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 Tobac

Heard: June 26, 2018 in Winnipeg, Manitoba
Decision: June 26, 2018
Reasons for Decision: August 13, 2018

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller, QC	Chair
Richard Sydenham	Industry Representative
Greg Wiebe	Industry Representative

Appearances:

Sakeb Nazim	)	Counsel for the Mutual Fund Dealers Association of Canada
William Gange	)	Counsel for the Respondent
David Tobac	)	Respondent, in person

1. By Notice of Hearing dated March 15, 2018, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced a disciplinary proceeding against David Tobac (the "Respondent") pursuant to ss. 20 and 24 of MFDA By-law No. 1.

2. The Notice of Hearing set out the following allegation: On October 12, 2016, the Respondent processed a redemption in a client account based on the instructions from someone other than the client, contrary to MFDA Rules 2.1.1 and 2.3.1.

3. Enforcement Counsel put before this Hearing Panel an Agreed Statement of Facts dated April 24, 2018, which stated at paragraphs 4, 5 and 6 thereof as follows:

> *4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.*
>
> *5. Staff and the Respondent jointly request that the Hearing Panel determine, on the basis of this Agreed Statement of Facts, the appropriate penalty to be imposed on the Respondent.*
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> *6. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV and no other facts or documents. In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent*.

Admissions

4. The Agreed Statement of Facts set out the following particulars:

> *Registration History*
>
> *8. Since January 4, 1999, the Respondent has been registered in Manitoba as a mutual fund salesperson (now known as a dealing representative) with Investors Group Financial Services Inc. ("IG"), a Member of the MFDA.*

9. At all material times, the Respondent carried on business in the Winnipeg, Manitoba area.

Unauthorized Redemption

10. At all material times, IG had policies and procedures in place that, in all cases, clients must authorize trades on their accounts.

11. At all material times, Client #1 and Client #2 were spouses and clients of IG, whose accounts were serviced by the Respondent.

12. The Respondent states that he provided services to Client #1 and Client #2 for approximately 15 years, and met with the clients once or twice a year during those 15 years.

13. The Respondent states that he believed Client #1 and Client #2 to be a happily married couple.

14. At all material times, Client #1 had an individual non-registered account and a Registered Retirement Savings Plan ("RRSP") account at IG, and Client #2 had a RRSP account and a Locked-In Retirement Account at IG.

15. The Respondent states that on October 10, 2016, Client #2 contacted the Respondent and asked him to redeem $20,000 from his account in order to purchase a vehicle. The Respondent states that he advised Client #2 that the Respondent would review the matter in order to determine from which account belonging to either Client #1 or Client #2 it would be best to redeem the monies.

16. The Respondent states that Client #2 and the Respondent spoke again on October 10, 2016, at which time, the Respondent suggested to Client #2 that it would be best to withdraw the monies from Client #1's non-registered account as this would have more advantageous tax consequences compared to redeeming monies from the RRSP account of Client #2. The Respondent states that he asked Client #2 to discuss this strategy with his wife, Client #1, and obtain her instructions to redeem the monies from her account.

17. The Respondent states that on October 11, 2016, Client #2 telephoned the Respondent and advised that he had discussed the matter with Client #1, who agreed to redeem $20,000 from her non-registered account.

18. On or about October 12, 2016, without speaking directly with Client #1 to obtain her authorization, the Respondent submitted to IG for processing the request to redeem $20,000 from Client #1's non-registered account, pursuant to Client #2's instructions.

19. On October 12, 2016, IG deposited $20,000 from Client #1's non-registered account into a joint bank account belonging to Client #1 and Client #2. Client #2 subsequently withdrew the proceeds of the redemption.

20. On October 21, 2016, Client #1 advised the Respondent that she had received a transaction confirmation showing the $20,000 redemption described above, and did not consent to the redemption.

21. Client #1 did not receive the benefit of the monies redeemed from her account, nor did she authorize Client #2 to receive the monies on her behalf.

