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: Valery Herner

Heard: November 30, 2016 and December 1, 2016 in Toronto, Ontario
Decision and Reasons: January 25, 2017

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

The Honourable P. T. Galligan, QC	Chair
David W. Kerr	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

David Halasz	)	Counsel for the Mutual Fund Dealers Association of Canada
	)	
Valery Herner	)	In Person without counsel
	)	
	)	
	)	

DECISION AND REASONS

1. By Notice of Hearing, dated March 9, 2016, the Mutual Fund Dealers Association of Canada (the "MFDA") made the following Allegation against the Respondent:

> Between June 2011 and June 2012, the Respondent recorded Know-Your-Client information for clients SM and MM on the clients' account documents, which information he believed to be inaccurate, in order to match the clients' information with the risk profile of the investments purchased by the clients, thereby failing to ensure that the orders he recommended or accepted for the accounts of the clients were within the bounds of good business practice, and impairing the Member's ability to properly supervise the Respondent's activities, contrary to MFDA Rules 2.2.1 and 2.1.1.

2. The following is the Respondent's Registration History:

   1. The Respondent has been registered in the securities industry since November 2001.

   2. Since August 24, 2015, the Respondent has been registered in Ontario as a Dealing Representative (formerly a Mutual Fund Salesperson) at Y.I.S. Financial Inc. ("Y.I.S."), a Member of the MFDA.

   3. Between January 22, 2008 and February 28, 2015, the Respondent was registered in Ontario as a Mutual Fund Salesperson at Investors Group Financial Services Inc. ("Investors Group"), a Member of the MFDA.

   4. At all material times, the Respondent carried on business in the St. Catharines, Ontario area.

OVERVIEW

3. While it will be necessary, later, to review certain of the facts in some detail, a brief overview of the circumstances will help to show the issues, in this case, in their factual matrix. In the early summer of 2011, Mr. M.M. was 57 years of age. His wife, S.M., was 54. They were the owners of a grape growing farm at Niagara on the Lake, Ontario. It was a successful operation. In his client information forms Mr. M. shows his annual income as between $75,000 and $99,999. In his statement to the MFDA he estimated his income, in 2010, at between $80,000 and $100,000. Mrs. M. worked away from home and on her client information forms she shows her annual income as between $25,000 and $49,999.

4. The grape farm is very valuable. Each of Mr. and Mrs. M. show their personal net worth at over $1,000,000. However, in their statement to the MFDA they said that was their joint net worth. In addition to the farm, they own a house in which the mother of one of them lives. Some years ago they purchased a cottage "up north" for $350,000, which they still own. They also had some GICs in RRSPs with a credit union. They are worth something "a bit more" than $80,000.

5. On May 16, 2010, Mr. M. was seriously injured in a motor vehicle accident. In June of 2011 he received a payment of $800,000 as part of the resolution of his claims arising out of the accident. In their statement to the MFDA, Mr. and Mrs. M. advised that since shortly after the accident they have been receiving, from an insurer, $8,000 monthly. That payment was continuing. They also mentioned another fund of up to $1,000,000 to which they may have recourse.

6. Mr. and Mrs. M. thought that they should get some advice about the investment of that large amount of money. Mrs. M. has a cousin whom she trusts very much and who is very "business-savvy" and who, she understood, "had had some really good experience with Mr. Herner". The cousin is R.S. They sought advice from him. He arranged for the Respondent to meet with Mr. and Mrs. M.

7. R.S. brought the Respondent to the M's farm in the early evening of June 30, 2011. Mr. and Mrs. M., the Respondent and R.S. met for approximately three hours. There is a crucial conflict about the advice given by the Respondent and the instructions which he received from Mr. and Mrs. M. at that meeting. A resolution of that conflict is necessary to the determination of the case.

8. As a result of that meeting five new client account forms were signed. On June 30, 2011, Mr. and Mrs. M. signed an application for a joint non-registered savings account. Each signed an application for a tax-free savings account. On July 8, 2011 each signed an application for a personal registered retirement savings plan.

9. In the know your client section of each form the risk tolerance selected is "high". In each, the investment portfolio profile selected is "moderate aggressive to aggressive".

