



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: Tamar Michelle Eisenberg

Heard: June 24, 2020 by electronic hearing in Calgary, Alberta
Decision and Reasons: July 27, 2020

DECISION AND REASONS

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller, Q.C.
James Samanta
Greg Wiebe

Chair
Industry Representative
Industry Representative

Appearances:

Sakeb Nazim)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
Zao Han)	Counsel for the Respondent
)	
Tamar Michelle Eisenberg)	Respondent
)	
)	

I. INTRODUCTION

1. On June 7, 2019, the Mutual Fund Dealers Association of Canada (“MFDA”) issued a Notice of Hearing (“NOH”) pursuant to Section 24.4 of MFDA By-law No. 1 in respect of Tamar Michelle Eisenberg, (the “Respondent”), alleging the following:

Allegation #1: In or around February 2009, the Respondent engaged in securities related business that was not carried on for the account, or through the facilities of the Member by recommending, referring, or facilitating the sale of shares totaling \$40,000 in a mortgage investment corporation to one client, contrary to the Member’s policies and procedures and MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1.

2. On July 2, 2019 the Respondent filed a Reply to the NOH denying she had made any recommendation to purchase the said shares or that the complainant was her client.

3. On or about March 2, 2020 the Respondent communicated written admissions of Allegation # 1 (the “Allegation”) and that the sanctions should include a monetary penalty of \$15,000 and costs of \$5,000.

4. At the hearing the only issue for consideration was whether the sanctions should also include a suspension, and if so, for what time interval (the “Issue”).

5. At the hearing, oral evidence was presented by the complainant (“TG”) for the MFDA and the Respondent on her own behalf.

6. After cross examination of TG by Respondent’s Counsel, MFDA Counsel tendered into evidence the Affidavit of Patricia West, an MFDA investigator, (“West”) which included written depositions and several exhibits. Respondent’s Counsel declined the opportunity to cross examine on the West Affidavit.

7. The Respondent’s testimony initially included that at the material times TG was not her client and she did not recommend the said sale of shares. To clarify whether the Respondent was attempting to resile from her admission, the Hearing Panel reviewed with the Respondent the contents of the Allegation. She then admitted to recommending the sale of shares to a client. The Hearing Panel was satisfied that the matter should continue as a penalty hearing on the Issue only.

8. After the conclusion of the testimony, the Respondent entered additional exhibits into

evidence, including a client letter supporting the Respondent, documents pertaining to the investment and a supporting letter from the Respondent's current employer.

9. Both Counsel then presented oral submissions to supplement their previously submitted written submissions, which included the citation of several previous case authorities.

10. The Hearing Panel adjourned the proceedings to deliberate and advised it would deliver its decision with written reasons at a future date.

11. After reviewing all of the evidence, the submissions of both Counsel, the case law and authorities cited to us, we concluded the MFDA had proved the Allegation to the required standard.

12. We further concluded that it was appropriate to impose the following sanctions:

- a) The authority of the Respondent to conduct securities related business while in the employee of, or associated with, any member of the MFA is suspended for a period of three months, pursuant to section 24.1.1 (c) of the MFDA By-law No. 1,
- b) The Respondent shall pay a fine in the amount of \$15,000 pursuant to section 24.1.1 (b) of the MFDA By-law No. 1, and
- c) The Respondent shall pay costs to the MFDA in the amount of \$5,000, pursuant to section 24.2 of the MFDA By-law No. 1.

II. REASONS

13. These are our written reasons.

Background Facts

14. The facts are conveniently summarized in the West Affidavit as follows:

- a) since June 1999, the Respondent has been registered as a mutual fund salesperson (now known as a dealing representative),
- b) from June 2006 to May 2009, the Respondent was registered in Alberta as a dealing representative with Desjardins Financial Security Investments Inc. ("Desjardins"), a Member of the MFDA. The Respondent resigned from Desjardins in May 2009,

