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: Eileen Marie Desgroseilliers

Heard: May 24, 2018 in Toronto, Ontario
Reasons for Decision: August 21, 2018

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

John Lorn McDougall QC	Chair
Brigitte J. Geisler	Industry Representative
Selwyn Kossuth	Industry Representative

Appearances:

David Babin	)	Counsel for the Mutual Fund Dealers Association of Canada
Eileen Marie Desgroseilliers	)	Respondent, not in attendance or represented by counsel

I. INTRODUCTION

1. By Notice of Hearing dated September 7, 2017, the Mutual Fund Dealers Association of Canada ("MFDA") commenced a disciplinary proceeding against Eileen Marie Desgroseilliers (the "Respondent") pursuant to ss. 20 and 24 of MFDA By-law No. 1.

2. The Notice of Hearing made the following allegations.

> **Allegation #1**: Between about January 28, 2015 and April 2, 2015, the Respondent misappropriated at least $31,702 from clients KP and FP, thereby failing to deal honestly and in good faith with the clients, and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.
>
> **Allegation #2**: Between January 26, 2015 and April 6, 2015, the Respondent held an account jointly with clients FP and KP, thereby giving rise to an actual or potential conflict of interest between the Respondent and clients KP and FP which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of clients KP and FP, contrary to MFDA Rules 2.1.4, 2.3.1 and 2.1.1.

3. At an initial hearing held before the Chair of this proceeding on November 14, 2017, at which the Respondent was in attendance by telephone, the date for hearing the disciplinary proceedings was fixed for March 27 and 28, 2018. As well, a second attendance was ordered for January 9, 2018 for the purpose of determining, *inter alia*, whether the second day of hearing, March 28, 2018, would be required. The January 9th attendance took place as scheduled and the Respondent was again in attendance by telephone. At the Respondent's insistence, the second day of hearing was preserved.

4. On the date set for the commencement of the hearing on the merits, March 27, 2018, despite her representation to Staff that she would attend, the Respondent failed to do so and all attempts to communicate with her were unsuccessful. Staff then asked that the hearing on the merits be adjourned to May 24, 2018, primarily to allow Staff to contact the Respondent and arrange for her

participation in the proceedings. All attempts to communicate with the Respondent were unsuccessful.

5. The hearing on the merits took place on May 24, 2018. The Respondent did not appear and was unrepresented.

6. At the opening of the hearing on the merits the following documents were made exhibits, the Notice of Hearing, Affidavit of Service and Affidavit of Ian Smith having been previously entered:

a) Exhibit No. 5: Affidavit of Mike Ford
b) Exhibit No. 6: Affidavit of Sandra Corbett
c) Exhibit No. 7: Affidavit of Mike McGinnis

7. In addition to the material filed by Staff aforementioned, there was also a Reply and a Revised Reply filed by the Respondent. These documents were useful to the extent that they contained confirmation of facts contained in Staff's affidavit evidence, particularly with respect to having access to KP's Scotiabank account and her use of funds obtained from KP or FP.

8. At or about the time of the scheduled hearing on the merits on March 27, 2018, Ian Smith, the investigator who was responsible for the investigation of the Respondent which led to the commencement of these proceedings as set out in his affidavit, which was initially filed, retired from the MFDA and Mike Ford, a manager of investigations in the enforcement department of the MFDA, assumed responsibility for the file upon Mr. Smith's retirement. Mr. Ford's affidavit, Exhibit No. 5, is in large part based on the original Smith affidavit as well as on information obtained from counsel and others.

The Respondent's Failure to Attend a Hearing

9. Rule 7.3 of the MFDA Rules of Procedure provides as follows:

> Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
>
> a) proceed with the hearing without further notice to and in the absence of the Respondent; and
> b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.
>
> Rule 7.3 of the MFDA Rules of Procedure, *supra.*

10. In tandem, Rule 13.5 of the MFDA Rules of Procedure provides as follows:

> 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.
>
> Rule 13.5 of the MFDA Rules of Procedure, *supra.*

11. The Respondent was not in attendance for the hearing on the merits in this matter. Nonetheless, to ensure an accurate and complete record both for the purposes of the hearing on the merits and any potential reviews or appeals, MFDA Staff chose to adduce affidavit evidence to prove the allegations in the Notice of Hearing.

