

Re Dziadecki

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Leszek Dziadecki

2023 CIRO 15

Canadian Investment Regulatory Organization
Hearing Panel of the Ontario District

Heard: February 27, 28, March 29, May 16, 2023

Decision: May 16, 2023

Reasons for Decision: September 26, 2023

Hearing Panel:

Frederick Webber, Chair

Kenneth Mann, Industry Representative

Guenther Kleberg, Industry Representative

Appearances:

Alan Melamud, Senior Enforcement Counsel, CIRO

Leszek Dziadecki, Respondent

REASONS FOR DECISION-MISCONDUCT

ALLEGATIONS

¶ 1 This matter was commenced by Notice of Hearing dated August 3, 2022, as amended by Amended Notice of Hearing, dated December 19, 2022, (the “NOH”), in which the Mutual Fund Dealers Association of Canada (the “MFDA”) alleged that Leszek Dziadecki (the “Respondent”) contravened his regulatory responsibilities by engaging in the following misconduct:

Allegation #1: Between 2015 and 2016, the Respondent engaged in securities related business that was not carried on for the account of the Member or conducted through its facilities by recommending, selling, or facilitating the sale of syndicated mortgage investments to clients and other individuals, contrary to the Member’s policies and procedures and MFDA Rules 1.1.1, 2.1.1, and 1.1.2 (as it relates to MFDA Rule 2.5.1).

Allegation #2: Between 2015 and 2017, the Respondent engaged in unapproved outside business activities in relation to syndicated mortgage investments, contrary to the Member’s policies and procedures and MFDA Rules 1.2.1(c) (now MFDA Rule 1.3), 2.1.1 and 1.1.2 (as it relates to MFDA Rule 2.5.1).

FACTS

Bionorth Technology Group (“Bionorth”)

¶ 2 This matter is focussed on the Respondent’s actions in relation to Bionorth. In 2015, the Respondent was

told about Bionorth by Edward Tsang (“ET”) who he had known for years and with whom he had previous business dealings. ET told the Respondent that Bionorth was about to raise financing by offering a syndicated mortgage investment (an “SMI”). ET knew that the Respondent was in the financial field and believed that the Respondent could assist with raising money for the Bionorth SMI.

Respondent’s MFDA Registration

¶ 3 Between May 7, 2004 and October 1, 2018, the Respondent was registered in Ontario as a dealing representative with Global Maxfin Investments Inc. (“Global”), a Member of the MFDA.

¶ 4 At all material times, the Respondent was owner and president of Advantage Group of Finance Inc. (“Advantage”), a company through which the Respondent sold insurance products and provided financial planning, and retained other individuals to provide services in connection with mortgages and income tax preparation.

Advantage

¶ 5 Advantage was approved as an outside business activity of the Respondent by Global. On July 31, 2014, the Respondent completed an outside business disclosure form concerning Advantage which stated, “MORTGAGE-ADVANTAGE-PROVIDED BY ANOTHER ASSOCIATE OF ADVANTAGE-NO MONETARY BENEFIT”, but nothing indicated that the Respondent would be involved with SMIs.

¶ 6 The outside business disclosure form indicated that the Respondent’s duties at Advantage would be “LIFE INSURANCE, DISABILITY, CRITICAL ILLNESS, SEGREGATED FUNDS, FINANCIAL PLANNING”.

Global’s Disapproval of SMIs

¶ 7 Global never sold SMIs nor authorized its Approved Persons (“APs”) to sell SMIs.

¶ 8 In November 2013, Global distributed Compliance Bulletin ICB-0022 (the “SMI Compliance Bulletin”), advising its APs that SMIs were securities which could only be sold through its facilities, and that, if the APs were approached or solicited to sell SMIs, they should immediately contact Global’s compliance department.

¶ 9 At all material times Global’s policies and procedures:

- (a) required its APs to conduct all securities related business through Global; and
- (b) prohibited its APs from engaging in an outside business activity without Global’s approval.

¶ 10 In 2014, 2016 and 2017, the Respondent completed annual compliance attestations in which he confirmed reading and complying with Global’s policies and procedures and compliance bulletins, and agreed that he would:

- only solicit and distribute mutual funds and exempt products approved by Global; and
- maintain the highest level of compliance and ethical conduct in all aspects of his business.

Respondent’s Promotion of Bionorth SMIs

¶ 11 The Respondent regularly ran ads about investing and insurance on a Polish radio station, including promoting the Bionorth SMI as a good, safe investment. This was admitted by the Respondent at the hearing and confirmed by the affidavits and testimony of the Respondent’s clients.