- c) since June 2009, the Respondent has been registered in Alberta as a dealing representative with Portfolio Strategies Corporation (PSC), a Member of the MFDA,
- d) at all material times, the Respondent carried on business in the Calgary, Alberta area,
- e) at all material times, Desjardins' policies and procedures required its Approved Persons to only engage in securities related business through Desjardins,
- f) commencing March 2009, TG became a client of Desjardins whose account was serviced by the Respondent,
- g) in or around February 2009, prior to TG becoming a client of Desjardins, TG advised the Respondent that she wished to invest \$40,000 in a low-risk investment that she could redeem within short notice in order to use the monies invested towards a down payment on the purchase of a house,
- h) in or around February 2009, without Desjardins' prior knowledge or approval, the Respondent recommended to TG that she invest in CareVest Blended Mortgage Investment Corporation ("CareVest"),
- i) the Respondent recommended that TG purchase the shares in CareVest based on the Respondent's understanding that TG needed to be able to redeem the monies invested on short notice in order to purchase a house,
- j) in or around February 2009, the Respondent obtained from CareVest and provided to TG the marketing materials for the investment in CareVest shares,
- k) the Respondent also completed the subscription agreement for TG to enter into this investment,
- l) in or around February 2009, pursuant to the Respondent's recommendation, TG purchased CareVest First Preferred Shares (CareVest shares) worth \$40,000,
- m) TG's purchase of CareVest shares was not carried on for the account or through the facilities of Desjardins,
- n) in or around December 2012, CareVest underwent corporate restructuring and the CareVest shares were amalgamated with other CareVest products and reclassified as CareVest Mortgage Investment Corporation (CareVest MIC) Class A shares,

- o) since then, the ability of shareholders to retract their shares in CareVest MIC has become subject to certain limits. In general, shareholders are entitled to request that CareVest retract their shares once every twelve months at a specific time, and there are limits on the amount of shares that can be retracted,
- p) in 2013, TG wished to purchase a house, and was unable to redeem her CareVest MIC shares at that time. As a result, TG was not able to use the monies invested to make a down payment towards the purchase of a house, and
- q) in June 2017, TG complained about the Respondent's recommendation that she invest in CareVest, and indicated that, as of May 31, 2017, she was only able to redeem approximately \$14,042 of her original investment of \$40,000.

15. Exhibit 10 of the West Affidavit contained the entirety of the transcript of an interview of the Respondent by MFDA Staff dated May 22, 2018. At the outset of the interview the Respondent was advised she was entitled to be represented by legal counsel and she confirmed that she had waived her right to do so.

16. At paragraph 8 of the West Affidavit, certain emails from the Respondent to TG in August 2013 were referenced, which contained the following comments:

- a) *'I put you in this because it perfectly met your requirements'.*
'I specifically put you in the Senior MIC with Canadian Horizons because it was the only one you could request redeeming at any time.'
- b) *'I had to put you into their "senior MIC" where no commissions were paid to me and you were able to redeem with 30 days' notice.'*

17. Paragraph 18 of the West Affidavit sets out certain admissions made by the Respondent in her interview including the following:

Transcript of Eisenberg Interview, p.13, lines 3-21

MS. WEST: Because it says I specifically put you in the senior MIC with Canadian Horizons because it's the only one you could request redeeming at any time. That's pretty clear.

MS. EISENBERG: Yes.

MS. WEST: And would explain why she says you recommended it to her.

MS. EISENBERG: I really don't feel I did, but I definitely made the recommendation that she go with one that she could get out of, which is what she wanted. And I mean I knew nothing more of the product than what was provided in the marketing material. So I didn't really understand it and I wouldn't have had a serious conversation with her about the risks associated with it, other than I knew that if she wanted to buy it, that this was the one that she should buy because she stated that she wanted to get out as soon as possible.

Transcript of Eisenberg Interview, p.15, lines 22-25

MR. NAZIM: So that was your primary reason for making the recommendation of those products to her?

MS. EISENBERG: M'hmm. That was the only reason that I suggested that she go the route that she did.

Oral testimony of TG

18. TG's oral testimony confirmed the particulars set out in paragraph 14(g)-(r) above and included the following additional particulars:

- a) in early 2009, she made the Respondent aware that she previously planned to put the funds into savings account to withdraw within 60 days, as she was planning to buy a house in the short term and needed it to be liquid,
- b) the Respondent told her it was a solid investment, that she could retract all her funds and there would be a redemption schedule,
- c) the Respondent filled in all the information for her and advised her to sign it,
- d) between 2009 and 2013 she thought the Respondent was still accurately representing the product prior to her first attempt to retract all of her funds in the spring of 2013,
- e) at one point between 2009 and 2013 she had the opportunity to retract all her shares as she learned CareVest was going through a conversion process,
- f) at this time she asked the Respondent if she should do so or whether the investment would remain liquid if she retained it,
- g) the Respondent advised her the investment would remain liquid, and would grow and she should keep her funds in the investment,
- h) in July 2013 she contacted the Respondent with a request to extract her \$40,000 for the purposes of a house purchase,

