



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: David Jeremy Dean

Heard: June 3-4, 2019, October 1, 2019 and November 19, 2019 in Toronto, Ontario
Decision and Reasons: January 29, 2020

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Joan Smart
Kenneth P. Mann
Joseph Yassi

Chair
Industry Representative
Industry Representative

Appearances:

Francis Roy)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
David Jeremy Dean)	Respondent, in person
)	
)	

I. INTRODUCTION

1. Proceedings were commenced by the Mutual Fund Dealers Association of Canada (the “MFDA”) against David Jeremy Dean (the “Respondent”) by Notice of Hearing, dated October 5, 2018.
2. The Notice of Hearing contained one allegation, being that, commencing June 9, 2016, the Respondent failed to cooperate with an investigation by Staff of the MFDA (“Staff”) into his conduct, contrary to section 22.1 of MFDA By-law No. 1.
3. The first appearance was held by teleconference on December 11, 2018, at which time the matter was adjourned to January 17, 2019, at the request of the Respondent, to allow him to retain counsel. At the second appearance held by teleconference on January 17, 2019, scheduling and other procedural matters were discussed and the hearing on the merits was scheduled for May 8, 2019. The Respondent had not retained counsel.
4. On May 8, 2019, the Respondent requested an adjournment of the hearing for medical reasons. The Hearing Panel granted the adjournment and directed that the hearing on the merits take place on June 3, 2019.
5. The hearing on the merits commenced on June 3, 2019, but additional time was required to complete the hearing.
6. On June 4, 2019, a scheduling appearance was held by teleconference, at which the Hearing Panel ordered that the hearing on the merits was to resume on October 1, 2019.
7. The hearing continued on October 1, 2019, but again additional time was required to complete the hearing.
8. On October 4, 2019, a further scheduling appearance was held by teleconference, at which the Hearing Panel ordered that the hearing on the merits was to continue on November 19, 2019.
9. The hearing was concluded on November 19, 2019.

10. The hearing involved only one allegation and was originally expected to be completed in less than one day. However, it took the Respondent more than one day to enter his evidence and, given that he was self-represented, the Hearing Panel gave him considerable latitude in doing so.

11. The key issue for the Hearing Panel to decide was whether the Respondent failed to cooperate in an investigation by Staff, contrary to section 22.1 of MFDA By-law No. 1.

II. POSITIONS OF THE PARTIES AT THE HEARING

12. The following is a brief summary of the positions taken by Staff and the Respondent at the hearing.

Position of Staff

13. Staff's position was that the Respondent failed to cooperate in an investigation by:

- a) failing to provide a written statement responding to Staff's questions set out in a letter from the MFDA to the Respondent, dated June 9, 2016 ("the MFDA inquiry letter"); and
- b) failing to attend an interview when requested by Staff to do so.

Staff contended that such conduct was contrary to section 22.1 of MFDA By-law No. 1.

14. Staff particularly focused on the Respondent's failure to cooperate after March 28, 2017.

15. Staff submitted that the misconduct was aggravated by the Respondent tendering at the hearing emails he said he had sent to Staff, dated July 27, 2016 and April 7, 2017, that Staff alleged were fabricated.

16. In Staff's view, the positions they say were advanced by the Respondent, namely that he had not received certain emails from Staff, he had sent exculpatory emails to Staff and had been suffering from ill health, were without merit.

Position of the Respondent

17. The Respondent was of the view that the original allegations made by the MFDA in the MFDA inquiry letter were unnecessary and that the investigation was a big overreach. He believed he had conducted himself in a reasonable manner in the circumstances.

18. The Respondent took the position that he had responded to Staff's questions in an email, dated July 27, 2016, but acknowledged he had not attended an interview as requested by Staff.

19. The Respondent found Staff difficult to deal with and became very frustrated when dealing with Staff in March 2017, who he said treated him badly on the telephone and failed to send him things within the time frame that Staff said they would. When he believed he had not received anything from Staff after March 28, 2017, the Respondent thought that "cooler heads had prevailed at the MFDA", until he received the Notice of Hearing in 2018.

20. The Respondent admitted that maybe he should have done a better job of following up with Staff after March 28, 2017.

21. The Respondent expressed his view that the idea that he would intentionally not cooperate was ridiculous, given that he had nothing to lose by cooperating, while it could only go badly for him if he failed to cooperate, including by exposing himself to a large fine.

III. BURDEN OF PROOF

22. As noted in the case of *F.H. McDougall*, [2008] 3 S.C.R. 41 at paras. 40 and 49, "there is only one civil standard of proof at common law and that is proof on the balance of probabilities." It was incumbent on Staff to present clear, cogent and convincing evidence to prove the allegations against the Respondent on the balance of probabilities. That is the standard applicable in MFDA disciplinary proceedings and that is the standard the Hearing Panel applied in this case.

