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: Marja Grobbink Harmer

Heard: July 6, 2022 by electronic hearing in Regina, Saskatchewan
Decision: July 6, 2022
Reasons for Decision: August 22, 2022

REASONS FOR DECISION (PENALTY)

Hearing Panel of the Prairie Regional Council:

Sherri Walsh	Chair
Sean Shore	Industry Representative
Greg Wiebe	Industry Representative

Appearances:

Justin Dunphy	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Marja Grobbink Harmer	)	Respondent

I. INTRODUCTION

1. In this Panel's decision and reasons dated March 22, 2022 (the "Reasons"), we found that the Respondent had engaged in the following misconduct:

> **Contravention #1**: Between June 2013 and February 2017, the Respondent engaged in personal financial dealings with clients by:
>
> - jointly investing with clients in real estate investments through a company that she owned or operated; or
>
> - opening and maintaining a joint bank account with clients relating to real estate investments,
>
> which gave rise to a conflict or potential conflict of interest that she failed to disclose to the Member or otherwise address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to the policies and procedures of the Member and MFDA Rules 2.1.4, 2.1.1, 2.5.1 and 1.1.2.
>
> **Contravention #2:** Between June 2013 and February 2017, the Respondent engaged in securities related business that was not carried on for the account or through the facilities of the Member, when she solicited, recommended, sold or facilitated the sale of investments by clients in real estate investments, contrary to MFDA Rules 1.1.1 and 2.1.1.
>
> **Contravention #3:** Between June 2013 and February 2017, the Respondent engaged in outside business activities that were not disclosed to or approved by the Member when she:
>
> a. solicited, recommended, sold or facilitated the sale of investment by clients in real estate investments;
>
> b. incorporated companies or served as the President or Director of the companies; or
>
> c. became an independent distributor for a skin care company.
>
> contrary to the Member's policies and procedures and MFDA Rules 1.2.1(c) (now 1.3.2), 2.1.1,
>
> 2.5.1 and 1.1.2.
>
> **Contravention #4:** Between December 2013 and February 2017, the Respondent engaged in securities related business that was not carried on for the account or through the facilities of the Member, by recommending, selling or facilitating the sale of investment in exempt market or other investment products to clients, contrary to the Member's policies and procedures and MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1.
>
> **Contravention #5:** Commencing in July 2019, the Respondent failed to cooperate with an investigation by MFDA Staff into her conduct, contrary to section 22.1 of MFDA By-Law No. 1.[1]

2. The Panel reconvened to hear submissions from the parties with respect to the appropriate penalty to be imposed on July 6, 2022 (the "Penalty Hearing").

3. In advance of the Penalty Hearing, Staff provided the Panel with a written submission in which it proposed that the following sanction be imposed:

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

b. the Respondent pay a fine in the amount of at least $1,275,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1, as follows:

a. $1,200,000 with respect to Allegations #1 – 3 (real estate investments);

b. $25,000 with respect to Allegation #4 (securities related business regarding exempt market products);

c. $50,000 with respect to Allegation #5 (failure to cooperate);

c. the Respondent pay costs in the amount of at least $20,000, pursuant to s. 24.2 of MFDA By-law No. 1.

4. In her oral submission at the Penalty Hearing, the Respondent opposed the imposition of any sanction. In support of her position, she said that she personally never received compensation from the Joint Ventures. She also said that the Joint Ventures were adversely affected by both a downturn in the rental market and COVID.

5. During the course of her submission the Respondent also provided information about her dealings with EK, who was another director and shareholder in the Joint Ventures. Enforcement Counsel objected to those submissions on the basis that the Respondent was raising matters that were not in evidence before the Panel.

6. The Panel agreed with Counsel's objection and to the extent that the Respondent's submissions at the Penalty Hearing contained information that was not before the Panel in evidence, we did not consider that information in determining the appropriate penalty.

7. At the conclusion of the Penalty Hearing the Panel made the following Order:

a) the Respondent be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member;

b) the Respondent pay a fine of $525,000 made up as follows:

i) $450,000 with respect to Allegations #1-3 (real estate investments);

ii) $25,000 with respect to Allegation #4 (securities related business regarding exempt market products);

iii) $50,000 with respect to Allegation #5 (failure to cooperate); and

c) the Respondent pay costs in the amount of $20,000.

