

Re Beh

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Jennifer Beh

2023 CIRO 43

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: August 11, 2023, in Vancouver, British Columbia

Decision: August 11, 2023

Reasons for Decision: December 13, 2023

Hearing Panel:

Nils Preshaw, Chair

Barbara Fraser, Industry Representative

Susan Monk, Industry Representative

Appearances:

Samantha Wu, Enforcement Counsel

Jennifer Beh, not in attendance or represented by counsel

REASONS FOR DECISION

CIRO

¶ 1 On January 1, 2023, the Mutual Fund Dealers Association of Canada (“MFDA”) and the Investment Industry Regulatory Organization of Canada (“IIROC”) were consolidated into the New Self-Regulatory Organization of Canada (the “New SRO”).

¶ 2 On June 1, 2023, the New SRO was renamed the Canadian Investment Regulatory Organization (“CIRO”). CIRO is now Canada’s national self-regulatory organization that oversees all investment dealers, mutual fund dealers and trading activity on Canada’s debt and equity marketplaces.

¶ 3 CIRO has adopted interim rules that incorporate the pre-amalgamation regulatory requirements contained in the rules and policies of IIROC and the by-law, rules and policies of the MFDA (the “Interim Rules”).

¶ 4 The Interim Rules include the Mutual Fund Dealer Rules which incorporate MFDA by-law, rules and policies in force at the time of the misconduct alleged in this matter.

¶ 5 Pursuant to transitional provisions in Mutual Fund Dealer Rule 1A, the regulatory requirements applicable to individuals and members who were subject to the jurisdiction of the MFDA may be enforced by CIRO.

INTRODUCTION

¶ 6 This was an uncontested disciplinary hearing pursuant to sections 7.3 and 7.4 of the Mutual Fund Dealer

Rules (formerly sections 20 and 24 of By-Law No. 1 of the MFDA).

¶ 7 After reviewing:

- a. the February 1, 2023, Notice of Hearing;
- b. a February 23, 2023, affidavit of service by process server Mr. L. Galvin;
- c. a July 13, 2023, affidavit of attempted service by process server Mr. F. Ahmad;
- d. an August 10, 2023, affidavit by CIRO Investigator Tim Fallows (formerly an investigator with the MFDA and subsequently the New SRO);
- e. a bill of costs in the amount of \$9,362.50; and
- f. after hearing submissions by enforcement counsel,

the Hearing Panel determined that Ms. Jennifer Beh (the “Respondent”) had contravened Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1) as alleged in the Notice of Hearing and as set out below.

¶ 8 These are the reasons for our decision.

ANALYSIS

I. THE RESPONDENT’S REGISTRATION HISTORY

¶ 9 Between April 1, 2010, and October 27, 2020, the Respondent was registered in British Columbia as a dealing representative with Toronto Dominion Investment Services Inc. (the “Dealer Member”).

¶ 10 Between January 30, 2014 and October 27, 2020, the Respondent was a TD branch manager.

¶ 11 As is discussed below, the Respondent’s registration as a dealing representative with the securities industry ended on October 27, 2020.

II. ORIGINS OF INVESTIGATION

¶ 12 On April 5, 2019, a District Vice President with TD sent the Respondent a letter, stating in part:

The Bank has completed an investigation into transactions processed by you between the period of November 1, 2018 to January 31, 2019. Specifically it was determined that there were 27 instances where you updated Customer Contact Preference (CCP). We reviewed all 27 instances and identified these transactions to be an unusual activity. ...

... your actions constitute a serious breach of the TDBG’s Code of Conduct and Ethics, specifically as it relates to Irregular Business Conduct - Sales Misconduct. Your failure to adhere to these policies increased the Bank’s exposure to potential risk, and furthermore in doing this, you also failed to protect the Bank’s interests and our customer’s interests.