Hearsay Evidence and Evidence by Sworn Statement

12. Rule 1.6 of the MFDA Rules of Procedure specifically permits hearsay statements to be admitted as evidence as follows:

> Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.
>
> (2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.
>
> (3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.

> Rule 1.6 of the MFDA Rules of Procedure.

13. Likewise, MFDA Rule of Procedure 13.4 permits evidence to be adduced by way of sworn statements, as follows:

> The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.
>
> Rule 13.4 of the MFDA Rules of Procedure.

14. MFDA Hearing Panels and other regulatory bodies routinely consider and rely on hearsay and affidavit evidence in making findings of fact.

> See, for example *Tonnies (Re),* MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2005, at paras. 10-12.

<u>Standard of Proof</u>

15. The standard of proof in this case, as in all MFDA and other regulatory proceedings in the securities industry, is the civil standard of a balance of probabilities. The Supreme Court of Canada stated in *F.H. v. McDougall* that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize relevant evidence with care to determine whether it is more likely than not that an alleged event occurred." Evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test but there is no objective standard to measure sufficiency.

> *DeVuono (Re),* MFDA File No. 201102, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated November 22, 2012, at paras. 11 – 13.

16. At the Hearing Panel's request, Mr. Ford was asked to review the evidence assembled by the enforcement branch of the MFDA in order that the Hearing Panel could gain a better understanding of the facts. That useful review, taken with the affidavit evidence which was filed, presents a clear picture of what occurred.

17. Between March 20, 2014 and April 6, 2015, the Respondent was registered in Ontario as a dealing representative with Investors Group Financial Services Inc. ("IG").

18. Clients FP and KP, who were the Respondent's common-law husband's parents, became clients of IG on January 26, 2015 when they opened a joint non-registered account, with the Respondent as their advisor.

19. Clients FP and KP were vulnerable clients. Client FP was 86 years old, and client KP was 83 years old. Client KP suffered from multiple myeloma and kidney failure, and required dialysis treatments three times a week. FP was diagnosed with dementia, and suffered from short-term memory loss. Client KP passed away on July 9, 2015.

20. On January 26, 2015, clients KP and FP made the Respondent a joint account holder of a bank account they held at Scotiabank (the "Scotiabank Account"). The Respondent was issued a client card linked to the account, and was able to make withdrawals from the account at tellers and bank machines.

21. The Respondent did not inform IG that she was made a joint account holder with clients FP and KP with respect to the Scotiabank Account.

22. Between January 28, 2015 and April 2, 2015, the Respondent withdrew $13,460 by using her client card to make the following cash withdrawals from the Scotiabank Account:

Date	Withdrawal
January 28, 2015	$100.00
January 28, 2015	$300.00
January 29, 2015	$100.00
January 29, 2015	$300.00
February 2, 2015	$300.00
February 3, 2015	$300.00
February 4, 2015	$160.00
February 5, 2015	$300.00
February 5, 2015	$100.00
February 6, 2015	$180.00

Date	Withdrawal
February 9, 2015	$300.00
February 9, 2015	$300.00
February 10, 2015	$300.00
February 10, 2015	$300.00
February 11, 2015	$300.00
February 12, 2015	$320.00
February 13, 2015	$240.00
March 6, 2015	$660.00
March 6, 2015	$1,500.00
March 7, 2015	$340.00
March 10, 2015	$700.00
March 12, 2015	$500.00
March 13, 2015	$400.00
March 17, 2015	$360.00
March 18, 2015	$400.00
March 18, 2015	$300.00
March 20, 2015	$400.00
March 20, 2015	$400.00
March 23, 2015	$300.00
March 24, 2015	$400.00
March 25, 2015	$420.00
March 26, 2015	$360.00
March 27, 2015	$640.00
March 30, 2015	$420.00
March 31, 2015	$360.00
April 1, 2015	$400.00
April 2, 2015	$400.00
April 2, 2015	$300.00
Total	**$13,460.00**

23. On February 18, 2015, client FP redeemed a Guaranteed Investment Certificate (“GIC”) in the amount of $14,060.05 that he held at Royal Bank (“RBC”). On the same day, client FP obtained a bank draft in the amount of $14,052.55, made out to the Respondent personally.