II. ANALYSIS AND DECISION

Authority of the Hearing Panel

8. Pursuant to section 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 a by-law, rule, or policy of the MFDA, a Hearing Panel can impose any of the penalties set out in Section 24.1.1(a) – (t), including a permanent prohibition on the authority of the Approved Person to conduct securities related business and a fine, not exceeding $5,000,000.00.

9. Pursuant to section 24.2 of MFDA By-Law No. 1, the Hearing Panel has the discretion to require a Member or Approved Person to pay the whole or part of the costs of the proceeding before the Hearing Panel and any investigations relating to that proceeding.

Factors Concerning the Appropriateness of the Proposed Penalty

10. The primary goal of all securities regulation is investor protection.

> *Pezim v. the British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at para. 68

11. In addition to investor protection, the goals of securities regulation include fostering public confidence in the capital markets and in the securities industry as a whole.

> *Pezim, supra,* at paras. 59 & 68*; Tonnies (Re)*, 2005 LNCMFDA 7(QL), at para. 45

12. In furtherance of these goals, disciplinary sanctions imposed in the securities regulatory context are intended to restrain future misconduct. As the hearing panel in *Tonnies (Re)* stated:

> 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)*, *supra,* at para. 45

13. Sanctions imposed by hearing panels should therefore be protective and preventative in order to prevent likely future harm to the markets. To determine whether a sanction is appropriate, a 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.

Tonnies (Re), *supra,* at paras. 44, 46

14. Hearing panels have considered the following additional factors when determining an appropriate penalty:

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 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.

Tonnies (Re), *supra,* at para. 48

15. When determining the appropriate penalty, a panel should also refer to the MFDA's Sanction Guidelines (the "Guidelines").

Mutual Fund Dealers Association of Canada Sanction Guidelines, dated November 15, 2018

16. The Guidelines, as their name suggests, are not mandatory or binding on a panel. They do, however, provide a summary of the key factors upon which hearing panels can exercise their discretion to impose sanctions in a consistent and fair manner.

17. The Guidelines described many of the same factors that are listed in the cases cited above and which have been considered in previous decisions of MFDA hearing panels.

Application to the Present Case

Seriousness of the Misconduct: The Joint Ventures

18. Contraventions #1, #2 and #3 a. & b. all compromise the same set of facts relating to: the Robinson Street, Vaughn Street, Montague and Hillcrest Joint Ventures (the "Joint Ventures").

19. In the Reasons the Panel found that the Respondent recommended to four sets of clients (Clients WA, WI, H and B) that they enter into Joint Venture agreements which involved real estate investments in which the Respondent had a material interest. In respect of Clients WA, the Panel also found that the Respondent opened a joint bank account to facilitate the receipt of rental incomes for one of the Joint Ventures. The Panel found that all of this conduct constituted a prohibited conflict of interest under MFDA Rules 2.1.4 and 2.1.1.

> *Harmer (Re)*, MFDA File No. 202061, Hearing Panel of the Prairie Regional Council, Decision (Misconduct) and Reasons dated March 22, 2022, at paras. 113 & 297-304

20. The Panel also found that this conduct was both a breach of the Respondent's obligation to ensure that all outside business activities were disclosed to and approved by the Member and a breach of her obligation to ensure that all securities related business was conducted through and approved by the Member, pursuant to MFDA Rules 1.2.1(c) (now 1.3), 1.1.1, and 2.1.1.

> *Harmer*, *supra,* at paras. 367-368

21. Finally, the Panel found this conduct violated the Member's policies and procedures in breach of MFDA Rules 2.5.1 and 1.1.2.

> *Harmer*, *supra,* at para. 324

22. Staff submitted that this misconduct, which, it pointed out, involved obtaining money from clients to use in investments in which the Respondent had a material interest, was serious misconduct indeed.

23. In support of its position, Staff pointed to the decision in *Nunweiler (Re)* where the Panel held that borrowing money from clients to use in companies in which an Approved Person has a personal interest is an irreconcilable conflict of interest:

> Where an Approved Person borrows money from a client, or arranges investments by clients in companies in which the Approved Person has a personal interest, such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that facilitating investments by a client in your company, or borrowing money from a client is not the exercise of responsible business judgment in the best interests of the client.
>
> *Nunweiler (Re)*, MFDA File No. 201030, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated July 4, 2011 at para. 17

24. Staff also submitted that by engaging in securities related business outside the Member and failing to disclose her outside business activities to the Member, the Respondent denied the Clients the benefit of the Member's oversight and due diligence to ensure the suitability of any securities recommendations the Respondent made for them. This, Staff submitted, contributed to the seriousness of the Respondent's misconduct.