¶ 12 The Respondent engaged in promoting the Bionorth SMI to clients without disclosing such activities to Global. By his own admission, the Respondent introduced the opportunity to invest in the Bionorth SMI to at least 6 clients and 3 individuals (collectively the “Investors”), who testified that they first learned of the Bionorth SMI from the Respondent. The Investors invested a total of \$1,045,900 in the Bionorth SMI. He also admitted to introducing the Bionorth SMI to, and discussing its terms and features with, an additional 11 individuals (the “Additional Investors”) who invested at least \$334,200 in the Bionorth SMI.

¶ 13 In addition to describing the terms of the Bionorth SMI, the Respondent recommended the Bionorth SMI to the Investors and provided assurances about the investment, describing it as “next level investment”, a “gold egg”, “almost guaranteed” and having “no risk”. This was confirmed in the affidavits and testimony of

the investors.

¶ 14 When the Bionorth SMI was ready to be offered to potential investors, ET once again contacted the Respondent, who then invited ET and his partner, FB, to the Respondent's office to make a presentation about the Bionorth SMI to the Respondent and his associates at Advantage. The Respondent received a brochure, a PowerPoint presentation, appraisal reports and legal documentation

¶ 15 The Respondent provided the Bionorth SMI promotional brochure about the Bionorth SMI to Investors.

¶ 16 The Respondent recommended that certain of his clients redeem mutual funds from their Global accounts in order to invest in the Bionorth SMI, even though those investors were not looking to change their investments from mutual funds.

¶ 17 The Respondent assisted certain of the Investors with completing the account opening documents required to invest in the Bionorth SMI and to transfer money to those accounts.

Bionorth Failure

¶ 18 After receiving the initial interest payments, interest payments ceased in 2017. In June 2018, when the Bionorth SMI was to mature, Bionorth did not repay the principal. On November 17, 2020, the mortgaged property was sold pursuant to a tax sale. There was insufficient funds from the tax sale to repay the Investors and the Bionorth SMI was discharged.

¶ 19 Accordingly, the Investors lost their entire principal amount of \$1,045,000 and it is equally likely that the Additional Investors lost their \$334,200 principal.

¶ 20 According to the testimony of the Investors, the loss of their principal was devastating, psychologically and financially.

Respondent's Financial Dealings with Bionorth

¶ 21 The testimony and documentary evidence established 3 financial transactions between the Respondent and Bionorth and 1 potential financial transaction between the Respondent's wife and Bionorth.

- (1) In the last quarter of 2016, according to the Respondent, the Respondent (through a friend with the Respondent acting as intermediary) paid \$60,300.98 to Bionorth to cover a Bionorth cash shortfall regarding an interest payment that was due. The Respondent's bank statement showed his receipt of \$40,000 and \$20,000 from Bionorth on January 26 and 31 respectively, and a copy of a cheque from the Respondent to repay his friend. The Respondent advised the MFDA that there was no loan agreement or interest paid by Bionorth.
- (2) In March 2017, the Respondent received \$20,846.13 from Bionorth, and in February and March made payments to a friend totalling \$20,500; the Respondent testified that these payments were the repayment of a loan made by a friend to Bionorth. Again there was no evidence of a loan agreement.
- (3) On July 28, 2017, the Respondent received \$5,000 in the Advantage bank account from Bionorth. According to the Respondent this was repayment of a loan he made to Bionorth to help pay some brokerage fees. There was no evidence of a loan agreement.
- (4) In October 2017, Bionorth's counsel drafted a promissory note for \$200,000 in favour of the Respondent's wife's company. The money was to be for an intended amalgamation with another company, but the transaction never proceeded.

Respondent's receipt of Internal Bionorth Information

¶ 22 The Respondent received considerable inside information concerning Bionorth from its president, FB. Examples in evidence include:

- (a) on June 5, 2017, an email from FB regarding a sale contract that Bionorth was working towards;
- (b) On July 28, 2017, an email about Bionorth's deliveries and accounts receivable;

- (c) On September 22, 2017, an email concerning interest payments to the investors in the Bionorth SMI;
- (d) Beginning October 23, 2017, numerous emails concerning Bionorth's efforts to get refinancing.

Respondent's Prior Ontario Securities Commission ("OSC") Proceeding

¶ 23 On March 1, 2006, the Respondent entered into a settlement agreement with the OSC in which the Respondent admitted to contravening MFDA Rules 1.1.5(g) and (h), by selling securities (convertible debentures) and accepting commissions from Zephyr Alternative Power Inc. ("Zephyr") without the knowledge or approval of his sponsoring dealer.

¶ 24 The president and CEO of Zephyr was ET, the same person who introduced the Respondent to the Bionorth SMI.