This letter serves as a reprimand regarding your conduct in the workplace. As a result of your actions and given the seriousness of this matter, we are imposing a 3 day unpaid suspension. In addition, you should be aware that:

- *You are ineligible to participate in TD Rewards & Recognition programs, including National Champions Club for the remainder of this fiscal year.*
- *Your actions will be considered when determining your quarterly managerial assessment (MA) rating for the next quarter as well as annual PP&D rating. As a result, you are ineligible to receive a quarterly MA rating above 5 for one quarter, and ineligible to receive an annual PP&D rating above Quality Solid (QS) for the current performance year.*

A copy of this letter will be placed in your Human Resources file. You should be aware that further disregard of TD Bank Financial Group’s Code of Conduct and Ethics policy will result in further disciplinary action, up to and including termination of your employment, for cause, without further

notice or payment in lieu thereof. As well, you should be aware, given the concerns, your sales activity will continue to be monitored to ensure adherence to the Bank's Code of Conduct & Ethics Policy as it relates to Sales Misconduct.

¶ 13 On October 27, 2020, the Respondent informed TD of her resignation by email. The Respondent's securities industry registration was suspended that same day and she has not been registered with the securities industry in any capacity since.

¶ 14 On August 25, 2021, Investigator Fallows wrote to the Respondent informing her that:

- a. he was conducting an investigation on behalf of the MFDA into allegations that the Respondent had made unwarranted changes to client contact preferences; and
- b. as a formerly "Approved Person" as set out in 24.1.4 of MFDA By-law No. 1, the Respondent was required to provide a written response to the allegations and confirm whether she had engaged in any similar conduct with any other dealer clients.

¶ 15 Investigator Fallows' August 25th letter was sent by registered mail to an address for the Respondent contained on a registration of individuals form 33-109F4. The Respondent signed for the letter on its delivery.

¶ 16 On October 1, 2021, Investigator Fallows again wrote to the Respondent noting that she had failed to provide a written response. He requested that she contact him to schedule a virtual interview by October 20, 2021. The Investigator noted that if the Respondent did not provide a response by that day, he would seek authorization to begin enforcement proceedings and that potential penalties might include a permanent prohibition of the Respondent's authority to conduct securities related business.

¶ 17 On October 22, 2021, the Respondent emailed Investigator Fallows stating that she did not recall making unwarranted changes to client contact preferences, that she no longer worked for TD bank and that she would not be seeking re-registration in the securities industry in the near future.

¶ 18 On November 4, 2021, Investigator Fallows again wrote to the Respondent informing her that the MFDA was conducting an investigation and asking that she take part in an interview. The Respondent was informed that she could be represented by counsel. The Respondent was asked to contact the MFDA within 10 business days.

¶ 19 On November 17, 2021, the Respondent emailed Investigator Fallows stating, that she did not wish to participate in an interview as she believed that she had outlined everything.

¶ 20 On November 18, 2021, Investigator Fallows responded by email asking if there was a convenient time for a telephone call with the Respondent and explaining there were things the Respondent should consider before deciding not to cooperate with the investigation.

¶ 21 On November 22, 2021, Investigator Fallows again wrote to the Respondent informing her that the MFDA was conducting an investigation, summarising communications up to that date and again asking that the Respondent agree to take part in an interview. The Respondent was given until December 8, 2021, to contact the Investigator and was again reminded that failing to cooperate in an MFDA investigation could result in a permanent prohibition of the Respondent's authority to conduct securities related business.

¶ 22 On January 12, 2022, Investigator Fallows wrote to the Respondent giving her until February 4, 2022, to contact the Investigator. She was again reminded that failing to cooperate in an MFDA investigation could result in a permanent prohibition of the Respondent's authority to conduct securities related business. Investigator Fallows' January 12th letter was personally served on the Respondent who orally confirmed her identity to a process server.

¶ 23 On February 15, 2022, Investigator Fallows again wrote to the Respondent informing her that the MFDA was conducting an investigation, summarising their communications to date and again asking that she agree to take part in an interview. The Respondent was informed that she was required to attend a virtual interview on March 7, 2022, and was asked to contact Investigator Fallows to obtain a hyperlink which would allow her to attend.