- i) the Respondent advised the Respondent had become locked out of the converted CareVest and could not perform the request. Instead, she sent contact information to TG to deal directly with a representative at Valiant Trust, the successor to CareVest,
- j) TG learned from that representative that she would have to wait until February 2014 for a retraction, and could only retract once annually,
- k) when TG contacted the Respondent at some date between 2014-2017 to find out what were her options for retraction and if the corporation made any commitment for growth, the Respondent said the investment would grow and would rebound and she should continue with the investment,
- l) when she applied for her first retraction and on subsequent occasions, TG discovered:
 - i. she could retract only the sum permitted by the corporation in that year,
 - ii. the window retraction varied every year and existed only for a few days
- m) TG missed the retraction window deadline in 2015 because she submitted her request a day late and has not been informed what was that amount of available retraction,
- n) In this time period, she contacted CareVest frequently to speak to customer service representatives who advised her:
 - i. there was no redemption schedule
 - ii. it would retract sums for the amount the entity chose
 - iii. it would give no commitment to allow her to retract all her money.
- o) TG has been able to retract since 2014 and as of December 2019 a total sum of \$22,877.

19. TG has also received dividends in the range of \$3000 and further dividends may continue to be paid in future.

20. TG has found that every year the amounts of permitted retractions decline and fears that the entity in future can prevent her from retracting anything.

21. TG has concluded that her investment has no share value, that she cannot sell her shares since one cannot retract the amount of a sale purchase, and there are no guarantees that she will be able to retract the balance of her funds.

22. TG testified that there has been a significant impact on her financial situation and life, including:

- a) the \$40,000 was meant for the entire amount for down payment and other than RSP savings, was all the income she had,
- b) due to her inability to retract the entire amount in 2013, she had to ask her partner's parents for that sum for the down payment,
- c) she felt ashamed to take money out of their retirement,
- d) she now had no savings,
- e) she felt frustrated and ashamed that her peers had mortgages they were paying down at this stage of life whereas she had no savings,
- f) the circumstances have prevented her from enjoying the opportunity to travel or benefit from growth in the real estate market, and
- g) the experience with the Respondent has caused TG to lose trust in all financial advisors and to suspect that they either do not understand or misrepresent their products.

Oral testimony of the Respondent

23. The Respondent's testimony included the following:

- a) she had some senior advisors she felt she could trust and as a matter of due diligence called them for their opinions who said they considered it a good investment,
- b) she did not understand she was breaching MFDA Rules,
- c) she learned in 2012 that there was a problem with the investment. At the time she joined PSC, the subject investment was a product "on their shelf" and she was able to gain knowledge about it and then felt comfortable recommending this product at this time,
- d) she admitted being locked out as TG testified,

- e) she learned about the MFDA investigation in either 2017 or 2018,
- f) at that time her life came to a grinding halt,
- g) she knew the investigation would be long and expensive
- h) she would have to hire a lawyer which would be costly,
- i) she was scared about her future,
- j) the investigation impacted her existing relationship with her clients,
- k) she was afraid of the consequences of being suspended,
- l) a suspension would be the effective end of her career in this industry,
- m) she has earned an annual income of \$50,000 and has funds currently in an RSP that would be applied to pay the fine and costs,
- n) a suspension would impact her ability to pay the fines and the costs to MFDA as her annual income in recent years meant that she would be required to use her RSP funds,
- o) she had approximately 100 clients, many of whom were elderly and would not be able to be properly serviced during a period of any suspension,
- p) her current employer would not provide any assistance in serving her clients during a period of any suspension,
- q) her existing clients would have to find their own financial advisors and it would be very difficult for them to do so,
- r) she was concerned that a suspension would impact her professional liability coverage but had not yet inquired as to what, if any, coverage consequences to her there might be.
- s) she would have considered purchasing the shares of TG to compensate her for her losses but did not feel it appropriate to communicate with her directly about anything during the investigation.

24. The Respondent produced a letter from her current employer, PSC, stating it continues to sponsor her registration as an Approved Person without hesitation.

25. The Respondent produced a letter from a client which stated that she continues to support the Respondent and considers her irreplaceable.