IV. FACTS

Our Approach to the Evidence

23. At the hearing, Staff filed an affidavit of Rob Lamshead, an investigator with the MFDA who was responsible for the investigation relating to the conduct of the Respondent. Staff called Mr. Lamshead as a witness. He is also referred to herein as Staff #2.

24. Staff also filed an Affidavit of Danny Vieira, the MFDA's Information Technology Systems Administrator, and called him as a witness to testify regarding searches he conducted of the MFDA's email systems and archives in respect of certain emails the Respondent indicated he had sent.

25. Unlike many cases of failure to cooperate, the Respondent filed a Reply, appeared in person at the hearing and testified on his own behalf.

26. There were some issues relating to the Respondent's introduction of documents. The requirement for the Respondent to provide pre-hearing disclosure to Staff of documents he intended to rely on at the hearing was explained to him several times, including at the appearance on January 17, 2019 and the scheduling appearance on June 4, 2019. However, the Respondent did not provide such documents to Staff prior to the first day of the hearing. He brought several documents to the hearing to be entered as evidence. Notwithstanding that there had not been prior disclosure, the Hearing Panel allowed a number of the documents to be entered as evidence in the proceeding. However, on the last day of the hearing, after the Respondent had been cross-examined, he sought to enter some additional documents. We did not allow those documents to be entered, in part because we found it was then too late and, in part, because we found they were not necessary for a proper determination of the case, given the evidence that had already been presented on the subject issues.

27. According to Rule 1.6(1) of the MFDA Rules of Procedure, "a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence." We received certain

evidence that was hearsay. However, we considered the nature of the evidence as we weighed the evidence and determined its reliability.

28. We refer to some, but not all, of the evidence in this decision. However, we considered all of the evidence, including oral testimony and exhibits. We also considered submissions made by Staff and the Respondent.

29. In some cases, we have used the initials of individuals who are not parties to the proceedings to afford a measure of privacy to those persons.

30. There were some significant issues of credibility as between Staff and the Respondent, particularly with respect to whether certain emails were sent by the Respondent.

31. Below is a summary of the evidence, together with our findings where the evidence of Staff and the Respondent differed on the key facts.

Respondent's Registration History

32. According to the National Registration Database, from March 14, 2003 to November 19, 2014, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with Sun Life Financial Services (Canada) Inc. ("Sun Life"), a Member of the MFDA. The Respondent indicated at the hearing that he was registered prior to 2003, but as the conduct in question occurred subsequent to that, the original registration date was not relevant to our considerations.

33. The Respondent has not been registered in the securities industry since November 19, 2014.

34. JD, another Sun Life mutual fund salesperson, had worked in the same office as the Respondent.

Interactions between Staff #1 and the Respondent in 2016

35. On June 9, 2016, a MFDA Case Assessment Officer ("Staff #1") sent the MFDA inquiry letter to the Respondent at his address at St. Clair Beach, ON ("his last known address") advising

him that the MFDA was conducting a review of his conduct as it had been reported to the MFDA that:

- a) he had obtained one pre-signed and one falsified client account form, both of which were dated in 2015; and
- b) according to clients NM and LM, who were then clients of JD, the Respondent had, in January 2016: spoken with NM who expressed concerns about their investments and requested redemptions from their accounts and the Respondent had advised he would inform the fund company of the requests; and advised NM that other clients of JD had made certain allegations about JD and that the Respondent was working with Sun Life to compensate the clients for losses (“the underlying allegations”).

In the letter, Staff #1 requested that the Respondent provide a detailed written response and relevant documents, no later than June 30, 2016.

36. The Respondent received the MFDA inquiry letter and testified that he found the letter more accusatory than he thought was necessary.

37. According to the evidence of the Respondent, between June 20 and June 22, 2016, he attempted at least two times to contact Staff #1. On June 22, 2016, the Respondent spoke with Staff #1 to request further information regarding the matters in the MFDA inquiry letter and an extension of time to respond to that letter. Staff #1 agreed to the Respondent’s request and extended the response date to July 7, 2016. That was confirmed in an email from Staff #1 to the Respondent. The Respondent testified that he also informed Staff #1 that the underlying allegations had nothing to do with him and asked the MFDA to find another way to resolve the matter rather than involve him.

38. On June 23, 2016, the Respondent again called the MFDA and spoke to another member of Staff to request copies of certain documents relating to their inquiry. The call lasted approximately 40 minutes. In that call, the Respondent indicated that JD had been making death threats against him and his family and that he was reluctant to respond to the MFDA inquiry letter as he feared his statements would be disclosed to JD.

39. On June 28, 2016, Staff #1 sent the Respondent an email advising that the relevant documents would be uploaded to the MFDA ShareFile electronic system for the Respondent to download and review.