- ¶ 24 Investigator Fallows' February 15th letter was delivered to the Respondent's home address by a process server and left with an individual who said he was the Respondent's husband.
- ¶ 25 On March 4, 2022, Investigator Fallows emailed the Respondent providing her with a hyperlink to attend a March 7, 2022, virtual meeting.
- ¶ 26 On February 21, 2023, the Respondent was personally served with copies of:
- a. a February 1, 2023, Notice of Hearing ("NOH") stipulating that a first appearance was scheduled for March 24, 2023. The NOH included: particulars of the Respondent's registration history; a description of an allegation of failing to cooperate with the MFDA's investigation; a summary of attempts made by MFDA staff to contact her; and details of the possible penalties the Respondent could receive including a permanent prohibition and a fine of up to five million dollars;
 - b. the MFDA Rules of Procedure;
 - c. a MFDA guide to disciplinary hearings; and
 - d. a February 15, 2023, letter from New SRO enforcement counsel.
- ¶ 27 On March 6, 2023, the New SRO issued a news release regarding the Respondent. The news release included details of an allegation that the Respondent had failed to cooperate with the investigation and referenced the March 24, 2023, first appearance date.
- ¶ 28 On March 17, 2023, the Respondent was sent a hyperlink by email that would have allowed her to attend the first appearance on March 24th, albeit virtually.

The First Appearance

- ¶ 29 The Respondent did not attend the first appearance held on March 24, 2023. Mr. Preshaw, the Chair of the Hearing Panel at the first appearance, was provided with the Galvin Affidavit which showed the Respondent had been personally served with:
- a. the Notice of Hearing (also published on the internet) which included the date of the first appearance and particulars of an allegation of failing to cooperate with an investigation; and
 - b. a letter from enforcement counsel attaching copies of the MFDA Rules of Procedure, a guide to the MFDA disciplinary hearing process. The letter also included a telephone number for the Respondent could call in order to obtain a hyperlink to attend the first appearance virtually.
- ¶ 30 The Chair was also informed that an email had been sent to the Respondent (using her somewhat unusual email address) with a hyperlink that would have allowed the Respondent to attend the first appearance.
- ¶ 31 The Fallows Affidavit had not yet been prepared and as such at the first appearance the Chair was not informed of the various communications that had occurred between Investigator Fallows and the Respondent to that point.
- ¶ 32 Given her somewhat unusual email address, the Chair was concerned that the Respondent may not have received a hyperlink allowing her to attend the first appearance and so, in addition to scheduling a hearing on the merits for August 11, 2023, the Chair ordered that the Respondent be personally served with documents showing the date and time of the August 11th hearing along with a hyperlink so that the Respondent could attend the hearing on the merits virtually.

Attempted Personal Service

- ¶ 33 Unsuccessful attempts were made to personally serve the Respondent with documents pursuant to the Chair's above order on June 10, 13, and 14, 2023. On June 24th, a process server left certain documents outside

the door of the Respondent's residence.

¶ 34 On July 30, 2023, the Chair was provided with the Ahmad Affidavit of attempted service detailing unsuccessful attempts at personal service. That same day, the Chair offered to make himself available for an application by enforcement counsel for an order of substitutional service.

¶ 35 On August 8, 2023, the Chair was informed that enforcement counsel instead intended to argue the issue at the hearing on the merits on August 11, 2023.

III. ALLEGATION

¶ 36 As a result of the Respondent's refusal to cooperate with the investigation, a Notice of Hearing was issued on February 1, 2023, in respect of the Respondent which alleged:

Commencing on or about November 17, 2021, the Respondent failed to cooperate with MFDA Staff's investigation into the Respondent's conduct, contrary to Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1).

IV. JURISDICTION OF THE HEARING PANEL

¶ 37 Mutual Fund Dealer Rule 6.1 empowers CIRO to conduct examinations of and investigations into the conduct, business, or affairs of any of its Approved Persons within its jurisdiction.

¶ 38 Mutual Fund Dealer Rule 6.2.1 obliges all Approved Persons and former Approved Persons to answer questions and attend an interview when requested to do so.