Submissions of Counsel

26. Counsel for the parties agreed that a primary goal of securities regulation is deterrence and the protection of the public, and that sanctions imposed by the Hearing Panel must to be preventative in nature only, and cannot be punitive.

Pezim v British Columbia (Superintendent of Brokers), [1994] 2
SCR 557

27. They further agreed that hearing panels frequently consider the following factors when determining whether a penalty is appropriate:

- a) The seriousness of the allegations proved against the respondent,
- b) The respondent's past conduct, including prior sanctions,
- c) The respondent's experience and level of activity in the capital markets,
- d) Whether the respondent recognizes the seriousness of the improper activity,
- e) The harm suffered by investors as a result of the respondent's activities,
- f) The benefits received by the respondent as a result of the improper activity,
- g) The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction,
- h) The damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities,
- i) 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,
- j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and
- k) Previous decisions made in similar circumstances.

Breckenridge (Re), MFDA File No. 200718, Hearing Panel of the
Central Regional Council, Decision and dated November 14, 2007
at p.21

28. The Respondent contended that any suspension would deprive her of her livelihood and her clients of their trusted advisor and would therefore be a penalty disproportionate to the scale

of the breach. Further, imposing a suspension would breach the principles set out by the Alberta Court of Appeal in *Walton v Alberta (Securities Commission)*, 2014 ABCA 273, (Walton) and was not supported by previously decided cases.

Findings of Fact

29. The Respondent had nearly 10 years' experience in this industry prior to committing the misconduct in 2009. We concluded she knew or should have known that recommending the investment without the authority of her Member was a breach of the MFDA Rules.

30. The Respondent made the recommendation with knowledge that TG had wanted the ability to withdraw from the investment within 60 days for a home purchase. She knew TG was reasonably relying on her as a financial advisor. At this same time, the Respondent admitted having no detailed understanding of the investment and hence gave no advice as to its risks. We found the Respondent's conduct in these circumstances to constitute reckless behavior.

31. We were satisfied that TG made all reasonable efforts to mitigate her losses.

32. On the disputed evidence as to whether the CareVest shares have or have not decreased in value or whether TG will eventually be able to redeem the entirety of her investment as a profit, we concluded that:

- a) TG is left with an investment that is tied up indefinitely,
- b) TG can retract only small amounts determined by the corporate entity, only once per year, and then only if she exercises all due diligence.

33. While TG was able to mitigate some of her losses by finding a retired couple willing to provide the requisite financial assistance, she still suffered a significant loss of opportunity to utilize the entirety of the savings to increase her equity in the house, or engage in other real estate investments. This is real and significant financial harm to the client.

34. While no one can presently predict with certainty whether and when the entirety of her investment will be restored to TG, in the interim, we concluded that TG has lost and continues to lose the use of diminishing portions of her initial savings fund. Further, she will have to remain

vigilant in actions to attain full recovery. Such uncertainty is an ongoing negative consequence to TG.

35. In addition, TG sustained emotional and social losses in having to ask to borrow money from her partner's parents, and being unable to pay down a mortgage as her peers have been able to do or have the opportunity for travel experiences.

36. Lodging her complaint after some years of frustration has not secured any financial relief to TG from any source. TG has lost confidence in financial advisors who she suspects often either do not understand or misrepresent the products they sell. We accepted TG's evidence that her complaint was pursued to protect other innocent investors from those Approved Persons who are either incompetent or dishonest.

37. We concluded these are all instances of serious client harm.

38. The Respondent has expressed her remorse for the breach to TG and to MFDA Staff which we accept as genuine. However, we did not accept her unacted upon thought to offer to purchase the TG's shares was a further mitigating factor.

39. We also accepted that the MFDA investigations and the hearing process, resulting in legal expense and negative publicity, has taken some emotional toll on the Respondent.

40. However, the decision to maintain a denial of the Allegation from June 2019 to March 2020 was hers. Further, the adjournment of the matter from March to June, 2020 was out of the control of either party. We found no evidence that MFDA was responsible for any unwarranted delay in bringing these proceedings to resolution.

41. We found no evidence that the Respondent was disabled from taking on new clients pending the proceedings, other than as a result of her own choice.

Review of Authorities

a) Legal Principles

42. The panel gave careful consideration to the Respondent's submission that imposing a suspension in this case would violate the principles of imposing sanctions enumerated in Walton.