THE LAW

Allegation #1, Securities Related Business Outside the Member

¶ 25 The elements of Allegation #1 are that the Respondent:

- (1) engaged in a securities related business,
- (2) not carried on for the account of the Member or through its facilities,
- (3) by recommending, selling or facilitating the sale of,
- (4) syndicated mortgage investments,
- (5) contrary to the Member's policies and procedures and MFDA Rules 1.1.1, 2.1.1, and 1.1.2.

¶ 26 SMIs are securities. The MFDA issued Bulletin # 0583-P, dated November 12, 2013, advising its Approved Persons that SMIs are securities. This has been confirmed by cases such as *Cheung (Re)*, 2019 LNCMFDA 17 at paragraph 17. This was not disputed by the Respondent. In November 2013, Global distributed the SMI Compliance Bulletin referred to in paragraph 8, above.

¶ 27 Section 1 of MFDA By-law No. 1 (now MFDA Rule 1A) defines "securities related business" expansively as "all business and activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities for the purpose of applicable securities legislation." The Respondent argued during the hearing that he was not compensated financially for his activities regarding the Bionorth SMI, but the definition makes clear that financial gain is not required for the activities to be a "securities related business". This is confirmed by cases such as *Sabourin (Re)*, 2009 LNONOSC 37 at paragraphs 58, 61.

¶ 28 The Ontario Securities Act ("OSA") in turn defines "trading" expansively as "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of [any sale or disposition of a security for valuable consideration]." The Respondent argued that his actions regarding the Bionorth SMI did not go so far as "recommending, selling or facilitating the sale" (in the words of Allegation #1) or "act, advertisement, solicitation, conduct or negotiation ...in furtherance of a sale..." (per the "OSA"). The Respondent argued that he merely provided factual information about the Bionorth SMI, without recommending it or facilitating its sale, that he was merely referring clients to mortgage brokers in his office who would effect the sales. However, this attempt to minimize his actions is inconsistent with the testimony of the witnesses and the panel has found that the evidence as summarized in paragraphs 11-17 above, clearly establishes that the Respondent was engaged in a securities related business within the language of Allegation #1, the OSA and cases such as *Re Donas* 1995 LNBCSC 18, *Goldbridge Financial Inc. (Re)*, 2011 LNONOSC 37 at paragraphs 25-28 and 53-58 and *Sabourin (Re)*, *supra* at paragraphs 55-62.

¶ 29 The next issue is whether the Respondent's actions were carried on for the account of the Member or through its facilities. As outlined in paragraphs 5 and 6 above, the Respondent's business, Advantage, was registered as an outside business with his Member. However nothing in that disclosure encompasses the Respondent's activities regarding the Bionorth SMI. The disclosure to Global refers to "mortgages" but not to syndicated mortgages. Furthermore, the reference to mortgages stated that such business would be "provided

by another”. In addition, the SMI Compliance Bulletin made it clear that the Member needed to approve all products that its APs wished to sell. The Member’s policies and procedures stated that SMIs were not approved products and the Respondent admitted at the hearing that he was not permitted to sell SMIs. Therefore this panel has concluded that the Respondent’s actions were not carried on for the account of the Member or through its facilities, nor were they approved by Global.

¶ 30 The last issue is whether the elements set out in paragraphs 26-29 are contrary to (1) the Member’s policies and procedures, or (2) MFDA Rules 1.1.1, 2.1.1, 1.1.2 or 1.2.1(c).

Member’s Policies and Procedures

¶ 31 Rule 2.5.1 (now MFDA Rule 2.5.1) requires Members to establish and maintain written policies and procedures for dealing with clients and ensuring compliance with MFDA and applicable securities regulations. APs have a corresponding obligation to comply with the Member policies and procedures pursuant to Rule 1.1.2. The purpose of these provisions is to ensure the Member’s ability to supervise its AP’s conduct and protect the interests of clients and the public. The panel has concluded that the facts set out in paragraphs 7-10 establish that the actions of the Respondent were contrary to the Member’s policies and procedures.

MFDA Rules

¶ 32 Subject to certain exceptions which are not applicable in this case, MFDA Rule 1.1.1 requires APs to conduct securities related business for the account of, and through the facilities of, the Member. As stated in *Wemple (Re)*, 2017 LNCMFDA 138, at paragraphs 13-15:

...Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry. [It] requires a regime whereby an AP is only permitted to sell investment products that have first been approved for sale by the Member...and which are sold through the facilities of the Member, ensuring the trading activity is subject to appropriate review and supervision...[thereby protecting] primarily the interests of the Member clients, but also the interests of Members and MPs.

