct at issue. The sanction should reflect the relevant mitigating and aggravating factors." **This Hearing Panel agrees with MFDA counsel that, in order to maintain public confidence in the regulatory process, the sanction should not be reduced simply because of the Respondent's inability to pay. Sanctions should be neither too harsh nor too lenient and should reflect all factors in order to maintain both public confidence in the regulatory process and the deterrent effect.** [Underline in original. Bold added.]

Kowalsky (Re), supra at paras. 29-32.

Mutual Fund Dealers Assn. (Re), supra at paras. 51-52.

Fauth (Re), supra at paras. 97-101, 107-110.

34. As a general principle, the Respondent should not be able to keep the $17,974 he gained because of his misconduct.

MFDA Sanction Guidelines, supra at p. 3,

35. To achieve general deterrence, the penalty must be more than simply disgorging the Respondent's ill-gotten gains. Members and Approved Persons must recognize that there will be a substantial cost to misconduct.

> Imposing that fine, in addition to disgorgement, is necessary as a matter of general deterrence. There may be significant financial benefits that can be obtained as a result of a contravention of IIROC Rules. As a general principle, no registrant should be able to profit from the breach of IIROC Rules. It is not sufficient deterrence simply to pay to IIROC an amount equal to the profit obtained from the misconduct. IIROC Dealer Members and Approved Persons must recognize that there will be a substantial cost to misconduct. A substantial fine, in addition to disgorgement, is appropriate in these circumstances.

Northern Securities Inc. (Re), 2014 LNONOSC 581 at para. 215.

Fauth (Re), *supra* at para. 97.

36. In this case, we find that the Respondent's misconduct was so serious that it requires a significant penalty of $30,000.

IV. COSTS

37. We reviewed the authorities that Staff provided and considered the fact that the Respondent had retained competent counsel which undoubtedly made the MFDA Staff's job easier. Staff provided a Bill of Costs in the amount of $18,037.50. Staff requested $5,000 costs, but we determined that an award of costs of $2,500 is consistent with the previous decisions provided.

DATED this 9th day of December, 2022.

"Emily Cole"
Emily Cole
Chair

"Cas Litwin"
Cas Litwin
Industry Representative

"Craig Woolford"
Craig Woolford
Industry Representative

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