43. While the facts and circumstances there were dissimilar to the case at hand, we accept and recite for convenience the following principles stated by the Alberta Court of Appeal:

- a) sanctions are not intended to be directly punitive but are exercised prospectively in the public interest,
- b) sanctions must be proportionate and reasonable for each respondent,
- c) individual and general deterrence are legitimate considerations in formulating an appropriate sanction and as such the penal aspects of the sanction orders cannot be ignored,
- d) the pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual respondent,
- e) sanction orders must be viewed globally,
- f) it is not an aggravating factor that the respondent fails to plead guilty or express remorse,
- g) deterrence and protection of public interest cannot exist without also considering the specific effect and deterrence to the individual respondent,
- h) administrative penalties must be proportionate to the offence and fit and proper for the individual offender,
- i) an administrative penalty focused purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved,
- j) unreasonable weight given to any single factor, including deterrence, will render the sanction itself unreasonable,
- k) an administrative penalty that is imposed for general and specific deterrence should be sufficient to reasonably accomplish that end, but no more,

- l) a monetary penalty that is beyond the individual respondent cannot be justified on the basis that it will deter others who are in a better financial condition,
- m) such sanctions ought not be so heavy as to deprive the Respondent of his or her livelihood, and
- n) the ordeal and expense of the hearing, together with the publicity that accompanied it, themselves have a deterrent effect.

44. We concluded that those enumerated principles align with the legal principles previously established for MFDA hearing panels, including those listed above. It was also stated in *Tonnies, supra*, at para. 46 that to determine whether a penalty is appropriate, the hearing panel should consider:

- a) The protection of the investing public,
- b) The integrity of the securities markets,
- 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.

b) MFDA Sanction Guidelines

45. The November 15, 2018, MFDA Sanction Guidelines are not mandatory but are intended to provide guidance to a hearing panel. In cases involving the type of misconduct in the present case, the following factors in the Sanction Guidelines are particularly relevant to the hearing panel's decision:

- a) General and specific deterrence,
- b) Public confidence,
- c) Seriousness of the allegations proved against the Respondent,
- d) Harm suffered by investors,
- e) Failure to recognize the seriousness of the misconduct, and
- f) Previous decisions made in similar circumstances.

c) Cited Case authorities

46. Counsel for each party cited case authorities in support of their opposing positions on the Issue. Several cases cited by the MFDA involved settlement agreement cases in which suspensions of either three or six months were approved, in addition to fines and costs. Several cases cited by the Respondent involved cases where a suspension for only a very short term of one to four weeks, or none at all, was imposed.

47. We noted that some cases involved settlement agreements, where others involved penalties arrived at after hearing. This panel is aware that hearing panels do not interfere lightly in a negotiated settlement and do not reject a settlement agreement unless it views the proposed penalty is clearly falling outside the range of reasonableness.

48. None of the cases cited had factual circumstances on all fours with the instant case, however we observed from review of all the reasons for decision that the various factors considered by the hearing panels included:

- a) instances where it was important to the client that they were involved with a Member or a registrant,
- b) whether the client entered into the investment by personal choice and not in reliance upon advice from the respondent,
- c) whether the client was content with the investment, notwithstanding the misconduct,
- d) whether the client had sustained financial harm,
- e) whether the client had complained to the Member or MFDA about the conduct,
- f) whether the duration of a suspension would prevent the ability to return to work in the industry,
- g) whether the respondent had left the industry,
- h) whether the respondent had an honest but mistaken belief the conduct was permitted by the MFDA Rules,
- i) whether the respondent had already been disciplined internally by the Member,
- j) whether the respondent had been terminated and unemployed for an interval prior to sanction disposition,

- k) whether a suspension would prevent or impair the respondent's ability to pay the monetary sanctions,
- l) whether the respondent had relied on advice or knowledge about the transaction from a branch manager,
- m) whether the respondent had also participated in the investment and suffered financial loss, and
- n) whether the respondent received commissions or other financial benefit.

49. One decision was cited by both counsel, namely, *Kruss (Re)*, MFDA File No. 200934, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 5, 2010 which concerned a settlement agreement. Kruss, while an Approved Person at two consecutive Members, engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling, referring, or facilitating the sale of \$50,000 of an investment product to client KS on two separate occasions, when that investment product had not been approved for sale by the Member. He received \$4,000 in commissions. The client suffered a loss of \$50,000.