IG's Response

22. On or about October 21, 2016, the Respondent advised IG that he had processed the redemption in Client #1's account described above without the authorization of Client #1.

23. IG subsequently commenced an investigation into the Respondent's conduct, and on January 26, 2017, issued a warning letter to the Respondent with respect to the unauthorized redemption in Client #1's account.

24. IG reversed the redemption and re-instated Client #1's account.

5. The Respondent conceded that the Agreed Statement of Facts constituted misconduct under the By-laws and Rules of the MFDA and that he ought to have confirmed with his client prior to having made the redemption in issue.

6. Rule 2.3.1 reads as follows:

Unauthorized trading is the practice whereby an Approved Person makes trades without the client's knowledge or approval.

7. The issue to be determined by this Hearing Panel is the appropriate penalty to be imposed on the Respondent by the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

8. Enforcement Counsel for the MFDA provided a copy of the Agreed Statement of Facts, Written Submissions and Book of Authorities several days ahead of the hearing. This Hearing Panel assumes Counsel for the Respondent was provided with copies of the same materials at about the same time.

9. Shortly before the commencement of the hearing on the morning of June 26, 2018 Respondent's Counsel submitted written submissions, including a slightly differently worded Statement of Facts, argument as to penalty and other case authorities.

10. One item in the Respondent's recitation of the Statement of Facts was that Client #1 had been fully reimbursed. However, at the commencement of the hearing, the Respondent agreed to withdraw that statement.

11. Enforcement Counsel's written submissions indicated it considered the appropriate penalty should be a fine in the range of $15,000 to $20,000 and costs attributable to conducting the investigation and hearing of the matter in the amount of $5,000. However, just prior to commencement of the hearing, Enforcement Counsel advised that MFDA would seek a costs award of only $2,500.00 notwithstanding that the such sum did not nearly reflect the actual cost of conducting a penalty hearing.

12. Respondent's Counsel's written submission indicated the appropriate penalty for the case at hand should fall in the range of $2,500 to $4,000. It also submitted that the costs question should be considered after the Hearing Panel made its decision on the quantum of a fine and suggested that a written submission on costs to be submitted within two weeks of the Hearing Panel's decision.

13. The hearing then proceeded with oral arguments by Enforcement Counsel and Respondent's Counsel.

14. This Hearing Panel considered each of Respondent's arguments, set out in turn below.

Application of the MFDA Penalty Guidelines

15. Respondent's Counsel took issue with the lack of reference to the MFDA Penalty Guidelines (the "Guidelines") by Enforcement Counsel. He attached the entirety of the Guidelines to his written submission. The face page of the Guidelines contain the words "UPDATED

VERSION: September 20, 2006." Enforcement Counsel in oral argument contended that they should not be considered because they have become outdated.

16. Respondent's Counsel referenced particular passages of the Guidelines for MFDA Staff and Hearing Panels that articulated the intention behind the Guidelines and listed specific factors and penalty types and ranges to consider. Respondent's Counsel then contended that based on the foregoing, a fine of $5,000 should be the base point. Respondent's Counsel then posited that a consideration of the factors listed in the Guidelines should be applied to determine whether the fine should be greater or lesser than the $5,000 suggested fine.

17. This Hearing Panel considered, but ultimately rejected, Enforcement Counsel's argument that the Guidelines were outdated and as such, not applicable to the case at hand. Other than the fact that the Guidelines were ostensibly updated as of September 2006, no evidence was presented for the proposition that they have no application to current cases or the case at hand. This Hearing Panel declined to draw the inference that Guidelines dated 2006 were no longer worthy of consideration by hearing panels but concluded that if Enforcement Counsel or other members of MFDA hold the opinion that the Guidelines require further updating, that is a matter to be evaluated elsewhere.