¶ 39 Section 1 of the Mutual Fund Dealer Rules defines:

- a. an "Approved Person" as being an individual who is a partner, director, officer, compliance officer, branch manager, or alternate branch manager, employee or agent of the Member who (i) is registered or permitted, where required by applicable securities legislation, by the securities commission having jurisdiction, or (ii) submits to the jurisdiction of the Corporation;
- b. a "Corporation" as being "[Name of New SRO]" (which, since June 1, 2023, has been named CIRO); and
- c. a "Member" as a Dealer Member that is registered as a mutual fund dealer in accordance with securities legislation and is not also registered as an investment dealer.

¶ 40 A Hearing Panel has the power to impose certain penalties on Approved Persons pursuant to Mutual Fund Dealer Rule 7.4.1.1.

¶ 41 Under the Mutual Fund Dealer Rules, the Corporation, now known as CIRO, can commence disciplinary proceedings against formerly registered Approved Persons for up to five years from the date on which the individual ceased to be an Approved Person pursuant to Mutual Fund Dealer Rule 7.4.1.4 (formerly section 24.1.4. of MFDA By-law No.1).

¶ 42 Decisions provided by enforcement counsel show that discipline of formerly approved persons has been upheld in *Securities Act* related matters.

Taub v. Investment Dealers Assn. of Canada, 2009 ONCA 628 at para 46; and

Dass v. Investment Dealers Association of Canada, 2008 BCCA 413 at paras 13-14 and 46.

¶ 43 A Hearing Panel has the power to impose certain penalties on formerly Approved Persons pursuant to Mutual Fund Dealer Rule 7.4.1.4.

¶ 44 The Hearing Panel relied on Investigator Fallows' affidavit in reaching our substantive conclusions. While Investigator Fallows was present and available for cross examination at the hearing on the merits, the Hearing Panel did not have any questions since enforcement counsel and filed documents provided sufficient information.

V. JURISDICTION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

¶ 45 The Respondent did not attend the hearing on August 11, 2023.

¶ 46 Despite not being able to personally serve the Respondent pursuant to the Chair's March 24, 2023 Order, enforcement counsel argued that the matter should proceed despite the Respondent's absence as:

- a. Rule of Procedure 7.3(1)(a) states that where a Respondent fails to attend at the date, time and location specified in a Notice of Hearing, a Hearing Panel may proceed with the hearing without further notice to and in the absence of the Respondent;
- b. Rule of Procedure 8.4(a) states that where a Respondent fails to serve and file a Reply to a Notice of Hearing, a Hearing Panel may proceed with the hearing without further notice to and in the absence of the Respondent; and
- c. Rule of Procedure 13.5 states that where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance with Rule 7.3.

¶ 47 Enforcement counsel also provided three decisions in support of their arguments:

Li (Re), 2020 CanLII 30007 (CA MFDAC) at paragraphs 2-3;

Re Meng Xi Li (Re), 2022 BCSECCOM 31 at paragraphs 20 and 48; and

Tan (Re), 2022 CanLII 31765 (CA MFDAC) at paragraphs 9-10.

Meng Xi Li

¶ 48 *Li (Re)* was a 2020 MFDA Hearing Panel decision following an uncontested disciplinary hearing held pursuant to sections 20 and 24 of By-Law No. 1 of the MFDA.

¶ 49 MFDA staff alleged that Ms. Li had committed violations of the MFDA Rules including, but not limited to, allowing a client to open an investment account in another person's name, recording false notes into a Member's client management system and transferring \$100,000 from a client's investment account to her own personal account.

¶ 50 The Hearing Panel in *Li (Re)* relied on MFDA Rule of Procedure 7.3 to proceed with the hearing even though Ms. Li was not present. The Hearing Panel ultimately decided that Ms. Li should be permanently prohibited from conducting securities related business, imposed a \$100,000 fine and ordered her to pay \$7,500 in costs.

Li (Re) at paragraphs 14 and 20

¶ 51 In *Re Meng Xi Li (Re)* the BC Securities Commission considered an application by Ms. Li (who was self-represented before the Commission) for an extension of the time to request a s.165(9) *Securities Act* review of the *Li (Re)* decision.