40. On July 4, 2016, Staff #1 sent another letter to the Respondent noting that, by June 30, 2016, he had not provided the information the MFDA had requested in the MFDA inquiry letter and advising him that, if he failed to provide the information by July 18, 2016, Staff would refer the matter to their Investigations group for a review as to possible commencement of proceedings against him for failing to cooperate. The letter also warned the Respondent of the consequences of failing to cooperate in an investigation, including a permanent prohibition on his authority to conduct securities related business in any capacity, as well as a fine of \$50,000 and costs (“the consequences of non-cooperation”). It was not clear to us why Staff #1 sent this letter on July 4, 2016, given that she had previously agreed to extend the time for the Respondent to respond to July 7, 2016.

41. On July 12, 2016, the Respondent sent an email to Staff #1 reminding her that he was still waiting to receive copies of the relevant documents, to which Staff #1 responded on July 13, 2016, that an email would have been sent to him from “ShareFile Notifications”.

42. It was unclear exactly when the Respondent was given access to the relevant documents in the ShareFile system but, in any event, he downloaded the documents on July 14, 2016.

43. On July 18, 2016, Staff #1 sent a letter to the Respondent at his last known address, advising him that the MFDA had completed its initial review of the matter and had escalated the file to Investigations. The Respondent testified that he did not believe he received this letter at the time, but he was not certain.

44. At the hearing on June 3, 2019, the Respondent stated that he provided a written response to Staff #1 by email on July 27, 2016 (“the July 27, 2016 email”), and produced one page of an email which he said he had sent to Staff #1. The email appeared unusual in several respects. First, in the heading it noted “Date received”, rather than the date sent. The Respondent explained that was because, prior to losing his jeremy@deanwealth.com email account in May, 2017, he had archived important emails on Evernote and Evernote shows the date when an email was received

at the sender's server, rather than when it was sent by the sender. Second, the Respondent only produced one page of an email that he indicated was two or three pages long. The Respondent explained that he thought Staff already had received the email and he was trying to save printing costs when printing at Staples. The first page of the email appeared to be responsive to some of the MFDA's requests in the inquiry letter.

45. The Respondent testified he thought he had sent the July 27, 2016 email properly but it was always possible that he made a mistake.

46. Staff #2 testified that the first time he heard of the July 27, 2016 email was in the Respondent's Reply to the Notice of Hearing. Staff conducted a review of the hard copy files of relevant MFDA Staff, the archived email electronic folder of Staff #1 and the MFDA's email appliance and found no record of receiving the July 27, 2016 email that the Respondent claimed he had sent.

47. At the scheduling appearance on June 4, 2019, Staff asked the Respondent to forward to them an electronic copy of the original July 27, 2016 email by the end of June 2019. The Respondent indicated he could only send him the Evernote notes as everything before he lost his email account due to non-payment was "flipped over to Evernote".

48. The Hearing Panel found, on the balance of probabilities, that the July 27, 2017 email was not sent by the Respondent to Staff. We based our finding primarily on the fact that Staff had no record of ever receiving the email prior to the hearing. We also considered the fact that the Respondent did not produce the email until the first day of the hearing, notwithstanding that he had referenced it in his Reply, and then only produced the first page. Furthermore, while the first page of the email appeared to be responsive to some of the requests in the MFDA inquiry letter, as the Respondent only produced that page, we could not determine the extent to which it would have been responsive to all of the MFDA's requests, if it had been sent.

49. The MFDA did not attempt to contact the Respondent between July 18, 2016 and January 4, 2017. The Respondent testified that, when he had not heard from Staff #1 for a while, he had tried to follow up with her and had left at least one message, which was not returned. He was not sure about exactly when that occurred.

50. The Respondent testified that he moved from his last known address in June or July, 2016 and continued to have access to his mail there for a short period thereafter.

51. At some point after he had moved from his last known address, the Respondent called MFDA Member Services to advise of a change of address. The Respondent believed he was told to call the Ontario Securities Commission (“OSC”). When he called the OSC he was told that they do not track address changes of non-registrants.

52. The Respondent testified that during this period of time “his life was falling apart” and he did not want any more stress.

53. Staff #1 left the MFDA in April 2018.

Interactions between Staff #2 and the Respondent in 2017

54. In the first three months of 2017, Staff #2, who had taken carriage of the investigation, made a number of unsuccessful attempts to contact the Respondent by letters sent or delivered to his last known address and eventually succeeded in contacting the Respondent via email.

55. On January 4, 2017, Staff #2 sent a letter to the Respondent at his last known address requiring that he:

- a) provide the information requested in the MFDA inquiry letter; and
- b) contact Staff no later than January 16, 2017 to schedule a date to attend the MFDA offices for an interview with respect to the circumstances surrounding his termination by Sun Life.

The letter also noted that, if he failed to comply, Staff would seek authorization to commence enforcement proceedings against him and advised him of the consequences of non-cooperation.

56. Staff #2 attempted to deliver another letter, dated March 1, 2017, to the Respondent via personal service at his last known address requiring that he:

- a) provide the information requested in the MFDA inquiry letter; and

- b) contact Staff no later than March 10, 2017 to schedule a date to attend at the MFDA offices to be examined with respect to the subject activities.

The letter warned the Respondent again of the consequences of non-cooperation.