24. The Respondent subsequently deposited the $14,052.55 bank draft in her account at Copperfin Credit Union.

25. At all material times, client FP believed that the funds given to the Respondent, or withdrawn by her from the Scotiabank Account were to be invested in an account in his name at IG.

26. Between March 7, 2015 and March 30, 2015, the Respondent also used her client card to make the following purchases, and received "cashback" from a retailer[1] in respect of the purchases:

Date	Amount
March 7, 2015	$104.68
March 7, 2015	$107.31
March 7, 2015	$102.45
March 9, 2015	$106.76
March 9, 2015	$110.48
March 9, 2015	$102.01
March 11, 2015	$103.93
March 11, 2015	$106.91
March 12, 2015	$131.04
March 13, 2015	$101.13
March 13, 2015	$101.13
March 14, 2015	$103.93
March 14, 2015	$102.01
March 14, 2015	$101.13
March 14, 2015	$101.11
March 14, 2015	$101.13
March 14, 2015	$102.01
March 21, 2015	$106.76
March 21, 2015	$106.19
March 21, 2015	$102.01
March 21, 2015	$101.13
March 21, 2015	$103.93
March 23, 2015	$104.27
March 23, 2015	$103.93
March 24, 2015	$107.89
March 24, 2015	$101.13
March 24, 2015	$106.19
March 25, 2015	$107.44
March 25, 2015	$104.63
March 25, 2015	$103.93
March 28, 2015	$101.13

[1] Some retailers offer a payment option known as "cashback", whereby the consumer purchasing items with a debit card can request that additional cash to be withdrawn from their account, on top of the purchase.

Date	Amount
March 28, 2015	$106.76
March 28, 2015	$106.76
March 28, 2015	$102.45
March 28, 2015	$103.34
March 28, 2015	$102.01
March 28, 2015	$103.93
March 30, 2015	$104.97
March 30, 2015	$104.97
March 30, 2015	$104.97
Total	**$4,189.15**

27. To date, the Respondent has failed to account for or return any of the funds, which totaled approximately $31,702.

28. None of the above funds were ever invested in client FP and KP's joint account at IG, and no other account in client FP's name was ever opened by the Respondent.

29. Client FP was compensated $14,052.55 by IG in relation to the GIC funds that were provided to the Respondent by way of a bank draft written out to her personally, which was a violation of IG's policies and procedures.

30. At all material times, IG was not made aware of the Respondent's actions.

II. ANALYSIS AND DECISION

Applicable Provisions

(a) Misconduct

The Respondent Misappropriated Client Monies

31. MFDA Rule 2.1.1 sets the standard of conduct imposed upon all Members and Approved Persons. It requires each Member and Approved Person to:

a) deal fairly, honestly and in good faith with clients;

b) observe high standards of ethics and conduct in the transaction of business;

c) refrain from engaging in business conduct or practice which is unbecoming or detrimental to the public interest; and

d) be of such character and business repute and have such experience and training as is consistent with the standards of the industry.

MFDA Rule 2.1.1, *supra.*

32. MFDA Rule 2.1.1 is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct. The Rule has been interpreted and applied in a purposive manner in a wide range of circumstances. As stated by the MFDA Hearing Panel in *Breckenridge (Re):* "The Rule articulates the most fundamental obligations of all registrants in the securities industry."

> *Breckenridge (Re),* MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007, at para 71.

33. Although the terms "business conduct or practice unbecoming", "good faith", and "high standards of ethics" are not defined in the Rules, these are all concepts that fall squarely within the Hearing Panel's specialized knowledge. As Roscoe J. stated in *Ripley v. Investment Dealers Association:*

> … to require that evidence be given in proof of such issues of basic ethics and honesty would be an affront to the common sense, experience and intelligence of the members of every professional Disciplinary Committee.

> *Ripley v. Investment Dealers Association (Business Conduct Committee),* [1990] N.S.J. No. 295, Q/L, affirmed [1991] N.S.J. No. 452 (C.A.), at page 17.

34. To state what is blindingly obvious, misappropriation of client funds by an Approved Person is dishonest conduct which is inconsistent with the standard of conduct set out in MFDA Rule 2.1.1.

35. MFDA Hearing Panels have consistently held that when an Approved Person solicits and accepts money and fails to pay back or otherwise account for it, the Approved Person engages in conduct that is contrary to MFDA Rule 2.1.1.

