



**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: Zhengwen (Katherine) Qi and Xiaodan (Bonnie) Huang**

Heard: October 30, 2013 in Toronto, Ontario  
Reasons for Decision: November 20, 2013

**REASONS FOR DECISION  
(Penalty)**

Hearing Panel of the Central Regional Council:

Frederick H. Webber	Chair
Guenther Kleberg	Industry Representative
Robert C. White	Industry Representative

Appearances:

H. C. Clement Wai	)	Counsel, Mutual Fund Dealers Association of
	)	Canada ("MFDA")
	)	
Zhengwen (Katherine) Qi	)	In person
	)	
Xiaodan (Bonnie) Huang	)	In person

### ***Penalty Hearing***

1. After a hearing on May 29, 2013, this Panel found that the allegations against the Respondents had been proven by the MFDA. The Panel issued its Decision and Reasons (Misconduct) on July 8, 2013. As agreed by the MFDA and the Respondents, the hearing recommenced on October 30, 2013 to determine the appropriate penalties. The Panel reviewed the MFDA's Submissions on Penalty dated October 29, 2013 and an undated letter from the Respondents which served as the Respondents' reply penalty submissions. Both parties also presented oral arguments:

### ***Proposed Sanction***

2. The MFDA sought the following penalties and costs against each of the Respondents:

- (a) A permanent prohibition on the authority of the Respondent to conduct 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 Bylaw No. 1;
- (b) A fine of \$40,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- (c) Costs attributable to conducting the investigation and hearing of this matter in the amount of \$5,000, pursuant to s. 24.2 of MFDA By-law No. 1.

### ***Factors Concerning the Appropriateness of the Penalty***

3. The Panel agrees with the submission of the MFDA that the primary goal of securities regulation is the protection of the investor.

*Pezim v. British Columbia (Superintendent of Brokers)*, [1994], S.C.J. 58, Iacobucci, J. at paras. 59 and 68.

4. As was submitted by the MFDA, when determining the appropriate sanctions to impose, 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.

*In The Matter of Arnold Tonnies*, Hearing of the Prairie Regional Council, MFDA File No. 200503 ("*Tonnies*"), Hearing Panel Decision dated June 27, 2005 at p. 22.

5. Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- (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.

*Tonnies, supra* at p. 23,

6. Sanctions are intended to be preventive, protective and prospective in nature. One of the objectives of securities regulation is to prevent harm to investors and capital markets. It is therefore appropriate for a Hearing Panel to impose sanctions on the basis of past conduct that

will protect the public interest and prevent future conduct detrimental to the integrity of the capital markets 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.”

*Tonnies, supra* at pp. 21-22.

7. The effect of general deterrence should thereby advance the goal of protecting investors. Thus, the penalty levied 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 *Re: 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 Corp. (Re)*, [2000] B.C.S.C.D. No. 92 at para. 61.

8. MFDA counsel also referred the Panel to the MFDA Penalty Guidelines that may be taken into account when determining the appropriate penalties. The Penalty Guidelines are intended to assist hearing panels, MFDA Staff and respondents in considering the appropriate penalties in MFDA disciplinary proceedings. As stated in the introduction to the Penalty Guidelines:

“The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.”

9. The MFDA Penalty Guidelines recommend the following considerations for Outside Business Activity:

1. Magnitude (in size and value) of outside business activity.
2. Number of clients affected.
3. Magnitude of client losses.
4. Suitability of outside business activity if involving securities.
5. Compensation received by the Respondent.
6. Any personal interest of the Respondent in outside business activity.
7. Whether the Respondent had honest but mistaken belief that proper approval obtained.
8. Legality of outside activity.
9. Whether outside activity resulted directly or indirectly in injury to clients of the Member and, if so, the nature and extent of the injury.
10. Whether the marketing and sale of the product or service could have created the impression that the Member had approved the product or service.
11. Whether the Respondent misled the Member about the existence of the outside activity or otherwise concealed the activity from the Member;

and suggest the following penalty types and ranges:

- Fine: minimum of \$10,000
- Write or rewrite an appropriate course (e.g. The Canadian Investment Funds Course)
- Period of increased supervision
- Suspension
- Permanent prohibition in egregious cases (e.g. undisclosed activity resulting in client losses)

10. The MFDA Penalty Guidelines recommend the following considerations for Standard of Conduct:

1. Nature of the circumstances and conduct;
2. Number of individuals affected; and
3. whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute;

and suggest the following penalties for approved persons:

- Fine: Minimum of \$5000
- Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course)
- Suspension
- Permanent prohibition in egregious cases

### *Considerations in the Present Case*

The Panel reviewed the foregoing considerations as they applied in this case as follows:

(i) Seriousness of the misconduct

11. 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. The Oversea Chinese Fund (the Fund) purchased by the Respondents' client, CPL, was not approved by the Member, Investia, nor was any activity by its APs (including the Respondents) regarding its sale, recommendation, referral or facilitation of its sale to their clients. The Respondents admitted that they knew the Fund was not a product approved for sale by the Member but that they never thought of their actions "as a business or sale to anyone of a financial product...." They also stated that their branch manager and general manager "knew that we and [CPL] invested in the [Fund] ...and that the branch manager did not make any comments."