However, the process server was unable to personally serve the Respondent with the letter, but on March 4, 2017, left it posted to the door at his last known address.

57. On March 10, 2017, Staff #2 sent an email to the Respondent requesting that he contact Staff in respect of an urgent matter.

58. Staff #2 attempted to deliver another letter, dated March 13, 2017, to the Respondent via personal service at his last known address requiring that he:

- a) provide the information requested in the MFDA inquiry letter; and
- b) attend an interview with Staff on May 24, 2017 and confirm his attendance by May 1, 2017.

The letter again warned the Respondent of the consequences of non-cooperation.

The process server was not able to personally serve the letter on the Respondent, but on March 17, 2017, taped it to the door at his last known address. The process server noted that the Respondent's name was on the directory at the building and that when the process server contacted the Superintendent via the intercom, she was informed by a person at that number that the Respondent resided at the subject address.

59. The Respondent testified that the caretaker at his last known address had contacted him to advise him that someone had been trying to find him, had tried to gain access to his unit and had left behind something from the MFDA. The Respondent's evidence was that he did not request from the caretaker or receive what had been left behind.

60. Staff did not receive a response from the Respondent to any of the letters referenced in paragraphs 55, 56 and 58. The Respondent testified that he did not receive any of those letters as he was no longer living at the address to which the letters were delivered. In our view, the likelihood is that the Respondent did not receive those letters, given that he subsequently

responded to the March 10, 2017 email he received from Staff #2. However, we found it concerning that the Respondent did not follow up when he learned that something from the MFDA had been left at his last known address.

61. On March 22, 2017, the Respondent sent an email to Staff #2 advising that he had been off work for health reasons, he had not been checking his email account on a regular basis and he would do his best to telephone Staff #2 on March 23, 2017. The Respondent's email was apparently in response to Staff #2's March 10, 2017 email.

62. The Respondent called Staff #2 on March 23, 2017 but, as Staff #2 had left for the day, he left a message.

63. On Friday, March 24, 2017, the Respondent called Staff #2, at which time, according to Staff's call log:

- a) the Respondent informed Staff #2 that he had not received any Staff correspondence after June 9, 2016, as he had not lived at his last known address since October 2016, but would not provide his current mailing address, saying he had no fixed address;
- b) the Respondent provided a phone number but indicated he did not believe Staff would be able to reach him through that number;
- c) Staff #2 agreed to send the Respondent their March 13, 2017 letter via email;
- d) the Respondent agreed he would contact Staff #2 on March 28, 2017; and
- e) the Respondent informed Staff #2 about the status of a police investigation into JD.

According to the Bill of Costs filed by Staff, one hour was billed for that call.

64. The Respondent emailed Staff #2 on March 27, 2017, confirming the March 24th conversation. In addition to what was noted in Staff's call log, the Respondent's email indicated that during the call:

- a) Staff #2 confirmed that no one from the MFDA had attempted to contact him by phone or email between July 2016 and March 2017;

- b) the Respondent advised he had contacted the MFDA and OSC about an address change, including speaking to someone named Candace at the MFDA, but Staff #2 stated no one working at the MFDA had that name;
- c) the Respondent had reached out to Staff #1 via telephone multiple times and had left at least one voice message, but to the best of his knowledge he had not received a return call; and
- d) Staff #2 would not provide details of the MFDA's letters, but promised to send them immediately after the call.

In the email, the Respondent also stated, "as expressed in multiple conversations and in [his] previous correspondence with the MFDA", his belief that the allegations against him were without merit and that he was reluctant to trust the process in light of the "MFDA's baffling pursuit of this process", his previous experience with the MFDA whistleblower program and the conduct of Sun Life. However, the Respondent indicated he would continue to cooperate with the MFDA, cautiously but to the best of his ability.

65. At the conclusion of his March 27, 2017 email, the Respondent requested that Staff #2 reply to confirm the contents of the email. Staff #2 did not provide a confirmatory reply.

66. We noted that, in the above email, the Respondent references "previous correspondence with the MFDA", but does not specifically refer to a July 27, 2016 email.

67. The Respondent testified that in his March 24, 2017 call with Staff #2, he also:

- a) referenced that he had previously sent a response to Staff #1 and offered to provide a copy, but Staff #2 declined the offer;
- b) discussed his health difficulties, particularly in relation to traveling from where he was living to Toronto for a meeting; and
- c) when asked for his address, the Respondent indicated he would only provide that if it was kept confidential as he was concerned about JD finding out, and Staff #2 would not give assurances on that.

With respect to a) above, given Staff #2's persistent efforts to obtain information from the Respondent during the investigation, we found it unlikely that he would decline an offer

from the Respondent to provide information. With respect to b) above, Staff #2 testified that there was no discussion of the Respondent's health on the call. In any event, there was no clear indication from the Respondent that his health would prevent him from participating in the investigation.

68. There appeared to be a contradiction between the Respondent being reluctant to provide his address to Staff #2 due, in part, to confidentiality concerns, and his apparent willingness to provide an address when he called MFDA Member Services in 2016 to advise of his change of address.