¶ 52 The Commission considered background facts (*Re Meng Xi Li (Re)* at paragraphs 5-25) including that Ms. Li had:

- a. been sent letters by registered mail notifying her that the MFDA was investigating her conduct. The address used was one that had been on file with the securities industry's national registration database;
- b. personally signed for the delivery of a letter informing her that the enforcement division of the MFDA was conducting an investigation;
- c. attended an interview with MFDA staff at which she confirmed her residential and email addresses and stated that, while she intended to move shortly, she would update the MFDA with any new mailing address;
- d. not provided the MFDA with a new address; and

e. not replied to subsequent letters sent to her by MFDA staff.

¶ 53 Given Ms. Li's silence in the days following her interview, MFDA staff had applied for and obtained an order of substitutional service from the Chair of an MFDA hearing panel allowing Ms. Li to be served by regular mail.

¶ 54 Though substitutional service had subsequently been accomplished, Ms. Li had not attended a hearing on the merits at which a permanent prohibition, a significant fine and costs were imposed.

¶ 55 Before the BC Securities Commission, counsel for the MFDA argued that Ms. Li should not be granted an extension to file an application to have the MFDA decision reviewed since she had failed to file an application within a 30-day deadline, and since Ms. Li had been aware of, and had participated in, the MFDA investigation and had been substitutionally served with the details of the hearing on the merits as ordered by the MFDA Chair at the initial appearance.

¶ 56 Ms. Li argued that she had first learned of the *Li (Re)* decision after the 30-day deadline had already passed and made various submissions as to the potential merits of her appeal.

¶ 57 The Commission considered arguments from both sides and beginning at paragraph 40 of *Re Meng Xi Li (Re)*, rejected Ms. Li's application for an extension:

48 The most important factor is essentially one of fairness. Our conclusion that Li's proposed evidence and arguments lack merit is directly related to the fairness question as, based on the materials before us and our analysis of those materials at this preliminary stage, we do not see a realistic potential for a different outcome on review. In addition, we note that Li is far from blameless in the creation of the procedural hurdle which she faces. Any participant in an investigatory or disciplinary process of a self-regulatory organization who is asked to agree and does agree to provide current contact information should understand the importance of keeping the regulator apprised of her contact information particularly given that an MFDA investigator told her there might be further proceedings. When a registrant is not able to be contacted through their own omission, the self-regulatory organization is justified in following its rules regarding alternative forms of service and a respondent should understand the risk that important information, including information which triggers statutory deadlines, might not be received in a timely way.

49 We have considered all of the circumstances and factors that are relevant. We have emphasized the factors from *Clock Holdings*, including the factor that there is no unusual prejudice to the MFDA in granting an extension (that is, no prejudice beyond what would normally arise from considering a hearing and review application). The lack of merit in the evidence and arguments put forward by Li together with her own responsibility for missing all of her prior opportunities to provide input are determinative for us. Those factors show that there would be no unfairness to deny the application.

50 The onus is on Li to establish that this is an appropriate case to extend the 30 day deadline. We conclude that all of the circumstances establish that this is not an appropriate case to extend the 30 day deadline. Li's application is dismissed.

(emphasis added)

Lucilla Sok Cheng Tan

¶ 58 *Tan (Re)*, was a 2022 MFDA Hearing Panel decision following an uncontested disciplinary hearing held pursuant to sections 20 and 24 of By-Law No. 1 of the MFDA.

¶ 59 MFDA staff alleged that Ms. Tan had committed violations of the MFDA Rules including, but not limited to, engaging in unapproved outside business activities, failing to disclose conflicts of interest arising from those outside business activities, and failing to cooperate with an investigation.

¶ 60 During the investigation, Ms. Tan had participated in an interview wherein she provided her residential and email address as well as her telephone number. MFDA Staff subsequently sent Ms. Tan a notice of hearing by mail and email and spoke with Ms. Tan by telephone. During that telephone conversation Ms. Tan claimed

that she no longer used her email address but refused to provide an updated email. Subsequent attempts to send Ms. Tan text messages and documents by registered mail were unsuccessful.