18. This Hearing Panel gave equally careful consideration to, but ultimately rejected, the Respondent's argument that a proper application of the Guidelines implied that a $5,000 should be a base point for consideration of the appropriate penalty. First, the same wording of the Guidelines quoted by the Respondent's Counsel at paragraph 3 of his written submissions, set out below for ease of reference, contradicts such an interpretation:

> *"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.*
> *...*
> *Lastly, the facts and circumstances of a particular case may warrant that penalties of a different type than those stated in the Guidelines are appropriate."*

19. This Hearing Panel after carefully reviewing the language of the Guidelines, rejected the inference that its deliberations as to penalty should be restricted to the list of factors contained in the Guidelines or reduced to a mechanical application of the factors, penalty types or ranges. In the case at hand, the Hearing Panel took the language of the Guidelines into account in determining the appropriate penalty in this case, but considered also the specific circumstances as set out in the Agreed Statement of Facts, the case authorities cited by both Counsel, and the oral and written submissions.

No adverse effect due to contesting penalty

20. Respondent's counsel submitted that the Respondent's decision to contest the penalty to be imposed rather than entering into a settlement agreement on that issue does not constitute an aggravating factor to be considered in the penalty determination. No one, including Enforcement Counsel, disputed the correctness of this proposition.

Factors to be Considered in determination of Penalty

21. The factors enumerated by settled case law that hearing panels should consider are:

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

Breckenridge (Re), MFDA File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 ("Breckenridge"), at para. 10.

22. Factors hearing panels also frequently consider when determining an appropriate penalty are:

a) The seriousness of the allegations proved against the Respondent;
b) The Respondent's past conduct, including prior sanctions;

c) The Respondent's experience and level of activity in the capital markets;
d) Whether the Respondent recognizes the seriousness of the improper activity;
e) The harm suffered by investors as a result of the Respondent's activities;
f) The benefits received by the Respondent as a result of the improper activity;
g) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
h) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
i) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
k) Previous decisions made in similar circumstances.

Breckenridge, supra, at para. 77

23. Both Counsel agreed and this Hearing Panel accepts that the mitigating factors are that the Respondent had no prior history with MFDA and that he received no financial benefit from the transaction.

Seriousness of the proven allegations

24. The Respondent contended the misconduct should be treated as less serious for the following reasons:

- It was a one-time transaction
- The conduct was taken in good faith for the financial interest of the family unit
- The Respondent was not duped by an unscrupulous individual but purposely turned his mind and skill set to determine what was in the best interests of spouses he believed to be happily married
- The Respondent had no ill motive in processing the redemption

- The Respondent had no history with the MFDA

25. As mentioned, the Respondent at the outset of the hearing withdrew the contention in his written submission that another factor in mitigation was that Client #1 had been fully reimbursed. He raised this factor again over the objection of Enforcement Counsel during oral argument to establish that no client had been harmed by the misconduct. After questioning by the Hearing Panel, the Respondent withdrew this submission. This Hearing Panel accordingly disregarded the contents of paragraphs 1-5 of the Respondent's written submissions under the heading "Statement of Facts".

26. This Hearing Panel rejected the contentions that the following characterizations of the Respondent's conduct should be regarded as mitigating factors:

- the Respondent committed the misconduct "in good faith for the financial interest of the family unit",
- "purposely turned his mind and skill set to determine what was in the best interests of spouses he believed to be happily married", and
- it was he who had suggested a financial plan that he believed would benefit both Clients #1 and 2.

27. MFDA Hearing Panels have held that an Approved Person is not permitted to accept trade instructions with respect to a client account from a third party if the third party does not have trading authority or a power of attorney to act on behalf of the client. Such conduct has been found to be contrary to MFDA Rules 2.1.1 and 2.3.1.

> *Griffith (Re),* [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201329, Panel Decision dated August 19, 2014, at para. 7
>
> *Wallace (Re)*, [2017] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201683
>
> *Wray (Re),* [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201661

Stolarz (Re), [2016] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201642

28. If a trade is processed without the knowledge or approval of the client (even if it can be shown that the trade was processed with good intentions and even if the client benefits the client financially or otherwise) the trade is unauthorized and the processing of such a trade constitutes a contravention of the regulatory obligations of the Approved Person who processed it.