10. The Respondent invested the joint savings accounts and the personal RRSPs in investments having the following risk assessments:

High risk 26%
Medium to high risk 32%
Low to medium risk 42%

11. He invested the tax free savings accounts in investments having the following risk assessments:

High risk 26%
Medium to high risk 26%
Low to medium risk 48%

12. Over the months which followed June 2011, the value of the investments made by Mr. and Mrs. M. declined. Displeased with the performance, in June 2012, they closed their accounts with the Respondent and moved their funds elsewhere. It is not part of our task to determine the value of their losses. Some of the funds in which investments were made had deferred sales charges for early termination. The difference between the money invested and that taken out is

approximately $160,000. If the deferred sales charges are exempted that difference is reduced to approximately $130,000. Mr. and Mrs. M. consider that they have had a significant loss.

THE EVIDENCE IN THE CASE

13. Two witnesses testified at the hearing. Stephen Davis, an investigator with the MFDA, identified and co-related some of the documentary material and gave some non-controversial information about the transactions. The Respondent testified under oath and was subjected to cross-examination.

14. Counsel for the MFDA tendered in evidence, as Exhibit #5, a volume containing many documents relating to the investigation. He also tendered as Exhibit #6 a volume containing the transcript of the interview to which the Respondent submitted pursuant to his duty to cooperate with the investigation.

15. Exhibit #6 also contains the transcript of an interview which the MFDA had with Mr. and Mrs. M. on June 10, 2014. They were not under oath. They were interviewed together. One answered some questions and the other answered other questions. They collaborated on answers. One sometimes supplemented and/or corrected the other.

16. While the transcript of that interview would not satisfy the legal requirements for the admissibility of hearsay evidence, we have power, under Rule of Procedure 1.6(1), to admit it. We exercised that power and did admit it, even though no reason was given to explain why neither Mr. nor Mrs. M. testified before us. We do not know whether, for some reason, they were unable to come and give their evidence under oath and be subject to cross-examination, or whether they simply did not want to come.

17. Finally the Respondent tendered into evidence a volume of documents which became Exhibit #7. Included in that exhibit is the affidavit of Mrs. M.'s cousin, R.S., sworn February 9, 2015. The affidavit is admissible under Rule 13.4(1). A copy of the affidavit was provided to the

MFDA on February 10, 2015, over a year before the Notice of Hearing was issued. The MFDA did not, as it was entitled to do, require R.S. to attend at the hearing for cross-examination.

THE CONFLICT ABOUT ADVICE AND INSTRUCTIONS

18. The descriptions of the discussions on June 30, 2011, which are given by Mr. and Mrs. M. in their interview, tend to be vague and disconnected. The overall position which they take was that the Respondent did not adequately explain risk to them. They were told that there could be a decline but "over time it recovers itself". They did not want to make a lot of money, "just more than at the credit union". "… We've been conservative through the whole thing. We just wanted a place to put our money and keep it safe and make a bit." They deny choosing high risk for risk tolerance and moderate aggressive to aggressive for investment portfolio profile.

19. The Respondent testified, and stated in his interview, that he recommended that Mr. and Mrs. M. invest in low risk securities. He said that, apparently, they knew that cousin R.S. had earned high returns – double digit – with his investments. They insisted that they have the same portfolio as R.S. The Respondent advised them that in order to obtain similar results to those of R.S. they would have to take the same risk. That was high risk.

20. The Respondent's version of the discussion is summarized in these extracts from his interview:

> So I said is this money intended for such a long period of time, you only been with the bank, we went through the KYC, we went through the risk tolerance. They keep insisting, saying, well, we trust R., R. been with you long enough, and we want the same portfolio as R. I said, well, R. is worth a couple hundred million bucks. He is a risk-taker. He runs several enterprises, you know, you don't seem to be the same. No, this is what we want. They insisted. I said okay, but the KYC, you're going to have to assume the same risk. Not necessarily you will receive the same performance because it was the summer of 2011 and I said market right now seems to be sliding down, so in the short term we could be experiencing negative result. And they're looking at R. and R. said, yes, we've been through the ups and downs, but he managed to always come back, recover money and make new gains again. Okay, so that's fine, let's do it. I said I don't

want to put the words in your mouth, but you're going to sign documents and I want you to understand what you're signing. …

… They held that cheque for several weeks, they didn't know what to do. So they contacted R. He's a cousin of S., and, you know, that's what he suggested. Let's meet with Val, I work with the guy for several years, he's done great for me and the rest of my companies, and let's see what he's going to suggest. I was quite cautious at the beginning because when they said about GIC, I want to make sure that they understand that, the risk they're taking. Right? And they were just consistently saying we want the same as R.. I said R. is a risk-taker, that's how he made his fortune because he take his chances. He's been through the ups and downs but, you know – and nevertheless, he's still growing. We trust him, this is what we want to do. I said to match his performance you're going to assume the same risk as R. Yes, that's what we want. I said here's KYC, here's your options. I'm not putting no words in your mouth, read it, sign it, tell me what you want to do. They did.