Tan (Re) at para 7

¶ 61 Ms. Tan's hearing on the merits was adjourned as the hearing panel was concerned that the notice of hearing may not have been successfully served. The hearing was adjourned to a continuation date at which MFDA staff argued that the hearing should proceed even though further attempts to serve Ms. Tan had been unsuccessful. The hearing panel held that Ms. Tan had been served with a notice of hearing pursuant to MFDA Rule of Procedure 4.2(1)(b):

(1) A Notice of Hearing shall be served by one of the following methods:

...

(b) by registered and ordinary mail or by courier with confirmation of delivery to the Respondent's last known address as recorded in the Corporation's records or in the records of any securities commission with which the Respondent is or was registered;

...

and rescheduled the hearing on the merits to a third continuation date, to be held by video conference.

¶ 62 At the continuation, the hearing panel also held (*Tan (Re)* at paras 13-15) that since Ms. Tan had been served with a notice of hearing and had failed to file a response, the disciplinary hearing could proceed pursuant to MFDA Rule of Procedure 8.4(1) (which allows a hearing panel to proceed with a hearing where a respondent had failed to file a response) and pursuant to MFDA Rule of Procedure 7(3) (which allows a hearing panel to proceed where a respondent had been served with a notice of hearing).

¶ 63 The hearing panel in *Tan (Re)* commented:

13. When a respondent has been properly served with a Notice of Hearing but fails to file a Reply or attend the hearing, Rules 8.4(1) and Rule 7(3) give a hearing panel the discretion to proceed with the hearing, accept the uncontested allegations as proved and order sanctions, all without further notice to the respondent. While this is a significant departure from usual hearing practices, it is nonetheless consistent with procedural fairness.

Tan (Re) at para 13

¶ 64 The hearing panel in *Tan (Re)* went on to impose a permanent prohibition, a \$75,000 fine, and costs of \$7,500.

Can the Hearing on the Merits proceed in the absence of the Respondent

¶ 65 On August 11, 2023, following submissions by enforcement counsel, the Hearing Panel stood down to deliberate on the issue of service.

¶ 66 When the hearing resumed, the Chair indicated that despite the submissions of enforcement counsel, he was of the view that because the Respondent had not been personally served as ordered, enforcement counsel ought to have applied for an order of substitution service. Since that had not been done, the Chair was of the view that the August 11th hearing should be adjourned, an order of substitutional service applied for, and if granted, the hearing on the merits could continue at a future date where proof of substitutional service could be provided.

¶ 67 However, despite the Chair's views, the majority of the Hearing Panel decided that CIRO had made reasonable efforts to notify the Respondent of the date, time, location, and subject matter of the hearing on the merits by making repeated attempts to serve the Respondent personally and by leaving documents at the door of the Respondent's residence.

¶ 68 The majority of the Hearing Panel therefore held that the Respondent had been adequately notified pursuant to any of the MFDA Rules of Procedure 7.3, 8.4 and 13.5 and as such a hearing on the merits could

proceed.

VI. FACTS

Failure to Cooperate

¶ 69 As described above, the Fallows Affidavit sworn August 10, 2023, shows that the Respondent was aware of Investigator Fallows' investigation. While the Respondent replied to some of Investigator Fallows' communications, she ignored the bulk of them, refused to provide a written response and refused to attend at an interview.

¶ 70 The Fallows Affidavit therefore established that the Respondent had failed to comply with reasonable requests to provide information and documents during an investigation contrary to Mutual Fund Dealer Rule 6.2.1 (formerly s. 22.1 of MFDA By-law No. 1).

VII. PROPOSED PENALTY

¶ 71 Given the Respondent's failure to cooperate with the investigation, enforcement counsel proposed the following penalties:

- a. a permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Dealer Member of CIRO that is registered as a mutual fund dealer, pursuant to Mutual Fund Dealer Rule 7.4.1.1(e) (formerly s. 24.1.1(e) of MFDA By-law No. 1);
- b. a fine in the amount of at least \$50,000, pursuant to Mutual Fund Dealer Rule 7.4.1.1(b) (formerly s. 24.1.1(b) of MFDA By-law No. 1); and
- c. costs in the amount of \$7,500, pursuant to Mutual Fund Dealer Rule 7.4.2 (formerly Section 24.2 of MFDA By-law No. 1).