Garries (Re), [2016] Hearing Panel of the Prairie Regional Council, MFDA File No. 201605

29. In the view of this Hearing Panel, the requirement to secure instructions from the client is plainly stated in Rule 2.3.1. Moreover, the foregoing case authorities make it clear that it is not acceptable to rely on the instructions of third parties and that purported good intentions behind the misconduct are not relevant.

30. In addition, compliance with Rule 2.3.1 would have been a very simple undertaking. The Agreed Statement of Facts states that Client #2 contacted the Respondent and asked him to redeem $20,000 from his account. Had the Respondent simply executed those instructions, he would not have found himself before this Hearing Panel.

31. However, since the Respondent thought it prudent to first investigate whether it would be financially advantageous to examine the spouse's account of Client #2, he could simply have contacted Client#1 to advise that he intended to do so and secured her agreement for the same. Had he done so, (assuming she agreed) he would not have found himself before this Hearing Panel.

32. Third, when the Respondent suggested to Client #2 on October 10, 2016 that it would be best to withdraw the monies from Client #1's non-registered account as this would have more advantageous tax consequences compared to redeeming monies from the RRSP account of Client #2, he could have simply contacted Client#1 to advise that he intended to do so and sought her agreement for the same. Had he done so, (assuming she agreed) he would not have found himself before this Hearing Panel.

33. The foregoing illustrates that the Respondent had ample opportunity to both comply with the Rule and fulfill his expressed purpose of providing financial advice to benefit both clients.

34. As a result of the foregoing, this Hearing Panel rejects the implication in the Respondent's submissions that the misconduct is not very serious because it was not intentional, fraudulent or deceptive and was committed "in good faith".

The Respondent's experience and level of activity in the capital markets

35. The Respondent contended that he is now aware of his mistake, but which he made "in good faith". These submissions imply that he was wholly unaware until this incident that he was not authorized to rely on the word of one spouse to constitute consent of another.

36. However, the Agreed Statement of Facts states and establishes that since January 4, 1999, the Respondent has been registered in Manitoba as a mutual fund salesperson (now known as a dealing representative). In this regard, the following passage contained in *Wray (Re) (supra*) at paragraph 33 is instructive:

> *As stated by the Investment Dealers Association Hearing Panel in Milewski (Re): ... it is not sufficient to take another person's word, even a husband's. Due diligence requires that the information relating to a new client's investment experience and objectives must be obtained directly from the client. The registered representative's obligations are owed to her and it is to her to whom he must look for instructions.*
>
> *Milewski (Re), [1999] I.D.A.C.D. No. 17, Ontario District Council Decision dated July 28, 1999, at pp. 8-9.*

37. *Milewski (Re) (supra),* was also cited in *Re Peer,* Hearing Panel of the Central Regional Council, MFDA File No. 201202, Panel Decision dated October 17, 2012, at para 11 ("*Re Peer*"), and again in *Re Lee,* Hearing Panel of the Atlantic Regional Council, MFDA File No. 201642 Panel decision dated January 16, 2017, ("*Re Lee*"), two of the decisions cited by the Respondent, albeit for a different proposition which is discussed later in these reasons.

38. Accordingly, it has been well settled law in the securities industry since 1999 that it is not sufficient to take one spouse's word for another, a proposition that this Hearing Panel considers was or should have been within the knowledge of the Respondent during the 15 years he provided services to Clients #1 and #2 and certainly well before 2016 when the subject transaction occurred.

Specific and general deterrence

39. The Respondent argued that as he is now aware of his mistake, but which he made "in good faith", there was no issue of specific deterrence and it is not a mistake that calls out for general deterrence of the industry as a whole.

40. This Hearing Panel rejected this argument. This Hearing Panel does not find the Respondent's rationalizations for his conduct to be reasonable or credible.

41. The question of whether misconduct warrants a penalty to ensure deterrence specific to a particular respondent does not turn solely his own subjective recognition of the nature and extent of his misconduct. In any case, this Hearing Panel was not satisfied that this Respondent truly appreciated the seriousness of his misconduct, having regard to his insistence that it was mitigated by his own "good faith".