MR. DAVIS: So you told them that to get the type of return that R., their cousin, had earned, they'd have to be a higher risk investor?

MR. HERNER: Absolutely. And I told them, I said the past performance never guarantees the future performance.

MR. DAVIS: Did you clearly explain what being a high risk investor meant?

MR. HERNER: Yes. I said the market fluctuations – the higher risk, the greater percentage-wise loss may occur. And it may take a longer time to recover that. But because -- they asked me, so in ten years what should I expect? I said I can only refer to the past historical information. And I brought, what I mentioned before to you, Mackenzie Financial spreadsheet. So here's what we got in the past half a century, right? You can see the timing is different, but market always bounce back. Otherwise, what's the point in investing in the market if it never recovers. So the cycle is always there. I'm not sure where we are in the cycle right now because I said in the past few years, after 2008, it seems to be – the market does not work the same as in the past. We seem to be going through the roller coaster ride right now. I'm assuming it would be done and over at some point and then we're going to be back to the regular market phases. But right now, I said, I'm not sure. Because market acts so unexpectedly on any given news, whether it

> is up news or down news, you know. I said right now I don't know. But within ten years, I'm assuming it will be the same. No guarantees.

During the interview Mr. Davis asked the Respondent:

> So they agreed they'd be a high risk investor?

The Respondent answered, "Yes".

21. Finally we quote from another part of the transcript:

> **MR. HERNER:** Yes. To answer your question, no, I didn't think they are on the same category as R. R. is always taking chances.
>
> **MR. DAVIS:** They're not the same type of client?
>
> **MR. HERNER:** No. Different personality, totally different objective. And that's why I recommended them not to follow R.'s steps. But they insisted, they said this is what we want. And we want you to do exactly the same.
>
> **MR. DAVIS:** So you didn't consider them to be honestly to be high risk investors?
>
> **MR. HERNER:** Personally, I didn't, no. Personally, I didn't.
>
> **MR. DAVIS:** But you signed the forms agreeing that they were high risk investors?
>
> **MR. HERNER:** That's what they choose. That's what they told me to do so. I give them every option not to choose that and they said this is what we want, we want to match the performance, match everything what cousin did. He seems to done all right in life, so he knows what he's doing, we want to follow his trend. I said his circumstance is totally different than yours. You can't do that. But that's what we want. They insisted, this is what we want.
>
> **MR. DAVIS:** Right.

> **MR. HERNER:** And at some point in the conversation they said if you don't want to do it, that's fine, we'll find somebody else who's going to do it. All right?
>
> **MR. HALASZ:** Sorry, who said that to you?
>
> **MR. HERNER:** Yes, one of them said – I think M. said if you don't want to do it – because I was trying to persuade them outside the same portfolio as R. Because it's totally different circumstances for you and R. Not the same. And you're right, I didn't feel that they are high risk clients. They insisted, this is what we want to do. If you don't want to do it, we'll find somebody else who will do it. All right. As long as you understand, as long as it's recorded and you put your signature on it.

22. There are two diametrical versions of the meeting. Mr. and Mrs. M. say that in effect they did what the Respondent recommended that they do. On the other hand the Respondent's version is that he recommended low risk investments to them, but that they insisted on having the possibility of obtaining the same returns as Mrs. M.'s cousin and to do so agreed to accept the high risk necessary to achieve them. They insisted to the point of saying that they would go to another advisor if the Respondent refused to carry out their instructions.

RESOLUTION OF THE CONFLICT AND FINDINGS OF FACT

23. When a tribunal is faced with diametrically opposed versions of an event, it must decide which of them is more probably correct. It must resolve the issue of credibility. There are a number of factors which will help it resolve the question of credibility. It is necessary for us to refer to but a few of them.

24. The first factor is how the witnesses appeared to the tribunal as they testified. Did one seem more credible than another? In this case we are unable to form an impression of those who gave one version of the meeting. They did not testify. However the Respondent did testify. He spoke of some issues between himself and his former employer and between himself and the MFDA. Those issues are not before us and therefore we do not mention or discuss them further. When he testified about the issues in this case he appeared to us to be forthright and truthful. He was candid in admitting that he should have recorded more fully what transpired at the meeting

in his contact sheet. He bore up well during cross-examination. We give more weight to what he testified before us than to what was said in an unsworn interview by persons whom we have not seen or heard and who have not been cross-examined.