25. The Panel agrees with all of these submissions.

26. As the Panel in *Nunweiler (Re), supra*, stated, when an Approved Person arranges for clients to invest in companies in which they have a personal interest, such conduct gives rise to a clear conflict of interest whereby the Approved Person puts their own interests ahead of those of their client.

27. The seriousness of the Respondent's misconduct relating to conflict of interest in this case was compounded by the fact that it involved securities-related business which was conducted outside the Member and which involved outside business activities that the Respondent did not disclose to the Member.

28. MFDA panels have found that such conduct, because it prevents Members from supervising transactions to ensure the suitability of investment recommendations made for clients, falls within the category of the most serious type of misconduct which an Approved Person can commit.

Szekely (Re), MFDA File No. 2018132, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated October 24, 2019, at para. 45

29. In assessing the seriousness of the Respondent's conduct, the Panel also considered the following factors relating to the scale of her misconduct:

- the number of clients involved;
- the amounts of capital invested by those clients; and
- the number of instances of misconduct.

30. Based on these factors, in the Panel's view, the scope of the Respondent's misconduct, which involved nine instances of misconduct and four clients who together invested over $1.0M of capital shows that the Respondent's misconduct was not only serious, it was not, to quote the words of the panel in *Boldt (Re)*, "a one-time error of judgment".

Boldt (Re), MFDA File No. 201649, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 6, 2017*,* at para. 40

Seriousness of the Misconduct: Exempt Market Products

31. With respect to Contravention #4, in our Reasons, we found that the Respondent engaged in securities-related business outside the Member by facilitating the referral of Clients WA and H to purchase various exempt market products.

Harmer, *supra*, at paras. 384-385

32. Staff submitted that, similar to the facts underlying Contraventions #1-3 a. & b., recommending or facilitating the purchase of exempt market products which are not offered through its facilities prevented the Member from conducting its due diligence to ensure the suitability of those investments for the Clients and prevented it from being able to verify whether the Clients qualified to purchase exempt market products.

33. The Panel agrees with Staff's submissions on this point and finds that the Respondent's conduct with respect to Contravention #4 amounts to serious misconduct.

Seriousness of the Misconduct: Failure to Cooperate

34. In the Reasons, we found that the Respondent failed to cooperate with Staff's investigation into her conduct by failing to answer interview questions about her ownership interest in the Joint Ventures and by failing to respond to Staff's subsequent requests for information.

Harmer, *supra*, at paras. 417-419

35. Staff submitted that the Panel should consider this misconduct to be serious, as well. In support of its submission Staff pointed to the decision in *Chow (Re)* where the panel said:

> 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.
>
> 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…
>
> 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.
>
> *Chow (Re),* MFDA File No. 202054, Hearing Panel of the Prairie Regional Council, Decision and Reasons (Penalty) dated January 18, 2022, at paras. 68- 71

36. The Panel agrees with Staff's submission that the Respondent's failure to cooperate with MFDA Staff during the course of its investigation into her conduct hindered Staff's ability to provide effective oversight over the mutual fund industry and amounts to serious misconduct.

37. For all of the above reasons, the Panel finds that the misconduct in which the Respondent engaged as identified in Contraventions #1-5 is serious.

Client Loss and Benefits Received by the Respondent

Contraventions #1-3 a. & b. – the Joint Ventures

38. With respect to Contraventions #1-3 a. & b., the Clients invested and received the following amounts:

Clients	Amounts Invested	Amounts Received
Robinson Joint Venture		
WA	$100,000 + $125,000 in additional expenses	$17,600
WI	$100,000	$17,600
H	$100,000	$17,600
B	$100,000	$17,600
Vaughn Joint Venture		
WA	$100,000 + $17,829 cash call	$3,157
H	$100,000 + $17,829 cash call	$3,142

Clients	Amounts Invested	Amounts Received
WI	$100,000 + $17,829 cash call	$1,628
Montague Joint Venture		
WA	$70,000 + $80,000 in additional expenses	$3,157
Hillcrest Joint Venture		
H	$100,000 + $17,354 cash call	$7.20 total from sale of shares

39. To summarize, in total the Clients contributed approximately $1,145,841 towards the four Joint Ventures and received interest payments or other compensation totaling approximately $81,500 from those investments.