VIII. THE SERIOUSNESS OF THE MISCONDUCT

¶ 72 Although the Respondent was aware of CIRO's investigation, she failed to respond to reasonable requests for information or attend at an interview. The Respondent's failure to cooperate ignored her duties and responsibilities as a formerly Approved Person and effectively thwarted CIRO's ability to conduct an investigation.

¶ 73 Prior MFDA hearing panels have held that a failure to cooperate with an MFDA investigation, including failing to attend an interview when requested to do so, amounts to serious misconduct.

Tonnies (Re), 2005 CanLII 77675 (CA MFDAC), citing *Artinian v. The College of Physicians of Ontario* (1990), 1990 CanLII 6860 (ON SC), and *Kaburda v. College of Dental Surgeons of British Columbia*, 2001 BCSC 1326);

Theroux (Re), 2014 CanLII 31777 (CA MFDAC), at para 9, citing *Re Ferguson* [2013], MFDA file No. 201233, *Re Spencer* [2012] MFDA file No. 201139, *Re Gizzo* [2011] MFDA file No. 201024, and *Re Desbois* [2010] MFDA file No. 200822);

Vitch (Re), 2011 CanLII 72465 (CA MFDAC), relying on *Artinian* at para 54; and

Surette (Re), 2020 CanLII 4101 (CA MFDAC), at para 24, citing *Hylton (Re)*, 2018 CanLII 119646 (CA MFDAC), *Cudmore (Re)*, 2018 CanLII 89285 (CA MFDAC), *Dixon (Re)*, 2017 CanLII 83857 (CA MFDAC), *Armani (Re)*, 2017 CanLII 62208 (CA MFDAC) and *McBurney (Re)*, 2015 CanLII 88907 (CA MFDAC).

¶ 74 Approved Persons even contravene Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1) where they have partially cooperated with an investigation.

Vitch (Re) at paras 54-56

¶ 75 The Hearing Panel in [Chow \(Re\)](#), 2022 CanLII 10912 (CA MFDAC), at paras 68-71, stated that failure to cooperate with an investigation amounts to serious misconduct because doing so prevents the (then) MFDA from fulfilling its mandate to protect investors and foster confidence in the capital markets:

When a Member or Approved Person refuses to fully comply with their obligation to cooperate with Staff's enforcement efforts to investigate complaints and concerns, they prevent the MFDA from performing its obligation to ensure the regulatory system achieves its goals of protecting the investor and fostering public confidence in the Markets and the securities industry as a whole.

This is why a failure to cooperate is typically considered to be serious misconduct. In most cases it is also evidence that the Member or Approved Person does not take their regulatory obligations seriously and is not interested in protecting the best interests of the client – the very individual whom the system is designed to protect...

For these reasons, a determination that an Approved Person has breached their obligation to cooperate with an MFDA investigation attracts significant penalties including, in most instances, a permanent ban on their ability to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member.

¶ 76 MFDA decisions such as *Chow (Re)* remain entirely relevant to hearings held under both the New SRO and CIRO.

IX. AGGRAVATING AND MITIGATING FACTORS

¶ 77 The Hearing Panel noted that while the Respondent had not previously been the subject of MFDA disciplinary proceedings, this factor was not given significant weight.

X. GENERAL AND SPECIFIC DETERRENCE.

¶ 78 Here, both the facts and prior caselaw support a finding the Respondent's failure to participate in an investigation is so serious that it is necessary to protect the public from a recurrence by removing the Respondent from securities markets.

Theroux (Re), at paras 15-16;

Surette (Re) at paras 26 and 45;

Hylton (Re), 2018 CanLII 119646 (CA MFDAC) at paras 7, 18 and 24;

Dixon (Re), 2017 CanLII 83857 (CA MFDAC) at paras 17 and 20;

McBurney (Re), 2015 CanLII 88907 (CA MFDAC) at paras 17-18 and 26;

Zhang (Re), 2013 CanLII 75278 (CA MFDAC) at paras 11, 16-18 and 26; and

Gizzo (Re), 2011 CanLII 30299 (CA MFDAC) at paras 27 and 33.