42. This Hearing Panel noted that the Respondent continued, even to the date of the hearing, to insist that Client #1 was not harmed by his conduct. This position demonstrated no recognition that his action would likely have resulted in a significant negative surprise to Client #1 to discover from examination of her own account that funds had been transferred out of it without her knowledge or consent. It demonstrated no recognition that Client #1 and other investors learning of the Respondent's conduct in this case would lose trust and confidence in Approved Persons.

43. The Respondent further contended his conduct was not a mistake that called out for general deterrence of the industry as a whole. For reasons stated earlier, this Hearing Panel does not accept that the fact the Respondent engaged in the conduct "in good faith" has any bearing on the

determination of penalty in this case. Moreover, this Hearing Panel rejects the notion that no specific deterrence is required merely because the Respondent is now aware of his mistake.

44. Further, this Hearing Panel sees no merit in the proposition that the Respondent's misconduct does not call out general deterrence of the industry as a whole. This Hearing Panel endorses the principle that the effect of general deterrence should advance the goal of protecting investors. As a result, the penalty levied should be sufficient so as to affirm public confidence in the regulatory system and ensure that others in the industry do not repeat the misconduct. As stated by the Supreme Court of Canada in Cartaway Resources Corp. (Re), [2004] 1 SCR 672 at para. 61 ("Cartaway Resources"),

> *"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...*

Previous decisions made in similar circumstances

45. Respondent's Counsel contended there were few cases on point, but then asserted that the case law (and Sentencing (*sic*) Guidelines) support a penalty less than the base penalty of $5,000. In addition, he contended there were significant mitigating factors and no aggravating factors to increase the penalty above $5,000.

46. Respondent's Counsel contended that to warrant a fine above $5,000, the MFDA Enforcement Counsel was obligated to present egregious conduct not contemplated by the Sentencing Guidelines or prove the need for increased deterrence or present argument for policy considerations that warranted an increased fine. He further argued that all the case authorities cited by Enforcement Counsel were inapplicable to the case at hand, indeed, those cases emphasized the inappropriate nature of Enforcement Counsel's submissions.

47. In short, the Respondent's contention is that the penalty range sought by Enforcement Counsel was disproportionately high by reason that the conduct of the respondents in those cited cases was significantly more serious than that in the case at hand.

48. The Respondent cited five MFDA decisions pertaining to the improper conduct of possession and use of pre-signed forms. All those cases were instances where the hearing panel's task was to determine whether to accept or reject a proposed settlement agreement.

49. The Respondent cited *Re Page,* Hearing Panel of the Central Regional Council, MFDA No. 201220, Hearing Panel Decision dated April 26, 2013, and *Re Byce*, Hearing Panel of the Central Regional Council, MFDA File No. 201311 dated September 4, 2013, both for the proposition that the facts in those cases demonstrated a pattern of conduct and premeditation that was not present in the instant case.

50. This Hearing Panel did not accept the Respondent's contention that these cases, which all involved improper possession and use of pre-signed forms, were demonstrative of behavior that was more serious misconduct than, or in any case useful comparisons with, the fact pattern in the case at hand.

51. First, none of those cases involved discretionary or unauthorized trading. Moreover, none of those fact patterns resembled a situation where an Approved Person notwithstanding an established pattern of meeting with the client approximately twice a year for 15 years, then without any request on her part, intentionally removed funds from that client's account without securing her prior consent or providing any notice whatsoever, whether in a personal meeting, a letter, a telephone communication or an electronic transmission. Finally, none of those cases were similar to a case where an Approved Person on receipt of instructions, proposed an alternate strategy, which involved use of the funds of the spouse, without communicating the rationale for the proposed strategy directly to the spouse whose funds were affected.