40. With respect to the Robinson Joint Venture, each of Clients WA, WI, H and B received a 10% interest in exchange for their initial investment of $100,000 while the Respondent received a 12.5% interest without making any capital contribution.

41. With respect to the Vaughn Joint Venture, each of Clients WA, WI and H received a 5.714% interest in exchange for their initial investment of $100,000 while the Respondent received a 12.5% interest without making any capital contribution in exchange for her interest.

42. With respect to the Montague Joint Venture, Clients WA contributed $70,000 in exchange for receiving a 50% interest in the property and title to the property, which they continue to hold. The Respondent received the other 50% interest in exchange for making a capital contribution of $1.00.

43. Finally, with respect to the Hillcrest Joint Venture, Clients H received a 6.154% interest in exchange for their initial investment of $106,000 while the Respondent received a 2.5% interest without making any capital contribution in exchange for her interest.

44. The Respondent's interest in the Joint Ventures was held through the vehicle of a company of which she was a director and shareholder, called "H&H".

45. In February 2020, Clients WA, WI and H commenced a civil claim for damages against the Respondent pertaining to the Vaughn and Robinson Joint Ventures. In April 2020 the Respondent and another individual reached an agreement with these Clients and the remaining investors whereby H&H and a company of which the other individual was a shareholder and director, transferred their shares and liabilities in the corporation which holds title to the Robinson Street Property to the remaining investors, including Clients WA, WI and H.

46. As of the date of the Penalty Hearing the evidence before the Panel was that: the Robinson and Vaughn Joint Ventures remained ongoing projects but the Clients had not recovered their initial investments; Clients WA continued to hold title to the Montague Joint Venture but had not recovered their initial investment; and with respect to the Hillcrest Joint Venture, Clients H sold their shares and suffered an actual loss of $117,000; and there was no evidence as to whether or to what extent the Clients will ultimately profit or receive a return on their initial investments in the three Joint Ventures which are ongoing.

47. Enforcement Counsel conceded that the Clients have not sustained a crystallized loss with respect to those investments. Counsel submitted, however, that the Clients have still suffered harm to the extent that their capital has been tied up for the foreseeable future in those investments.

48. Based on this evidence, the Panel finds that although the Clients retain their respective interests in the Joint Ventures, and the Respondent has given up her interest in some of those investments to the Clients, and Clients WA hold title to the Montague property, the Clients' monies remain at risk and it is not known whether or to what extent they will receive a positive return on those investments.

49. The Panel finds, therefore, that the Clients have suffered harm as the result of the Respondent's misconduct.

50. The Panel also finds that the Clients have suffered harm to the extent that the Respondent's misconduct deprived them of having the protection and benefit of the Member's guidance which could have avoided or reduced the harm to all concerned. MFDA Panels have considered this to be an aggravating factor.

51. With respect to benefits received by the Respondent, Enforcement Counsel submitted that the Respondent stood to gain from the capital which the Clients invested in the Joint Ventures and that she therefore obtained a benefit, notwithstanding the fact that there was no evidence that the Joint Ventures had generated any profit.

52. In response, the Respondent submitted that because she never received compensation from the Joint Ventures, she could not be seen as having obtained any benefit from her conduct.

53. Enforcement Counsel submitted that the penalty with respect to Contraventions #1-3 a. & b. should, to the extent appropriate, reflect the benefit that the Respondent received.

54. They acknowledged that this was not an easy case in which to come up with an appropriate fine insofar as Contraventions #1-3 a. & b. are concerned and that determining the harm suffered by the Clients and the benefit received by the Respondent could not be done with mathematical precision.

55. To arrive at the sanction they proposed with respect to Contraventions #1-3 a. & b., Enforcement Counsel relied on decisions of MFDA Hearing Panels where the respondent had engaged in personal financial dealings by having clients lend money to them or to a corporation of which they were a director, shareholder and principal, such as, for example, in *Boldt (Re), supra*.