50. The parties had agreed to sanctions of a one month suspension, a fine of \$10,000, costs of \$2,500, but also to an order to pay back the client's investment of \$50,000.

51. The considerations in *Kruss*, similar to the case at hand, involve the type of misconduct, the amount of the investment, and the amount of the loss. The considerations which differ are that here the Respondent received no commission, has not repaid any of the client's financial loss and the penalty has been contested by the parties, including presenting oral testimony providing greater detail as to the surrounding circumstances and impact upon the affected parties.

52. While *Kruss* was a useful comparator, particularly in establishing the reasonableness of imposing a suspension of some modest duration, we found the misconduct to be more serious in the instant case having regard to our findings as to the extent and ongoing nature of the financial harm to the client.

53. We concluded that the cases relied on by the Respondent for the proposition that there should be no suspension all involved mitigating circumstances not present in the instant case, such as:

- a) repayment of the financial loss to the client,
- b) submission to significant internal discipline by the Member,
- c) payment of a significant financial penalty imposed by the Member,
- d) loss of title for 3 months,
- e) a 6 month period of close supervision,
- f) disclosing her conduct to any branch manager at the Member such that she was induced to believe the conduct was not wrongful,
- g) having joined in the investment and suffered personal financial loss, or
- h) impecuniosity.

Analysis

54. We considered the foregoing facts, submissions, case authorities, and the following factors in determining whether a suspension was appropriate in this case.

Seriousness of the Misconduct

55. The misconduct in the present case is serious. Engaging in securities related business without the knowledge and approval of the Member undermines the regulatory regime, exposes clients to potential harm, and can bring the mutual fund industry into disrepute. The Member loses its ability to supervise the transactions and to assess the suitability of the transactions for the investors.

56. TG relied on the Respondent to act in compliance with MFDA Rules, including the requirement to conform to Members' policies and procedures. The Respondent's actions were contrary to both MFDA Rules and the Member's policies and procedures.

Harm to Client/ Benefit to Respondent

57. While the Respondent received no direct financial benefit from engaging in her misconduct, her actions had dire consequences to TG who suffered serious financial harm which began in 2013 and will continue into the future. There has been no compensation of client losses made or attempted.

58. TG entered into the investment in reliance upon advice from the Respondent and not by reason of her own independent choice. It was important to her that the Respondent was a registrant. She is very discontented with the investment and has also suffered consequential emotional adverse effects, in addition to the serious ongoing financial harm.

59. TG's reason for lodging the complaint demonstrates that the Respondent's misconduct has brought the mutual fund industry into disrepute, at least in her eyes.

60. The Respondent suffered no financial or professional consequences between 2013 and 2017 and endured no internal discipline from the Member.

61. There was no evidence of reasonable reliance on a branch manager that her conduct was within MFDA Rules or the Member's policies and procedures.

62. The Respondent has paid no financial recompense to TG who since the misconduct has suffered ongoing negative financial and other consequences.

Industry Experience of Respondent

63. Since the Respondent has been registered as a mutual fund salesperson (now a mutual fund dealing representative) since June 1999, we did not find credible her contention that she was not aware that her conduct violated MFDA Rules. We concluded that in February 2009 she knew or ought to have known and respected the requirements of the MFDA and the Member.

64. We note that the Respondent remains employed in the mutual fund industry.

Expression of Remorse

65. We accepted that the Respondent has expressed remorse for her misconduct.

Respondent's Recognition of Seriousness of Misconduct

66. However, we noted the Respondent demonstrated ambivalent attitudes as to the recognition of the seriousness of her misconduct. Her conflicting testimony as to whether she acknowledged that her conduct amounted to recommendation of the investment to a person who was her client left us in doubt as to whether the Respondent has yet unequivocally accepted and fully recognized the seriousness of her misconduct.

67. Further the Respondent's contention that the ongoing financial harm resulting constituted only an inconvenience to TG left us in doubt as to whether she fully recognizes the seriousness of the consequences of her misconduct.

68. We were unconvinced that these circumstances could be treated as mitigating factors.

Deterrence

69. The Supreme Court of Canada in *Cartaway Resources Corp.* and MFDA hearing panels have held that it is appropriate for deterrence to be among the factors taken into account when determining penalty.

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672 at paras. 52 – 62

Tonnies, MFDA File No. 200503, Hearing Panel of Prairie Regional Council, Decision and Reasons dated June 27, 2005 at para. 47

70. The effect of general deterrence should advance the goal of protecting investors. As a result, the penalty imposed should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry. As the Supreme Court of Canada stated in *Cartaway Resources Corp.*:

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. 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...