52. In the cases of *Re Peer and Re Lee*, (*supra)*, it was emphasized that the role of a hearing panel at a settlement hearing was fundamentally different than its role at a contested hearing and referenced the often cited reasons in *Milewski (Re*) supra (at page 10) which are set out below:

> '*We also note that while in a contested hearing the Panel attempts to determine the correct penalty, in a settlement hearing the Panel "will tend not to alter a penalty that it considers to be a within a reasonable range taking into account the settlement process and the fact that the parties have agreed".*

53. The hearing panel in *Re Lee, (supra)*, at paragraph 9 went on to state as follows:

> *9. It is clear from the jurisprudence emanating from the Courts and previous MFDA hearing panels that this Hearing Panel's task is not to decide whether we would have arrived at the same decision as that reached by the parties in this case. Rather, it is our responsibility to determine whether the penalty agreed upon falls within a reasonable range of appropriateness having regard to the conduct of the Respondent. If the negotiated settlement maintains the integrity of the investment industry it is our duty to accept it.*

54. Based on the foregoing authorities, this Hearing Panel's duty is to determine the correct penalty in the circumstances of this case. This Hearing Panel considers that it is not obligated to fetter its discretion in such determination by rigidly adhering to a range of penalty decisions imposed in settlement agreement cases, or by considering itself obligated to fit its proposed penalty within the boundaries of Penalty Guidelines promulgated by the MFDA.

55. Respondent's Counsel also disputed the relevance of the following case authorities cited by Enforcement Counsel:

> *Griffith (Re),* [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201329, Panel Decision dated August 19, 2014
>
> *Wallace (Re),* [2017] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201683
>
> *Wray (Re),* [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201661

Stolarz (Re), [2016] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201642

56. Respondent's Counsel not only disagreed that the fact patterns in those case authorities were applicable to the case at hand, but characterized the submission of the same as inappropriate, disproportionately high and involving significantly more serious conduct than that of the case at hand.

57. This Hearing Panel found that all of those cases held that that an Approved Person is not permitted to accept trade instructions with respect to a client account from a third party if the third party does not have trading authority or a power of attorney to act on behalf of the client. All the cases found such conduct to be contrary to MFDA Rules 2.1.1 and 2.3.1. Three of the four cases concerned an instance of an Approved Person taking instructions from one spouse in respect of finances of the other spouse.

58. This Hearing Panel found that those cases are all comparable in terms of the contravention of the Rules in question. In particular, the most of those cases contain the salient comparable feature of a respondent relying on a spouse's word for the wishes of another spouse. In the result, this Hearing Panel rejected the Respondent's contention that these authorities were inappropriate or not comparable to the instant case.

59. This Hearing Panel observed from the cases cited by Enforcement Counsel the frequency in recent years of unauthorized trading based on reliance by the Approved Person of the word of the spouse of another client in lieu of seeking instructions directly from the affected spouse.

60. This Hearing Panel again observed that all these cases involved a hearing panel considering whether to accept or reject a settlement agreement jointly proposed by MFDA and the Respondent. Accordingly, it rejected the implication from Respondent's Counsel's submission that since none of the cases cited by Enforcement Counsel concerned imposition of a fine of $20,000, it was not open to this Hearing Panel to consider a fine in that amount. It further rejected the implication that it was obligated to undertake a measurement of the conduct of the Respondent to the conduct of

the respondents in those cited cases and plot the penalty as if on some spectrum of wrongful conduct.

61. Moreover, although neither counsel made such a suggestion, this Hearing Panel states for clarity that a contested hearing as to penalty is not equivalent to a negotiation. The Hearing Panel is under no obligation to consider both ranges of penalty asserted by opposing counsel and to then locate a median fine that falls somewhere in between.

62. Respondent's Counsel did not make reference to any other factors listed in paragraphs 21 and 22 above. However, this Hearing Panel considered additional factors were relevant and constituted aggravating factors in the case at hand.

The protection of the investing public

63. The Respondent contravened his regulatory obligations and Member's policies by not obtaining instructions from the client. The Respondent appeared to have no appreciation for the fact that the regulatory regime exists to protect investors from precisely the kind of loss suffered by Client #1. The very act of trading on a client's account without authority undermines the confidence of the investing public, irrespective of whether the funds are subsequently returned to the client.