56. Enforcement Counsel submitted that such cases demonstrate that panels take the view that the amount of monies provided for the purpose of raising capital to invest in businesses in which a respondent has a material interest, whether by a loan or in the form of shares, ultimately form the basis for deciding the amount of the fine.

57. In their submissions, Enforcement Counsel also made reference to the method of assessing the appropriate fine in cases which involve misappropriation, namely – the remedy of disgorgement.

58. This remedy was recently considered by the Ontario Securities Commission:

> Disgorgement is an important tool to advance the remedial and protective aims of securities regulation and to ensure that specific and general deterrence of misconduct is achieved. The disgorgement remedy is intended to deprive a wrongdoer of gains obtained through misconduct and thereby remove the incentive to engage in similar future non-compliance with securities regulation.
>
> In addition, disgorgement serves the important public interest of maintaining public confidence in the capital markets and securities regulation, by making it clear that contravening securities regulations does not pay.
>
> *MFDA (Rojas Diaz) (Re)*, 2021 ONSC 24 at paras. 30-31

59. They submitted, therefore, that the amount of the penalty in this case should reflect the amounts that were invested by the Clients, less any returns they had obtained: $1,064,341 ($1,145,841 minus $81,500) plus a further financial penalty – for a total penalty of $1,200,000.

60. In response to questions from the Panel, Enforcement Counsel acknowledged that the Respondent did not actually receive the sum of $1,064,341. In proposing a fine based on that amount, they said they were simply trying to focus the Panel on the fact that the Respondent stood to benefit from the monies the Clients invested.

61. While the Panel finds that the Respondent did receive a benefit from her misconduct and agrees with Staff's submission about the underlying principles which support the imposition of a significant fine, the totality of the evidence does not support basing that fine on the premise that the Respondent received a benefit from her misconduct in the amount of the monies the Clients invested, less any monies received to date - $1,064,341.

62. This is the reason why our decision as to the appropriate fine with respect to Contraventions #1-3 a. & b. differs from the amount which was proposed by Staff.

63. Put another way, while we agree with Staff's submission that the appropriate penalty with respect to Contraventions #1-3 a. & b. must reflect the basic principle that a respondent must not be allowed to retain benefits they have received from their misconduct, we do not agree with Staff's submission that the amount of benefit the Respondent received from her misconduct directly corresponds to the amount of money the Clients invested in the Joint Ventures.

64. The cases on which Staff relied in support of the fine they were proposing: *Brake (Re),* MFDA File. 200804 Hearing Panel of the Prairie Regional Council, Decision and Reasons (Misconduct) dated December 3, 2008, and *Boldt (Re), supra*, were cases where, due to the nature of the misconduct itself, the loss the clients suffered and the benefit the respondent received respectively, were not only actual and quantifiable, they corresponded directly - one to the other.

65. That is not the case here.

66. Nonetheless, it bears repeating that the Panel agrees that significant penalties must be imposed when the misconduct at issue involves clients funding a project in which a respondent has a material interest, as was the case in this matter.

67. In our view, the penalty which we have ordered in this case does send a clear message that wrongdoers must not benefit from their misconduct, thereby removing the incentive in the future, to engage in similar non-compliance with the requirements of securities regulation.

Contravention #4 - Exempt Market Products

68. Clients WA suffered either a book or actual loss of approximately $75,000 on their $100,000 investment in the various exempt market products.

69. Clients H invested $100,000 in an exempt market product which was subsequently rolled into another project but there was no evidence of loss with respect to this investment.

70. There was no evidence that the Respondent received any direct or indirect benefit such as a referral fee or commission, for example, from the Clients' investments in the various exempt market products.

71. The Panel agrees with Staff's submission that on a principled basis, there is a distinction between misconduct which involves referrals to investments outside the member involving a third party where the respondent has no material interest in the investment – similar to the facts underlying Contravention #4 in this case and investments where the respondent has a material interest - similar to the facts underlying Contraventions #1-3 a. & b. in this case.

72. We also agree with Staff's submission that the distinction between these two types of misconduct should be reflected in the fine which a panel imposes: the former situation giving rise to a lower fine than the latter.

Respondent's Past Conduct and Experience in the Capital Markets

73. The Respondent was registered in the mutual fund industry from August 2002 to February 2017.

74. Enforcement Counsel submitted that based on her long registration history the Respondent knew or ought to have known of the requirements set out in MFDA Rules including the obligation to cooperate with Staff's investigation into her conduct.