69. On Monday, March 27, 2017, Staff #2 sent an email to the Respondent, attaching a copy of the March 13, 2017 letter that again required that the Respondent provide a written response to the MFDA inquiry letter and attend an interview on May 24, 2017.

70. On March 28, 2017, the Respondent called Staff #2. According to the evidence of Staff #2, during the call, the Respondent indicated he did not currently have internet access and had not yet read Staff #2's March 27, 2017 email, but would review it before March 30, 2017, and would contact Staff #2 if he had questions concerning the information in the letter. The issue of the Respondent's address was discussed again. Staff #2 also asked about a report regarding JD that the Respondent indicated he had made to the police.

71. The Respondent testified that he found the March 28th call frustrating. His evidence was that he had checked his email account on the weekend and had not seen the email that Staff #2 had said on the previous Friday he would send. The Respondent testified that he had to go to another location to check his email account as he did not then have email access where he was living.

72. On March 28, 2017, Staff #2 confirmed the contents of the conversation that day in an email to the Respondent, which was received by the Respondent, and asked that the Respondent provide certain information about the Respondent's report to the police by April 7, 2017.

73. Staff #2's evidence was that he did not hear from the Respondent after March 28, 2017. The Respondent did not attend the interview on May 24, 2017.

74. The Respondent testified that he sent an email from his hotmail account to Staff #2 on April 7, 2017 (the “April 7, 2017 email”) and at the hearing on June 3, 2019, provided Staff with a copy of the email he said he had sent. He subsequently entered the email into evidence. In the email, the Respondent stated that he had not received any letters from the MFDA or a reply to his March 27, 2017 email and indicated his frustration with the situation. Attached to the email was a copy of the Occurrence Confirmation Report relating to the Respondent’s report to the police concerning JD’s threats against him.

75. Staff #2 testified that the first he heard of the April 7, 2017 email was when he read the Respondent’s Reply to the Notice of Hearing in 2019. Staff conducted a search the MFDA’s email appliance and the hard copy of relevant Staff files and did not find any record of receiving the April 7, 2017 email.

76. At the scheduling appearance on June 4, 2019, confirmed in an email the following day, Staff asked the Respondent to send to Staff the original April 7, 2017 email in a format that would allow Staff to analyze the meta-data behind the email to assist in determining when it was created and if and when it was sent. After the Respondent advised Staff on October 1, 2019, that he had been unable to send a new email attaching the original email as requested, Staff sent an email to the Respondent the next day informing him how to attach the original email to a new email and requesting again that the Respondent send the emails, dated July 27, 2016 and April 7, 2017. The Respondent did not send to Staff the original emails as requested.

77. At the hearing on November 19, 2019, the Respondent produced a photograph of what appeared to be a computer screen showing the April 7, 2017 email. However, we could not determine from the photo when it was created or whether it was ever sent to Staff.

78. We have found, on the balance of probabilities, that the Respondent did not send the April 7, 2017 email to Staff. We based our finding primarily on the fact that the MFDA had no record of receiving the email and also on the facts that the Respondent did not produce the email until the first day of the hearing and failed to provide Staff with an electronic copy of the original sent email as requested during the course of the hearing.

79. The Respondent testified that, after the March 28, 2017 call with Staff #2, he checked his email account once again for Staff #2's March 27, 2017 email but did not see it. The Respondent could not confirm whether or not he had looked for the email in his spam. His evidence was that he was then "fed up" with the MFDA and decided to leave the matter in their hands.

80. All of the emails sent by Staff to the Respondent during the investigation were to the Respondent's jeremy@deanwealth.com email account. The Respondent testified that his email account expired on May 1, 2017, and that he was informed by GoDaddy that he would continue to have access to his email account during a grace period of approximately 20 days thereafter. The Respondent did not then advise the MFDA that he could no longer be contacted through that account but could be contacted through his hotmail account.

81. The Respondent testified that, after March 28, 2017, he did not receive any phone calls or messages from Staff. According to the Respondent, the next thing he heard about the matter was when he became aware that a Notice of Hearing had been issued, dated October 5, 2018.

82. On May 10, 2017, Staff #2 sent an email to the Respondent reminding him that he had not: confirmed by May 1, 2017, that he would be attending an interview on May 24; provided information relating to his reporting of several incidents to police regarding JD; and provided his current address. Staff #2 gave the Respondent until May 15, 2017 to satisfy the requirements. It would appear that email would have been received in the Respondent's jeremy@deanwealth.com email account before he lost access to it.

83. On May 26, 2017, Staff #2 sent an email to the Respondent that:

- a) confirmed he had failed to attend the interview on May 24, 2017, and failed to provide the information and documents requested in the MFDA inquiry letter; and
- b) informed him that Staff would then seek authorization to commence a disciplinary proceeding against him for failing to cooperate in their investigation and again warned him of the consequences of non-cooperation.