> *Crackower (Re),* MFDA File No. 200506, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 22, 2005, at paras. 3-7.
>
> *Brown-John (Re),* MFDA File No. 200502, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated June 27, 2005.
>
> *Vilfort (Re),* MFDA File No. 201021, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 15, 2015, at para. 16.
>
> *Lindsay (Re),* MFDA File No. 201040, Hearing Panel of the Central Regional Council, Decision and Reasons dated June 10, 2011, at paras. 14-15.
>
> *Vandermey (Re),* MFDA File No. 201702 Hearing Panel of the Central Regional Council Decision and Reasons dated October 2, 2017, at paras. 20-22.

36. The unfortunate result of Mr. Smith's retirement meant that Mr. Ford's evidence was heavily reliant on Mr. Smith's affidavit and was, consequently, often double hearsay. Consequently, although we reference the references in the affidavits in our findings listed below, we relied heavily on the fact that the missing money was identified by the financial institutions responsible for its safekeeping. Secondly, the Respondent in her Replies acknowledges she took money from FP and KP but maintains she was entitled to do so or that, in the case of the bank draft for $14,052.55, she didn't receive it, despite the evidence being directly to the contrary.

37. The evidence demonstrates that:

a) The Respondent had individual access to the Scotiabank Account by virtue of being a joint account holder, and by way of her client card;

   Ford Affidavit at paras. 32 – 33.

b) Between January 28, 2015 and April 2, 2015, the Respondent withdrew $13,460 from the Scotiabank Account;

Ford Affidavit at paras. 40 – 44, 54 – 56, and 58 – 60.

c) Client FP at all times believed that any cash provided to the Respondent would be invested at IG;

McGinnis Affidavit at paras. 7 – 8.

d) On February 18, 2015, the Respondent deposited the $14,052.55 bank draft made out to her personally by client FP, in her account at Copperfin Credit Union;

Ford Affidavit at paras. 45 – 49.

e) Client FP at all times believed that the bank draft funds provided to the Respondent would be invested at IG;

Ford Affidavit at paras. 50 – 53.

f) The Respondent withdrew a further $4,189.15 from the Scotiabank Account using cashback transactions, which transactions had never occurred during the period of July 2014 to January 2015 when clients FP and KP were the only account holders on the Scotiabank Account;

Ford Affidavit at paras. 55 and 57.

g) None of the funds obtained by the Respondent were ever invested at IG on behalf of client FP or client KP, and none of the funds have been returned or otherwise accounted for by the Respondent; and

Ford Affidavit at para. 61
McGinnis Affidavit at paras. 8 and 9.

h) The Respondent's conduct was only uncovered after the client's daughter filed a complaint with IG in Jul 2015 following the death of client KP.

Corbett Affidavit at para. 5
Ford Affidavit at paras. 34 – 36.

38. In short, our conclusion is based on the fact that the Respondent had the means to take the clients' funds, acknowledges she did take their money, the funds disappeared and haven't been repaid by the Respondent. Absent an explanation from the Respondent, which wasn't forthcoming, the only possible conclusion is that the Respondent misappropriated the funds in question, $31,702.00.

<u>Conflict of Interest</u>

39. MFDA Rule 2.1.4, in summarized form, requires that:

a) "Approved Persons be aware of the possibility of conflicts of interest arising in connection with business conducted by them for clients;
b) Where an Approved Person becomes aware of a real or potential conflict of interest, an Approved Person is obligated to disclose such conflicts to the member; and
c) Where a conflict of interest arises, Rule 2.1.4(b) requires that "the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client."

MFDA Rule 2.1.4, *supra*

40. The conflict of interest that arose as a result of the Respondent becoming a joint account holder is clearly contemplated by IG's policies and procedures manual. In that manual, section entitled "Conflicts of Interest and Personal Financial Dealings with Clients", under the heading "Sharing of Bank Account Information", the following is stated:

> Investors Consultants are not permitted in any way to link a mutual fund account in their own name to a client's bank account…Similarly, a client's mutual fund account must not be linked to a Consultant's bank account. *<u>These arrangements could enable one of the parties to have access to the account of the other without their knowledge or permission</u>* [Emphasis added].