25. Another factor is whether one version is inherently more probable than the other. The version of Mr. and Mrs. M. would have one believe that for some reason the Respondent put down high risk when that was something that they did not want. One has to wonder why an advisor would do such a thing. The Respondent had nothing to gain from doing so. One must ask why would someone jeopardize his reputation and livelihood for no apparent reason. It seems to us to be much more likely that an advisor, who was considered competent and honourable by a member of the clients' family, would follow his clients' instructions.

26. The last factor to which we think it necessary to refer is this. Is there any independent evidence which tends to support in a material way one version or the other? There is strong evidence which supports and confirms the Respondent's version of events. It is the affidavit of Mrs. M.'s cousin R.S. We think the affidavit is so important that we reproduce it in full, with identifying information redacted.

AFFIDAVIT

IN THE MATTER OF a complaint made by M.M. and S.M. of Niagara on the Lake against Val Herner, personally.

I, R.S., of the Town of Niagara on the Lake, in the Regional Municipality of Niagara
MAKE OATH AND SAY/AFFIRM THAT:

1. I am the cousin of S.M. and have known M.M. and S.M. for many years and have personal knowledge of the facts herein set forth.
2. M.M. is a farmer and has owned and operated a farm at Niagara on the Lake.
3. M.M. was involved in a car accident which put him into a wheel chair. To compensate him for his injuries he received a settlement of approximately $800,000.00.
4. As M.M. and S.M. had no experience in investing money, they asked my advice.
5. I advised them that I was not capable of giving them that advice but that I would be willing to introduce them to my advisor, Val Herner of the Investment Group who had handled my investments in the past and I was satisfied with his performance.
6. Accordingly, a meeting was arranged for Val Herner to meet with M.M., S.M. and myself to handle the introductions.
7. I advised Val Herner that he should keep his presentation simple and clear to make sure that M.M. and S.M., while they were excellent intelligent farmers, they had no experience in investing money.
8. On the 29th day of June, 2011 at 7:30 p.m., we met at the farm on their porch. The meeting lasted about 3 hours. After I made the introductions, Val Herner, outlined all of the options open to them with his firm. He cautioned them to invest in low risk investments, as they were inexperienced and they needed to safeguard their investments. They insisted over and over again that they wanted the same returns on their investments that I had made over the past 3 years.
9. I have reviewed the statement of Val Herner dated the 18th day of July, 2012, attached as Exhibit A to this my affidavit and paragraphs 1, 2 and 3 of that statement are true.
10. Should any further information be required please feel free to contact me. I can be reached at (identifying information omitted) St. Catharines.

SWORN/AFFIRMED before me at the)
City of St. Catharines)
In the Regional Municipality)
of Niagara)
this 9th day of February, 2015)
) "R.S."
) R.S.

A Commissioner, etc. [Signature]
(Exhibit A omitted)

27. In the circumstances of this case, the evidence of R.S. is entitled to very great weight. He is a relative of Mrs. M. If anything, one would expect him, because of family ties, to be on her side. He was at the meeting. There is no reason to doubt the accuracy of his recollection. He had nothing to gain by siding with either Mr. and Mrs. M. or with the Respondent. His testimony has a ring of objectivity about it.

28. His affidavit tends to support the Respondent's testimony, and his statements to the MFDA, on two very critical issues. First it confirms that the Respondent advised Mr. and Mrs. M. to invest their money in low risk investments. Second it supports the Respondent when he said that the clients insisted on having returns comparable to those obtained by R.S.

29. There is no independent evidence which tends to support the version given by Mr. and Mrs. M.

30. It is unnecessary to refer to any other of the factors which assist tribunals in deciding where the truth lies in conflicting versions of an event. We have concluded that the Respondent was truthful in his testimony and in his interview with the MFDA. We have doubts about the candor of Mr. and Mrs. M. as they described the meeting.

31. In all respects, where he was describing the events with which we are concerned, we accept without reservation the version of the June 2011 meeting given by the Respondent in his testimony and in his interview with the MFDA. Where there are conflicts between his version of that meeting and the version given by Mr. and Mrs. M., we accept his version and reject theirs.