75. The Panel agrees with this submission.

76. The one mitigating factor which the Panel has taken into account is the fact that the Respondent has no prior disciplinary history by the MFDA.

Remorse or Recognition by the Respondent of the Seriousness of the Misconduct

77. Enforcement Counsel submitted that while the Respondent admitted to certain facts in the Reply she filed to the Notice of Hearing, primarily with respect to her involvement in the Joint Ventures, her denial regarding the outside business activities she conducted and her engagement in securities-related business regarding exempt market products, together with her failure to cooperate with Staff's investigation, required Staff to conduct a full hearing on the merits.

78. Enforcement Counsel acknowledged that the Respondent should not be punished for requiring Staff to prove the Contraventions in the Notice of Hearing on the balance of probabilities and the Panel should not, therefore, consider the Respondent's failure to admit to the misconduct, to be an aggravating factor. However, Enforcement Counsel submitted that by requiring Staff to prove its case the Respondent does not gain the benefit of the mitigating factors that might have been present had the Respondent entered into a Settlement Agreement or even an Agreed Statement of Facts.

79. The Panel agrees with these submissions. The Panel also finds that overall throughout these proceedings the Respondent has demonstrated a disturbing lack of recognition of the seriousness of her misconduct.

Deterrence

80. Both the Supreme Court of Canada and MFDA hearing panels have held that deterrence is a factor to be taken into account when determining an appropriate penalty.

> *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 SCC, at paras. 52-62
>
> *Tonnies (Re), supra*, at para. 47

81. Deterrence is intended to capture both specific deterrence of the wrongdoer and general deterrence of other participants in the capital markets.

82. The effect of general deterrence should advance the goal of protecting investors. A penalty should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated not only by the particular respondent, but by others in the industry.

83. As the Supreme Court of Canada stated:

> 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.
>
> *Cartaway Resources Corp. (Re), supra*, at 61

84. In the Panel's view, our imposition of a permanent prohibition together with a monetary fine in the amount of $525,000 achieves the goals of both specific and general deterrence.

Previous Decisions Made in Similar Circumstances

85. In its written submission, Staff provided the Panel with a number of cases for guidance as reflected in the chart below. These cases primarily relate to the misconduct which underlies Contraventions #1-3 a. & b.:

Case	Relevant Facts	Penalty
Brake (Re) MFDA File. 200804 Hearing Panel of the Prairie Regional Council, Decision and Reasons (Misconduct) dated December 3, 2008	• The Respondents failed to disclose or obtain approval to conduct certain outside business activities. • The Respondents engaged in securities related business outside the Member by selling more than $1,000,000 in shares of corporations. • The Respondents engaged in a conflict of interest by failing to disclose that the $1,000,000 in shares were in companies owned or operated by the Respondents. • The Respondents failed to return the invested monies. • One Respondent failed to fulfil her obligations as a branch manager. • The Respondents failed to cooperate with Staff's investigation.	Contested Hearing: • Permanent Prohibition • Fine of $1,222,966 with respect to allegations 1-4 • Fine of $50,000 to each Respondent with respect to failure to cooperate • Fine of $75,000 with respect to Branch Manager violations • Costs of $10,000 payable by each Respondent
Boldt (*Re)* MFDA File No. 201649, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 6, 2017	• The Respondent engaged in personal financial dealings with three clients when he arranged for the clients to loan at least $1,330,000 to a non-arm's length corporation. • The Respondent was a director, shareholder and/or principal of three corporations which was not disclosed to, and approved by, the Member. • The Respondent failed to cooperate with an investigation conducted by Staff. Other Factors: • Clients loaned approximately $1,330,000 to a company owned by the Respondent, of which only $517,705 was returned and the Respondent retained approximately $812,295, which was unlikely to be repaid.	Agreed Statement of Facts with Contested Penalty only: • Permanent Prohibition • Fine of $950,000 • Costs of $7,500

Luong Dao (*Re*) MFDA File No. 201971, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 9, 2021	• The Respondent engaged in an outside business activity that was not disclosed to or approved by the Member regarding rental properties.
	• The Respondent engaged in personal financial dealings with a client by:
	  • purchasing two condominium units with the client and accepting payments from the client to finance the costs of purchasing and maintaining the Condominium Units;
	  • opening and maintaining a joint bank account with client MH regulating to Condominium Unit expenses; and
		Settlement Agreement:
		• Permanent prohibition
		• Fine of $50,000
		• Costs of $10,000