Cartaway Resources, supra, at para. 61

71. Our decision on the Issue must re-affirm public confidence in the regulatory system, and to do this, it must be seen to act as a general deterrent.

Raymond Brown-John, MFDA File No. 200502, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated June 27, 2005.

72. The Sanction Guidelines recommend imposition of the suspension where the misconduct in question undermines the regulatory regime, caused some measure of harm to the integrity of the securities industry as a whole and brings the mutual fund industry into disrepute. We conclude that this type of harm occurred in the instant case.

73. We have accepted that there are certain mitigating factors present here including the following:

- a) the Respondent has not previously been the subject of any MFDA disciplinary proceeding,
- b) her agreement in March 2020 to proceed to a penalty hearing solely on the Issue rather than a 3 day hearing, has saved some time and expense to MFDA,
- c) she received no direct financial remuneration from the client,
- d) she has expressed remorse,
- e) she has suffered some emotional stress as a result of the investigation and the proceedings.

74. These mitigating factors must be balanced against the other factors present here. We concluded they do not outweigh the seriousness of the misconduct, the financial harm and other consequences to the client, the Respondent's conflicted views about her misconduct, and the need for specific and general deterrence to the Respondent and other Approved Persons who might be like-minded.

75. We concluded the sanctions to be imposed here must serve to send a message to not only the Respondent but also to others in the mutual fund industry that the conduct engaged in by the Respondent is serious and warrants the imposition of significant disciplinary penalties.

76. We concluded that there remains some continuing requirement for specific deterrence for the Respondent. There also remains a requirement for general deterrence and warning of the significant risk of harm that can flow from conduct that results in the processing of trades off the books and records of the Member and circumvents the Member's supervisory processes.

Proportionality of the Sanction to the Respondent

77. We were not satisfied on the evidence that the Respondent does not have the financial wherewithal to pay or satisfy the quantum of fines and costs sought by MFDA. We further noted that:

- a) the Respondent admitted that she has funds available to pay the fine and costs at this time,
- b) there was no suggestion that the Respondent required installment payments to meet the payment of the fine and costs, and
- c) the Respondent's potential difficulty paying the fine and costs if she is suspended for a period of months could have been exacerbated by her own choice to decline new clients pending the proceedings.

78. We were not satisfied that the Respondent's existing clients will be unable to obtain appropriate financial advice were a suspension of up to six months imposed. We concluded that there are many competent Approved Persons capable of serving her clients for such an interval, even if associates in her own Member are unable or unwilling to assist her.

79. We were not satisfied that should she choose, the Respondent will be unable to resume her occupation and service her existing and future clients after a suspension is served. In this regard, we noted that:

- a) the Respondent's current employer has confirmed continuing support,
- b) the one client letter submitted confirmed continuing support,

- c) the Respondent has no objective basis for suspecting her liability insurer will deny coverage to her in future.

80. We were not satisfied that the Respondent's financial circumstances were so precarious that a suspension would disrupt her ability to earn an income or impede her payment of the fine and costs, amount to the equivalent of an occupational death sentence in the financial sense or would put her out of business forever.

Conclusion

81. From the evidence, our findings of credibility regarding the witnesses, the case authorities cited, the Sanction Guidelines, the oral and written submissions of counsel, and the need to wisely balance all the factors in this case, we concluded that the imposition of a period of suspension in addition to the agreed upon fine and costs penalties would not run counter to previously decided cases, breach the principles set out by the Court of Appeal in *Walton* or constitute an objectively crushing or unfit sanction on the Respondent.

82. We concluded a suspension of three months along with the agreed upon fine of \$15,000 and costs of \$5,000 will serve both the purposes of specific deterrence for the Respondent and general deterrence of other Approved Persons who might be tempted to engage in similar misconduct.

83. The sanctions considered globally are within a reasonable range of appropriateness having regard to other decisions made by other hearing panels in similar situations. Further, they will foster public confidence in the integrity of the Canadian capital markets, and the industry.

84. We thank Counsel for their assistance.

DATED this 27th day of July, 2020.

“Shelley L. Miller”

Shelley L. Miller, QC
Chair

“James Samanta”

James Samanta
Industry Representative

“Greg Wiebe”

Greg Wiebe
Industry Representative

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