32. Based upon those conclusions we make certain findings of fact. At the meeting, on June 30, 2011, the Respondent recommended to the clients that they invest in low risk securities. The clients rejected that recommendation because they wanted to achieve the same returns which R.S. was earning on his investments. The Respondent told them that in order to possibly achieve equivalent returns they would have to accept the same high risk which R.S. had accepted. The Respondent explained to them that higher risk involved a risk of higher losses. They accepted that risk. The Respondent advised them that investing in high-risk securities did not necessarily

mean that there would be high returns. There could be losses. The Respondent only agreed to record high risk and a moderate aggressive to aggressive investment portfolio, which he did not recommend, upon persistent insistence that he do so and under their threat that if he did not do so they would go to someone who would accede to their instructions. When they signed the five new client account forms we find that, they saw and knew full well that the KYCs showed high risk and moderate to moderate aggressive portfolio profiles. Those classifications, shown in the five client account forms, were precisely what the clients wanted. When the Respondent put those classifications in the five KYCs he complied precisely with his clients' fully informed instructions.

THE ALLEGATION

33. It is necessary to examine the Allegation contained in the Notice of Hearing. For ease of reference we reproduce it here.

> Between June 2011 and June 2012, the Respondent recorded Know-Your-Client information for clients SM and MM on the clients' account documents, which information he believed to be inaccurate, in order to match the clients' information with the risk profile of the investments purchased by the clients, thereby failing to ensure that the orders he recommended or accepted for the accounts of the clients were within the bounds of good business practice, and impairing the Member's ability to properly supervise the Respondent's activities, contrary to the MFDA Rules 2.2.1 and 2.1.1.

34. It appears to accuse the Respondent of a number of things:

1. Recording of information which he believed to be inaccurate.
2. A purpose – to match that information with the risk profile of investments that were purchased.
3. Failing to ensure that the orders were within the bounds of good business practice – a consequence.
4. Impairing the Member's ability to supervise – a consequence.

35. It is obvious that items 2, 3 and 4 are completely dependent upon a finding that the Respondent did record information which he believed to be inaccurate. Thus the material or essential part of the Allegation – what lawyers would call the gravamen of the offence – is whether the Respondent recorded KYC information which he believed to be inaccurate.

DETERMINATION

36. It is the position of the MFDA that the information was inaccurate because of the Respondent's opinion that the clients were not high-risk investors. It is correct to say that the Respondent did not believe that the clients were high-risk investors. However there is no proof, not even a suggestion, that the Respondent did not record correctly the risk classification – high risk and portfolio profile – which were in R.S.'s KYC. The MFDA's position is a subtle one. Its contention is that even though the Respondent correctly recorded information in the account documents his recording was inaccurate because it did not conform to his opinion of the clients' risk classification.

37. We stress that the critical word in the Allegation is not "unsuitable", it is "incorrect". The Respondent is not charged with recording information which he believed to be unsuitable. If that could be another offence, it is one with which he is not charged. Moreover, in its written submissions the MFDA is critical of certain aspects of the Respondent's handling of these transactions. We decline to make any comment upon conduct which is not the subject of a specific charge against him.

38. The Respondent faced a dilemma. There is no doubt that an advisor is under a duty to recommend to a client only what he/she thinks are suitable investments for that client. The Respondent fulfilled that duty by recommending low risk investments to Mr. and Mrs. M. They rejected that advice and insisted "over and over again" that they wanted returns which were only possible from high-risk investments. They told him that if he would not make those investments for them, they would go to someone else who would.

39. The responsibility of the advisor is to recommend. Ultimately, however, the choice of risk and investment profile is that of the client. Where a fully, and appropriately, advised client makes a choice, with which the advisor does not agree, the advisor cannot be faulted. He/she has fulfilled his/her duty to the client by making appropriate recommendations.

40. The Respondent appropriately advised his clients. They rejected his advice and chose the risk tolerance and investment profile which had been chosen by Mrs. M.'s cousin, R.S. The Respondent accurately recorded their choices in the relevant KYCs. Therefore, the material, essential part of the Allegation has not been proven.

41. It is unnecessary to discuss what we have called items 2, 3 and 4 in the Allegation because they are dependent upon a finding that the gravamen of the Allegation had been proven.

DISPOSITION

42. For the reasons set out above, the Allegation made in the Notice of Hearing has not been proven on a reasonable balance of probabilities and is, therefore, dismissed.

DATED this 25th day of January, 2017.

"P. T. Galligan"

The Hon. P. T. Galligan, QC
Chair

"David W. Kerr"

David W. Kerr
Industry Representative

"Guenther W. K. Kleberg"

Guenther W. K. Kleberg
Industry Representative

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