Case	Relevant Facts	Penalty
	• accepting three cheques from the client totaling $95,000. • The Respondent submitted 5 annual questionnaires to the Member that contained false or misleading responses. Other Factors: • The Respondent and client jointly invested in two rental condominium units. The Client contributed approximately $145,000 in addition to paying towards ongoing expenses along with the Respondent.	
	• The Respondent and client jointly operated and maintained a bank account with respect to the properties, and were jointly on the mortgages for those properties. • The Respondent, for one property, only paid an initial $30,510 and treated a $91,530 discount from the vendor as part of the deposit, and did not disclose this to the client. • The client sued the Respondent and the parties are trying to sell the properties.	
Szekely (Re) MFDA File No. 2018132, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated October 24, 2019	• The Respondent solicited approximately $287,542 from two clients and two individuals for investment outside the Member, and has failed to fully repay or account for these monies. • The Respondent solicited approximately $287,542 from two clients and two individuals for investment outside the Member, thereby engaging in securities related business outside the Member. • The Respondent engaged in personal financial dealings with two clients by: • soliciting approximately $80,000 for investment outside the Member, and entering into an agreement to invest the monies on behalf of the clients and pay the investment principal and interest to the clients; and • soliciting approximately $10,000 for a joint investment with the Respondent in a private investment club operated by the Respondent outside the Member. • The Respondent failed to cooperate with an investigation by MFDA Staff. Other Factors • Two clients invested $90,000 with the Respondent, which was paid out and subject of a mutual release with the Respondent. • Two other individuals invested $197,542.56, of which they only recovered $95,000 from the Respondent.	Agreement on Facts with Contested Penalty only: • Permanent Prohibition • $100,000 for Allegations 1, 2, and 3 • $50,000 for Allegation 4 • Costs of $5,000
Cheung (Re) MFDA File No. 201808, Hearing	• The Respondent engaged in securities related business which was not carried on for the account of the Member or through its facilities, by recommending, selling, facilitating the sale of, and/or making referrals in respect	Uncontested Hearing: • Permanent Prohibition • Fine of $75,000

Case	Relevant Facts	Penalty
Panel of the Central Regional Council, Decision and Reasons dated January 28, 2019,	of the sale of investments to at least 5 clients totaling approximately $244,300. • The Respondent engaged in another gainful occupation, which was not disclosed to and approved by the Member, when he recommended, sold, facilitated the sale of, and/or made referrals in respect of the sale of investments to at least 5 clients totaling approximately $244,300. • The Respondent referred clients to another Approved Person to purchase investments outside the Member, and received at least $12,305 in referral fees for doing so. • The Respondent misled the Member during its investigation into his conduct. <u>Other Factors:</u> • The Respondent facilitated the sale of syndicated mortgage investments to at least 5 clients, and received referral fees of $20,000 for doing so. The Respondent was also an investor. • There were no client complaints and the Hearing Panel was unable to determine the extent of client harm in the investments. At least one mortgage investment resulted in a bankruptcy.	• Costs of $6,000

86. The Panel has already discussed why the decisions in *Brake (Re), supra,* and *Boldt (Re), supra,* are distinguishable in terms of determining the appropriate fine with respect to Contraventions #1-3 a. & b.

87. We found the decision in *Luong Dao (Re), supra,* to be of more assistance in guiding our global assessment of a fine for those Contraventions.

88. In that case, as described in the chart reproduced above, the respondent engaged in an outside business activity that was not disclosed to or approved by the member, involving rental properties. The amount of money which the client invested in that case was approximately $145,000 in addition to paying ongoing expenses relating to the units.

89. The penalty agreed upon by the parties included:

- a permanent prohibition;
- a fine of $50,000; and
- costs of $10,000.

90. While the Panel acknowledges that the penalty in *Luong Dao (Re), supra,* was approved of in the context of a settlement agreement, we nonetheless found it to be a useful starting point

from which to reach our determination as to the appropriate penalty in this matter, given the similarity of the underlying facts between the two cases.