The Respondent testified that he did not receive this email at the time.

84. The Respondent testified that prior experience with the MFDA caused him not to trust the MFDA. In the past he had made a whistleblower submission with respect to Sun Life to the MFDA because he believed it was the right thing to do. Sun Life apparently found out that he had provided whistleblower information to the MFDA.

Credibility

85. Throughout the proceeding, Staff provided a detailed and convincing record of their efforts to secure the cooperation of the Respondent, the Respondent's responses and their efforts to determine whether certain emails that the Respondent claimed he had sent had been received by the MFDA. We found the Staff witnesses to be credible and, unless specifically noted, we accepted their evidence.

86. We appreciate that the Respondent, being self-represented, faced some challenges in presenting his evidence. However, there were some aspects of his evidence that we did not find credible. In his Reply, the Respondent attempted to mount a strong defence which he claimed was supported by various notes, recordings and records, but when it came to the hearing he provided very little evidentiary support for his case, indicating generally that the evidence was no longer available to him. Also, notwithstanding being urged to provide the July 27, 2016 and April 7, 2017 emails in a format that would assist Staff in determining whether the subject emails had in fact been sent, he failed to do so. His failures to provide such evidence reflected adversely on his credibility. Where the Respondent's evidence conflicted with that of Staff, we have rejected it.

V. ANALYSIS

87. Pursuant to section 21 of MFDA By-law No. 1, the MFDA has a duty to make such examinations of, and investigations into, the conduct of any Approved Person or other person under its jurisdiction as it considers necessary or desirable in connection with any matter relating to compliance by such person with, among other things, the by-laws, rules, regulations and policies of the MFDA.

88. Under section 22.1 of MFDA By-law No. 1, for the purpose of any such examination or investigation, the MFDA may require the Approved Person or other person under its jurisdiction to, among other things:

- a) submit a report in writing with regard to any matter involved in the investigation;
- b) produce for investigation and provide copies of the books, records and accounts of such person; and
- c) attend and give information respecting such matters,

and such person is obliged to comply with those requirements.

89. Under section 24.1.4 of MFDA By-law No. 1, for the purpose of the above sections, an Approved Person remains subject to the jurisdiction of the MFDA, notwithstanding that he or she has ceased to be an Approved Person.

90. As was stated in the case of *Theroux (Re)*, Hearing Panel of the Central Regional Council, MFDA File No. 201307, Panel Decision dated April 1, 2014, at paragraph 9:

MFDA Hearing Panels have consistently held that a failure by an [Approved Person] to cooperate with an MFDA investigation by failing to provide information, documents or a written report when requested to do so, is serious misconduct, contrary to section 22.1. Such failure to cooperate subverts or frustrates the MFDA's ability to perform its regulatory function to fully investigate a matter and determine all the relevant facts and undermines the integrity and effectiveness of the self-regulatory system.

91. It is critical that persons under the jurisdiction of the MFDA cooperate in MFDA investigations in order that the MFDA can effectively fulfill its regulatory mandate to protect the public.

92. In this case, the Respondent appears to have cooperated with the MFDA at various times during the MFDA's inquiry and investigation. For example, when the matter was at the inquiry stage in 2016, the Respondent called Staff several times to discuss the matter and followed up with an email reminding Staff to send him certain relevant documents that they had undertaken to send. While the Respondent testified that he had sent a written response to Staff #1 on July 27, 2016, as noted above, we have concluded that email was not sent. When the matter was at the investigation

stage in 2017, the Respondent responded by email to an email from Staff #2, called Staff #2 as he had undertaken to do and had a lengthy conversation with him, confirmed that conversation in an email to Staff #2 and called Staff #2 a second time. While the Respondent testified that he had sent a subsequent email to Staff #2 on April 7, 2017, as noted above, we have concluded that email was not sent.

93. In our view, a very critical fact was that the Respondent was aware that Staff #2 had sent an email to him on March 27, 2017, attaching a letter containing details relating to the investigation, but only followed up once to see if he had received the email and did not contact Staff #2 to advise him that he had not received the email. That was notwithstanding that he knew he was under investigation and there were serious consequences if he failed to cooperate in the investigation. A reasonably diligent former Approved Person would have followed up with the investigator in those circumstances. Further, the Respondent did not advise Staff #2 of his change of email address in May 2017. Ultimately, the Respondent failed to attend the interview with Staff on May 24, 2017, as required.

94. We have found that, commencing on at least March 29, 2017, the Respondent failed to cooperate with an investigation by Staff of the MFDA, contrary to section 22.1 of MFDA By-law No. 1, as he failed to provide a written response to the MFDA inquiry letter and he failed to attend the interview with Staff.

95. Staff also urged us to find that the Respondent had fabricated the July 27, 2016 and April 7, 2017 emails that he tendered at the hearing. We did not find Staff's evidence on this point to be sufficiently clear and convincing to prove this allegation on the balance of probabilities. We were not able to determine whether those emails were created by the Respondent on the dates noted and for some reason not sent, or were created at a later date.