¶ 79 As was also explained in *Tan (Re)*, referencing the rules in place at that time (at paragraphs 45 to 60), there is perhaps no greater obligation on an Approved Person than that imposed by Mutual Fund Dealer Rule 6.2 which obliges a Member or Approved Persons to cooperate in an investigation and among other things states that for the purpose of any examination or investigation pursuant to the Rule, an Approved Person under the jurisdiction of the Corporation may be required to produce copies of books, records and accounts relevant to the matters being investigated, and attend and answer questions under oath.

¶ 80 The importance of the duty to cooperate with an investigation is emphasized by Mutual Fund Dealer Rule 7.4.1.4 which provides that an individual who ceases to be an Approved Person nonetheless remains subject to the Corporation's jurisdiction for a period of five years after the date that they ceased to be a member.

¶ 81 Once again, comments by the hearing panel in *Tan (Re)* are worth repeating:

50. Penalties in MFDA enforcement proceedings are justifiable to the extent that they serve to protect the investing public from future harm. They must be forward looking, in the sense that they should be preventative in orientation, not retrospective or punitive.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, at paras 59 and 68

51. In this regard, general deterrence is the central consideration:

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... and the circumstances of the person charged [.]

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672 at para 61

52. The weight to be given general deterrence in any given case, therefore, must always be based on a thorough assessment of the character of the misconduct. Moreover, to be reasonable a penalty in the regulatory context must be supported by a rational analysis that establishes the penalty as proportional to the misconduct.

Cartaway, at para 64

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paras 14 and 85

53. Previous hearing panel decisions have consistently identified certain key factors as relevant to the determination of sanctions. These are summarized in the November 15, 2018 Sanction Guidelines issued by the MFDA to assist hearing panels in their deliberations. The factors most germane to this case are that:

- a. Effective specific and general deterrence is crucial to preventing inappropriate conduct and ensuring public confidence in the mutual fund industry and the fairness of the capital market.
- b. Public confidence requires that sanctions accurately reflect the mitigating and aggravating factors disclosed by the facts.
- c. Proper weight should be given to the relative seriousness of the proven misconduct. Distinctions should be drawn between negligent and deliberately deceptive conduct, and between isolated and repeated incidents.
- d. A hearing panel should consider the degree to which a respondent has accepted responsibility for their misconduct. Attempts to frustrate, delay or undermine an investigation or hearing, including by concealing or intentionally providing misleading information, should be considered an aggravating factor.
- e. Sanctions should reflect whether or not the misconduct resulted in the respondent receiving benefits or investors sustaining harm.

Appropriate Penalty

¶ 82 Given the above, the Hearing Panel has determined that the imposition of a \$50,000 fine was both in line with prior caselaw and necessary to satisfy general deterrence.

Theroux (Re);

Surette (Re);

Hylton (Re); and

Dixon (Re).

¶ 83 The Hearing Panel hopes that the significant fines imposed at this, and earlier hearings will serve to motivate Approved Persons and/or Members to participate in CIRO investigations.

¶ 84 While it is not possible to predict what may have occurred had the Respondent cooperated with this investigation, had she done so an entirely different penalty may have been appropriate.

¶ 85 The Hearing Panel agreed with enforcement counsel that the facts, prior caselaw and the \$9,362.50 bill of costs which was provided, also supported an order that the Respondent pay \$7,500 in costs.

XI. CONCLUSION

¶ 86 The Hearing Panel orders that the Respondent:

- a. be prohibited from conducting securities related business while in the employ of or associated with any Dealer Member of CISO that is registered as a mutual fund dealer, pursuant to Mutual Fund Dealer Rule 7.4.1.1(e);
- b. pay a fine of \$50,000, pursuant to Mutual Fund Dealer Rule 7.4.1.1(b); and
- c. pay costs in the amount of \$7,500, pursuant to Mutual Fund Dealer Rule 7.4.2.

DATED at Vancouver this 13 day of December 2023

“Nils Preshaw” _____

Nils Preshaw, Chair

“Barbara Fraser” _____

Barbara Fraser, Industry Representative

“Susan Monk” _____

Susan Monk, Industry Representative