The integrity of the securities markets

64. The Respondent's conduct was contrary to IG's policies and procedures. When an Approved Person engages in unauthorized trading, there is potential for significant client loss, as occurred to Client #1 in this case. Such a client and others who have learned of the misconduct will have suffered a loss of trust in the integrity of the securities market, irrespective of whether the funds are subsequently returned to the client. The Respondent failed to acknowledge that his improper activity caused damage to the integrity of the capital markets in the jurisdiction. Moreover, Approved Persons may prove their good intentions by merely and strictly complying with the MFDA Rules and those of their Member.

The Respondent's experience and level of activity in the capital markets

65. Given his experience in the mutual fund industry, this Respondent ought to have known and acted in accordance with the compliance requirements of the MFDA and the Member. As noted above, it has been well settled law since 1999 that Approved Persons are not authorized to take the word of a spouse as consent to engage on trading on the other spouse's account. By circumventing this important requirement, the Respondent exposed his client to risk and loss.

Whether the Respondent recognizes the seriousness of the improper activity

66. The Respondent redeemed $20,000 from Client #1's account without her knowledge, authorization or approval. He never attempted to communicate directly with the client about the transaction. This constituted a client loss of $20,000 as a result of the unauthorized redemption made by the Respondent. He appears to consider it as a trivial error, for which he deserves minimal sanction. The Respondent's refusal to acknowledge the fact that the client did not receive the benefit of the monies redeemed from her account is an aggravating factor. The Respondent's failure to recognize that the reimbursement to the client by IG constituted harm suffered by IG is an aggravating factor.

The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets

67. This Hearing Panel also takes the view that it is necessary to impose a monetary penalty that emphasizes the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons.

68. This Hearing Panel also concluded that it was necessary on the facts of this case that the penalty be sufficient to specifically deter the Respondent from not only engaging in misconduct in the future, but to disabuse him from the notion that he may ignore the specific wording of the MFDA Rules or a Member's policies in preference to his own personal judgment about his

supposed good intentions, his own skills or his own interpretation of when harm might befall his client from his chosen actions.

69. This Hearing Panel concluded that the penalty in this case must also serve as sufficient warning to other Approved Persons and to the investing public that it is serious misconduct to undertake unauthorized trading particularly when it involves relying on the word of third parties such as spouses, other family members, or clients in any kind of relationship to each other that might suggest their word can be relied upon in lieu of the authorization from the client's own mouth. Further, the penalty must make clear that the misconduct has no place in the mutual funds industry.

70. This Hearing Panel accordingly accepted the submission by Enforcement Counsel that a fine in the range of $15,000-20,000 should be considered. However, due to the aggravating factors enumerated above, which outweighed the mitigating factors found, this Hearing Panel determined that a fine in the upper end of that range was necessary in the circumstances of this case.

71. This Hearing Panel concluded that a fine of $20,000 should secure the appropriate level of specific deterrence to this Respondent and the appropriate level of general deterrence to other Approved Persons. Further, it will advance the public interest and the objective of the MFDA to enhance investor protection and ensure high standards of conduct in the mutual fund industry. Finally, it will serve the goal of protecting the integrity of the securities markets and of the MFDA's enforcement processes.

72. After rendering the above determination on monetary penalty, Respondent's Counsel withdrew his application to adjourn for written submissions on costs and acceded to a disposition of costs in the sum of $2,500. Enforcement Counsel concurred. As a result, the Respondent was ordered to pay costs of $2,500.

73. This Hearing Panel thanks both Enforcement Counsel and Respondent's counsel for their helpful presentations and for their cooperation during the hearing.

DATED this 13th day of August, 2018.

"Shelley L. Miller"

Shelley L. Miller, QC
Chair

"Richard Sydenham"

Richard Sydenham
Industry Representative

"Greg Wiebe"

Greg Wiebe
Industry Representative

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