Ford Affidavit at Exhibit 22

41. The Respondent's position as a joint account holder with clients FP and KP allowed her to access the Scotia Account without the knowledge of FP and KP. Rather than acting in the best interest of her clients, the Respondent proceeded to use her unfettered access to the Scotiabank Account to misappropriate the clients' money almost immediately after receiving the card evidencing her status as a joint account holder.

42. The Respondent's conduct constituted a clear breach of MFDA Rule 2.1.4 and the IG policies and procedures manual. However, without in any way trivializing the conflict of interest finding we have made, the fundamental and overwhelming misconduct of the Respondent was her abject failure to deal with clients FP and KP fairly, honestly and in good faith, the paramount duty of those who participate in the securities industry.

<u>Penalties</u>

43. In the present case, Staff 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 member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
b) A fine of at least $75,000 pursuant to s. 14.1.1(b) of MDA By-law No. 1; and
c) Costs in the amount of $10,000 pursuant to s. 24.2 of MFDA By-law No. 1.

44. The primary goal of securities regulation is the protection of the investor. In addition to protection of the public, the goals of securities regulation also include fostering public confidence in the capital markets and the securities industry.

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

45. The Hearing Panel in *Tonnies (Re)*, stated that the role of a Hearing Panel, when imposing sanctions in furtherance of the above goals, is as follows:

The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in *Re Mithras Management Ltd. et al.* (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:

> …[T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

Tonnies, supra, at para. 45.

46. Sanctions imposed by a Hearing Panel should therefore be protective, preventative, and intended to be exercised to prevent likely future harm to the markets. To determine whether a penalty is appropriate, the Hearing Panel should consider:

a) the protection of the investing public;
b) the integrity of the securities markets;
c) specific and general deterrence;
d) the protection of the MFDA's membership; and
e) the protection of the integrity of the MFDA's enforcement processes.

Tonnies, supra, at para. 46

47. Staff submitted, and the Hearing Panel fully accepts, that the present case constitutes the most egregious possible breach of the standard of conduct set out in Rule 2.1.1. The Respondent exploited a relationship of trust she had with the clients FP and KP and took full advantage of their frailty and vulnerability to misappropriate their assets.

48. There is little that can be said in favour of the Respondent. While she was not subject to any other MFDA disciplinary proceedings, she was only registered as a dealing representative for just over a year. The Respondent has not expressed any remorse for her actions; quite the contrary as she maintains she was entitled to act as she did. However, she failed to appear at the hearing to try to establish that fact, despite being given ample opportunity to do so.

49. In our view it is clear that the proper penalty includes a permanent prohibition pursuant to section 24.1.1(e) of MFDA By-law No. 1. The Respondent is, in our view, ungovernable, poses a risk to both investors and, through her conduct, to the reputation of the markets generally. She should not be permitted to return to the mutual fund industry.

<u>Monetary Penalties</u>

50. In cases involving misappropriation of client funds, the general trend in previous MFDA cases is that the quantum of the fine is to be at least equal to the amount misappropriated and often is a great deal more, depending on the circumstances.

> *Ng (re),* MFDA File No. 201539, Decision and Reasons dated July 8, 2016 at para. 110.

51. In cases where the Respondent preyed on vulnerable seniors, the fines assessed can be multiples of the amount misappropriated.

> *Vandermay (Re)*, MFDA File No 201702 Hearing Panel of the Central Regional Council, Decision and Reasons dated October 2, 2017.
>
> *Roskaft (Re)*, MFDA File No. 201317, MFDA Hearing Panel of the Central Regional Council, Decision and Reasons dated May 2, 2014

52. The Respondent ceased cooperating with Enforcement staff and did not appear at the hearing.

53. The proposed fine, $75,000, is well within what the Hearing panel considers to be reasonable in all the circumstances of this case as is the amount claimed for costs. The Hearing Panel therefore accepted both amounts.

III. CONCLUSION

54. For all the foregoing reasons, the Hearing Panel therefore signed the order dated May 24 2018, attached hereto, in which a permanent prohibition against the Respondent was imposed, together with a fine in the amount of $75,000 and $10,000 for costs.

DATED this 21st day of August, 2018.

"John Lorn McDougall"

John Lorn McDougall, QC
Chair

"Brigitte J. Geisler"

Brigitte J. Geisler
Industry Representative

"Selwyn Kossuth"

Selwyn Kossuth
Industry Representative

DM 630517