91. Taking a $50,000 fine as a starting point, therefore, the Panel has increased that amount to arrive at a global fine of $450,000 to reflect the scale of the Respondent's misconduct in this case including the number of Clients, instances of misconduct and amounts invested, all of which the Panel considers to be aggravating factors.

92. In determining the appropriate sanction for these Contraventions, the Panel also relied on the decision in *Szekely (Re), supra,* where the panel imposed a global fine of $100,000 for three allegations which involved the respondent soliciting approximately $287,542 from two clients and two individuals, for investment outside the member, as described in the chart reproduced above.

Totality Principle

93. Citing what they described as the "totality principle", Staff submitted that it would be appropriate for the Panel to take a global approach towards assessing a fine for Contraventions #1-3 a. & b. because the grounds for those Contraventions were all connected to the same set of facts relating to the Respondent's involvement in the Joint Ventures.

94. The totality principle is described in the Sanction Guidelines as one of the key factors for a panel to consider in fashioning an appropriate sanction:

> **10. For multiple violations, the total or cumulative sanction should appropriately reflect the totality of the misconduct**
>
> Depending on the facts of the case, the existence of multiple or similar violations may be treated as an aggravating factor and may warrant higher sanctions. The totality principle should be considered where there are multiple violations; the overall sanction imposed should not be excessive or disproportionate to the gravity of the total misconduct. Hearing Panels may adopt a global approach to sanctioning where the imposition of a sanction for each contravention would have the effect of imposing an excessive sanction on the Respondent.
>
> Sanction Guidelines, pp. 4-5

95. The Panel agrees with Staff's submission as discussed above, and has assessed a global fine for Contraventions #1-3 a. & b. which reflects the misconduct which underlies those Contraventions in its totality.

96. In assessing a global fine, the Panel has treated "the existence of multiple or similar violations" as an aggravating factor while at the same time arriving at an overall sanction for these Contraventions which is not excessive to the gravity of the total misconduct.

97. With respect to Contravention #3 c., regarding the Respondent's involvement in a skin care company which was an outside business activity that was distinct from the Joint Ventures, Enforcement Counsel submitted that a penalty to be imposed for Contraventions #1-3 a. & b. would be sufficient for the purposes of specific and general deterrence.

98. The Panel agrees with that submission and has not assessed a fine specific to that Contravention.

99. With respect to Contraventions #4 and #5, Enforcement Counsel submitted that because those Contraventions related to separate factual matters regarding third party exempt market products where the Respondent had no direct interest and to the Respondent's failure to cooperate, respectively, it would be appropriate for the Panel to impose separate fines for each of those Contraventions.

100. The Panel agrees with this submission and has imposed separate fines for each of Contraventions #4 and #5 in amounts that were consistent with the sanctions proposed by Staff.

Costs

101. Enforcement Counsel presented the Panel with a draft Bill of Costs in the amount of $44,900 which provided evidence of Staff's efforts to conduct the investigation and hearings in this matter. Enforcement Counsel proposed, however, that the Panel award costs in a sum that was less than half that amount.

102. The Panel finds this a fair approach, which takes into account Staff's considerable efforts while at the same time recognizing that the amounts set out in the Bill of Costs do not reflect actual expenditures made by the MFDA.

III. CONCLUSION

103. In summary, this Panel has determined that the following penalty is appropriate in this case:

a) the Respondent be permanently prohibited from conducting securities-related business in any capacity while in the employ of, or in association with, any MFDA Member pursuant to section 24.1.1(e) of MFDA By-law No.1;

b) the Respondent pay a fine in the amount of $525,000 pursuant to section 24.1.1(b) of MFDA By-law No. 1 as follows:

   i. $450,000 with respect to Contraventions #1-3 a. & b.;

   ii. $25,000 with respect to Contravention #4;

   iii. $50,000 with respect to Contravention #5; and

c) the Respondent pay costs in the amount of $20,000 pursuant to section 24.2 of MFDA By-law No. 1.

104. The Panel is satisfied that this penalty sends a clear message that the type of misconduct in which the Respondent engaged, having regard to all five Contraventions, has no place in this industry.

DATED this 22nd day of August, 2022.

"Sherri Walsh"
Sherri Walsh
Chair

"Sean Shore"
Sean Shore
Industry Representative

"Greg Wiebe"
Greg Wiebe
Industry Representative

DM 895842