96. The Respondent raised several issues with respect to his defence, in addition to the alleged July 27, 2016 and April 7, 2017 emails, including that: he believed the original allegations against him set out in the MFDA inquiry letter were without merit; the MFDA was difficult to deal with and he was frustrated by their lack of timeliness in providing documents to him; he did not receive all of the communications from the MFDA; he did not trust the MFDA's processes after his experience with their whistleblower program; and he was suffering some personal and health

issues at times during the relevant period. We have found that those issues did not constitute valid defences and did not excuse his failure to cooperate. However, some of those issues were relevant to our consideration of an appropriate sanction.

VI. SANCTION

97. Prior to the commencement of the hearing, Staff filed written submissions in which they proposed the following penalties against the Respondent:

- a) a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA member;
- b) a fine in the amount of at least \$50,000; and
- c) costs in the amount of \$7,500.

98. On the last day of the hearing, Staff filed additional submissions, which had been emailed to the Respondent several days prior, in which they proposed, in addition to the permanent prohibition, the following penalties against the Respondent:

- a) a fine in the amount of at least \$75,000; and
- b) costs in the amount of \$10,000.

Staff argued that this was an egregious case in which a fine of \$75,000 was justified based on their allegation that the Respondent had fabricated two emails that he tendered as evidence at the hearing.

99. We note that during the investigation, the Respondent was advised by Staff that penalties that would be imposed on him in an enforcement proceeding for failure to cooperate would "include, among other things, a permanent prohibition on your authority to conduct securities related business in any capacity as well as a fine of \$50,00 and costs."

100. The MFDA Sanction Guidelines provide a framework for Hearing Panels to consider in determining appropriate sanctions, incorporating a number of the factors that Hearing Panels have

considered in deciding penalties in previous cases. The factors that are relevant to this case that we have considered include the following:

- a) the seriousness of the allegations proved against the Respondent;
- b) whether the Respondent recognizes the seriousness of the misconduct;
- c) the benefits received by the Respondent as a result of the misconduct;
- d) the harm suffered by investors as a result of the misconduct;
- e) the Respondent's past conduct, including prior sanctions;
- f) previous decisions made in similar circumstances;
- g) general and specific deterrence;
- h) public confidence; and
- i) the Respondent's ability to pay.

101. Seriousness of the allegations:

- a) Failure to cooperate: The Respondent's failure to cooperate with Staff's investigation was serious, as cooperation by those under the MFDA's jurisdiction is a cornerstone of the MFDA regulatory regime. His failure to provide a written response to the MFDA inquiry letter and attend for an interview, as requested, frustrated Staff's ability to determine whether there had been any contraventions by the Respondent and, if so, the full nature and extent of the conduct.
- b) Fabrication of emails: As noted above, we have not made a finding that the Respondent fabricated any emails.

102. The Respondent's recognition of the seriousness of the misconduct: The Respondent did not appear to recognize that he had failed to cooperate in the MFDA's investigation. He was of the view that he had acted reasonably during the investigation. In fact, he did cooperate at various times during the inquiry and the investigation. However, as we have found, he did not send a response to the MFDA inquiry letter and, ultimately, he did not attend for an interview. We considered the fact that the Respondent appeared at the hearing as some indication that he now understands the seriousness of the matter.

103. Mitigating factors:

- a) The underlying allegations: The initial allegations against the Respondent raised in the MFDA inquiry letter, if they could have been proven against him, would not likely have resulted in a significant sanction against the Respondent. We were clearly not in a position to make any findings regarding those allegations and we appreciate that during the course of the investigation, other issues may have come to light. However, on its face, this did not appear to be a case where the Respondent avoided a large fine for alleged egregious conduct by refusing to cooperate. We have considered this factor in our determination of sanction, but have balanced it against the importance of the need to cooperate in investigations.
- b) Some cooperation by the Respondent: We have given some consideration to the fact that the Respondent appeared to be trying to cooperate in the investigation at various times. However, he failed to carry through with his cooperation.
- c) The benefits received by the Respondent as a result of the misconduct: There was no obvious benefit received by the Respondent, other than possibly avoiding being sanctioned in respect of the underlying allegations, which may well have been less significant than a sanction for failing to cooperate in the investigation.
- d) Harm suffered by investors: There was no allegation of harm suffered by investors as a result of the Respondent's misconduct.
- e) The Respondent's past conduct: The Respondent had no past disciplinary history with the MFDA. In fact, he showed some commitment in the past to the MFDA's regulatory function when he made a whistleblower submission.
- f) Other mitigating factors: There were several other factors which, while not excusing the misconduct, we believe affected how he responded to the MFDA and were appropriate to consider, albeit to a limited extent, in relation to the penalty. First, during the time of the investigation, the Respondent appeared to have been facing significant personal challenges. Second, the Respondent appeared to have had concerns arising out of threats to his safety which limited what he was willing to tell the MFDA, including with respect to where he was living. Third, the Respondent believed Staff was not as responsive to him as they ought to have been during the investigation.