12. In February 2009, Weizhen Tang admitted to investors at a meeting he had convened that, in effect, he had been running a Ponzi scheme and had been concealing the substantial trading losses he had incurred. While this is serious misconduct which resulted in losses not only for the client, CPL, but also for the Respondents who also were investors in the Fund, it is the Respondents conduct that is in issue in this case. It is clear from the evidence of the Respondents

that the Fund was well known in the Chinese community and to the client, CPL prior to CPL investing in it and that CPL made her own decision to invest in the Fund. CPL was not called as a witness to contradict the evidence of the Respondents. As noted in the Panel's decision on the allegations, MFDA counsel did not rely on the words "recommending", "referring" or "selling" to CPL by the Respondents as stated in allegation #1. MFDA counsel took the position that the Respondents "facilitated" the investment by CPL by transporting the cheque to the Fund, by discussing the Fund and its riskiness with CPL and giving the user name and password for accessing her account in the Fund to CPL. The Panel finds that, while the Respondents knew that the Fund was not a product approved for sale by the Member, the actions of the Respondents were not a major factor in CPL's investing in the Fund and are considered by the Panel to be at the less egregious end of the scale of actions which might be encompassed by Allegation #1.

13. The MFDA counsel referred the Panel to several cases of "outside business activity" in support of his assertion that the Respondents' conduct was serious misconduct. One of those cases was *Re Bytnar* [2011] MFDA File No. 201015. It is the Panel's view that this case illustrates that their conduct was relatively less egregious. In *Bytnar*, the respondent "encouraged" four of his friends to invest the securities in question, and facilitated the investment by explaining things, completing documents and taking them to and from the company, by collecting money for delivery to the company, bringing payments to the investors and listening to investor complaints. In short, the Respondents' actions were far less of a cause of their client's investment in the Fund than was that of the respondent in *Bytnar*.

14. The requirement that Approved Persons inform their Member of client complaints ensures that the Member is able to fulfill its duty to engage in an adequate and reasonable assessment of all complaints. When an Approved Person fails to inform their Member, or when an Approved Person enters into private settlement agreement without advising or obtaining the prior written consent of the Member, the Member's ability to assess the complaint as well as its ability to determine if there are further issues with the Approved Person is subverted. The Panel has found that the MFDA has established this allegation and the Respondents' explanation that they were unaware of the need to report the claims and the settlement, or did not do so because the claims were settled right away, does not justify their failure to report the claims and not to enter into the settlement as required by the Rules.

15. Both allegations concern an isolated incident involving one client and one transaction. Investia contacted the Respondents' former clients to enquire if any other clients had invested in the Fund. No former clients have contacted Investia or made claims that they invested in the Fund.

(ii) Investor Harm

16. The client, CPL, lost between \$17,100 and \$40,000 on her investment in the Fund depending on whether the payments of \$11,500 and \$11,400 by the Respondents to CPL are viewed as a repayment or a loan by them. This was not totally clear from the evidence, but the precise amount of the loss is not germane in determining the appropriate penalty in this case. The issue is whether the Respondents' undisclosed securities related business caused the harm suffered by CPL. It is clear from the Respondents' evidence, and in the absence of testimony by CPL, that CPL made up her own mind to invest in the fund and the actions of the Respondents played a minor role in that decision. Therefore it is the Panel's decision that the losses suffered by CPL were largely due to her own decision to invest in the Fund.

(iii) The Respondents' recognition of the seriousness of their misconduct

17. As stated in the MFDA submissions, the Respondents have cooperated with Staff's investigation as well as the Member's investigation into the matter. In the hearing and in their reply letter, both Respondents appeared to recognize the seriousness of their misconduct (even if they did not do so at the time) and the need to comply with all applicable rules in the future.

(iv) Benefits received by the Respondents

18. Both Respondents asserted that they received no benefit from their actions and the MFDA submissions admitted that the MFDA was not able to determine the benefits received by the Respondents, if any. The Panel also noted that the Respondents invested in the Fund and lost money.

(v) Whether the Respondents were aware of the prohibited nature of the activity

19. The Panel agrees with the assertion in the MFDA submissions that both of the Respondents knew or ought to have known that the Fund was not approved for sale by Investia. As noted in paragraph 11 above, this was admitted by the Respondents. The Panel pointed out to the Respondents in the hearing, and wishes to emphasize herein, that when entering a regulated industry such as the mutual fund industry, it is incumbent on all registrants to know and assiduously follow all the rules and regulations of the regulator and of their Member. Lack of knowledge, perceived lack of oversight by management as may have existed in this case, or careless disregard is no excuse.

(vi) The Respondents' past conduct and level of activity in the capital markets

20. The Respondents have no past disciplinary history with the MFDA, which is a minor mitigating factor in this case.

(vii) Previous decisions made in similar circumstances

21. The Panel reviewed the cases referred to it by MFDA counsel, in particular the *Bytnar* case which was discussed above. The Panel felt that lesser penalties than requested by the MFDA would be more appropriate having regard to:

- The relatively less egregious nature of the Respondents' conduct;
- The relatively minor degree to which the Respondents' actions caused the loss suffered by the client, CPL;
- The absence of a prior disciplinary history;
- The absence of any profit motive, or actual profit by the Respondents; and
- The isolated nature of the Respondents' conduct

***Summary on Penalty***

22. Accordingly it was the Panel's decision that the principles stated in paragraphs 3-7 above, in particular, specific and general deterrence, balanced by fairness to the Respondents in this particular case, would be achieved by imposing the following penalties and costs on each of the Respondents, which were announced at the hearing on October 30:

1. A prohibition on the authority of each Respondent to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member for a period of 6 months, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
2. A fine of \$20,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
3. Following the period of suspension, if either Respondent wishes to conduct securities related business while in the employ of, or associated with, a Member of the MFDA, she shall successfully complete the Canadian Investment Funds Exam; and
4. Costs attributable to conducting the investigation and hearing of this matter in the amount of \$5,000, pursuant to s. 24.2 of MFDA By-law No. 1.

**DATED** this 20<sup>th</sup> day of November, 2013.

“Frederick H. Webber”

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Frederick H. Webber,  
Chair

“Guenther Kleberg”

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Guenther Kleberg,  
Industry Representative

“Robert C. White”

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Robert C. White,  
Industry Representative

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