104. Previous decisions in similar circumstances: Staff directed us to a number of previous cases in which MFDA Hearing Panels imposed a permanent prohibition and fines ranging from \$50,000 to \$75,000. In all of the cases, the underlying allegations appeared on their face to be more serious than in this case. Many of those cases are also distinguishable from the case at hand in that in those cases the respondents did not cooperate at all in the investigation and did not appear at the hearing.

Armani (Re), [2017] Hearing Panel of the Central Regional Council, MFDA File No. 201701, Panel Decision dated August 3, 2017

McBurney (Re), [2015] Hearing Panel of the Central Regional Council, MFDA File No. 201522, Panel Decision dated December 29, 2015

Theroux (Re), [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201307, Panel Decision dated April 1, 2014

Zhang (Re), [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201309, Panel Decision dated October 23, 2013

Desbois (Re), [2010] Hearing Panel of the Central Regional Council, MFDA File No. 200822, Panel Decision dated March 16, 2010

Staff also referred us to a case in which an individual respondent cooperated to some extent in the subject investigation and the fine imposed was \$50,000, in addition to a permanent prohibition. Again, in that case the alleged underlying conduct was more serious than that alleged in this case.

(Re) Bassett [2005] I.D.A.C.D. no. 26, Decision of the Pacific Regional Council dated June 16, 2003

Under the previous MFDA Penalty Guidelines, which were replaced in 2018 by the MFDA Sanction Guidelines, the suggested penalty for a failure to cooperate was a minimum fine of \$50,000 and a permanent prohibition on an Approved Person.

105. Ability to pay: According to the MFDA Sanction Guidelines, which are posted on the MFDA's website, the Respondent's ability to pay may be a consideration in determining an appropriate penalty. However, the burden is on the Respondent to raise the issue and provide evidence of a bona fide inability to pay, such as tax returns. As the Respondent was self-represented, on several occasions prior to the day when closing submissions were made, including at the appearance on May 8, 2019, and the scheduling appearance on June 4, 2019, the Chair of the Hearing Panel advised him that if he planned to submit that he was unable to pay a fine, he

should provide evidence of his impecuniosity to Staff, including tax returns, prior to advancing that argument. However, as of the final day of the hearing, he had only provided to Staff and the Hearing Panel one 2018 T4A from his former employer and a letter from the Canada Revenue Agency (“CRA”) to his former employer, dated November 17, 2017, requiring the former employer to make payments to CRA in respect of the Respondent. The Respondent did not provide any documented evidence of his current income, expenses or assets. Various statements made by the Respondent, including that he had no assets and was unemployed, suggested to us that he had financial issues. However, while we gave some limited consideration to this factor, we could not be satisfied, based on the very limited documented evidence before us regarding his current financial condition, that he would be unable to pay a fine.

106. We have determined that a fine of \$40,000 is appropriate in this case. The Hearing Panel considered imposing a fine of \$50,000 as originally recommended by Staff, but in light of the mitigating circumstances outlined above, we have reduced that amount somewhat. However, we were satisfied that the importance of cooperation in investigations by persons under the MFDA’s jurisdiction still demanded that a significant fine be imposed in order to send a message that failing to cooperate in investigations will not be tolerated. Further, it is appropriate to impose an order of a permanent prohibition on the Respondent’s authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member. With respect to the prohibition order, we have found that the Respondent’s conduct in this matter has indicated that he is difficult to govern. In our view, the size of the fine and the prohibition order will serve the purposes of specific and general deterrence, protecting the MFDA’s enforcement process and maintaining public confidence in the regulatory system.

107. At the conclusion of the hearing, Staff presented a Bill of Costs, which indicated that their costs were \$12,000, excluding: the cost of the process servers; IT Staff time; Staff time associated with preparation of orders and internal meetings to obtain instructions; and certain disbursements. We noted that the Bill of Costs only accounted for 11 hours of Staff time at the hearing, while in fact the hearing took 2.5 days. In our view, a cost order of \$10,000 is warranted, given the Staff time expended. In assessing the costs, we also considered the fact that the Respondent did not provide Staff with the July 27, 2016 email, which purported to respond to the MFDA inquiry letter,

prior to the hearing. Had the full email been provided to Staff after service of the Notice of Hearing and before the hearing, it is possible that Staff may have reassessed whether to proceed.

108. Accordingly, the following order is imposed on the Respondent:

- a) a permanent prohibition on the Respondent’s authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to section 24.1.1.(e) of MFDA By-law No. 1;
- b) a fine in the amount of \$40,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and
- c) costs in the amount of \$10,000, pursuant to section 24.2 of MFDA By-law No. 1.

DATED this 29th day of January, 2020.

“Joan Smart”

Joan Smart
Chair

“Kenneth P. Mann”

Kenneth P. Mann
Industry Representative

“Joseph Yassi”

Joseph Yassi
Industry Representative

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