¶ 33 By recommending, selling and facilitating the sale of the Bionorth SMI outside the Member, the Respondent not only contravened MFDA Rule 1.1.1, but also failed to observe high standards of ethics and conduct in the transaction of business and engaged in business conduct that is unbecoming and detrimental to the public interest, contrary to MFDA Rule 2.1.1.

Allegation #2, Unapproved Outside Business Activity

¶ 34 In essence Allegation #2, engaging “in unapproved outside business activities”... is a more general version of Allegation #1, as it lacks the requirement to establish that the action constitutes a “securities related business”. While the panel found that the actions of the Respondent did constitute a “securities related business”, even if the panel had not done so, the Respondent’s actions were undoubtedly a “gainful employment” or an “outside activity” under former MFDA Rule 1.2.1(c) (and MFDA Rule 1.3, effective March 17, 2016). As established by cases such as *Harmer (Re)*, 2022 LNCMFDA 113 at paragraphs 390-402, *Are (Re)*, LNCMFDA 104 at paragraphs 11, 27-28 and 39, and *Haan (Re)*, LNCMFDA 87 at paragraphs 2 and 9, conduct to recommend, sell or facilitate the sale of an investment constitutes an outside business activity under MFDA Rules.

¶ 35 As noted in paragraphs 5, 6 and 29 above, the Respondent did not disclose his activities regarding the Bionorth SMI to his Member.

¶ 36 Accordingly the panel has concluded that the Respondent engaged in unapproved outside business activities that he failed to disclose to the Member contrary to former MFDA Rule 1.2.1 (c) (now MFDA Rule 1.3).

¶ 37 In addition, the reasoning and conclusion set out in paragraphs 32 and 33, above, apply to Allegation #2. Accordingly the panel has found that the Respondent’s actions are contrary to MFDA Rules 2.1.1 and 1.1.2 (as it relates to MFDA Rule 2.5.1).

Financial Benefit to the Respondent

¶ 38 MFDA Rule 1.1.1 prohibits securities related business outside the Member, whether or not it is done for gain. While not required for a finding of misconduct, counsel for the MFDA asked the panel to find that the Respondent received or anticipated a financial benefit from his actions regarding the Bionorth SMI because that would be relevant for a determination of appropriate sanctions.

¶ 39 The panel has noted that MFDA counsel requested that the panel find that the Respondent received or anticipated a financial benefit, and not whether his actions were done for gain as provided in the Rule. While “gain” may be broader than “financial benefit”, MFDA counsel only requested a finding of financial benefit, and the panel has limited its findings to that concept.

¶ 40 The Respondent testified that he derived no financial benefit from his actions regarding the Bionorth SMI, that (1) all monies received from Bionorth were in repayment of loans to Bionorth and not the payment of commissions, and (2) that, while there was no immediate financial benefit to him, he expected that his clients would look favourably on his introduction to the Bionorth SMI, and would return to invest with him when the Bionorth SMI term ended and would also promote him to their friends and family.

¶ 41 There was no documentary evidence of any loans from the Respondent to Bionorth, only his testimony to that effect.

¶ 42 MFDA counsel submitted that it defied common sense and is inconsistent with the facts, that the Respondent’s actions were done with no immediate financial benefit.

- In his dealings with his clients and other investors, a more rational approach would have been to promote products that he was licensed to sell, which were more in keeping with the client’s investment wishes and which would earn commissions for the Respondent;
- With respect to the loans made through his friends, there was no adequate explanation why his friends, with no connection to Bionorth, would lend significant amounts of money with no written agreement and no interest;
- The Respondent’s detailed involvement in Bionorth’s business operations went far beyond that of someone who was merely introducing Bionorth to potential investors;
- In light of the Respondent’s prior settlement with the OSC, in which he received commissions from ET for selling an unapproved product, it made no sense that he would do so again, with ET not expecting to pay commissions, or the Respondent not expecting to be paid commissions. The panel agreed with the MFDA submission that evidence of the prior proceeding is admissible, subject to the limitations of similar fact evidence.

¶ 43 The panel has concluded that the Respondent’s actions regarding the Bionorth SMI were done with the expectation of financial benefit. The panel shares MFDA counsel’s skepticism about the absence of commissions, but he admitted at the hearing that there is only the implication of commissions on the sale of the Bionorth SMI which was denied by the Respondent. However the Respondent’s own testimony is that, although he received no commissions on the Bionorth sales, he anticipated future commissions when clients and other investors returned to invest with him at the end of the Bionorth SMI term. That expectation of future commissions is sufficient for the panel to conclude that the Respondent’s actions were done with the anticipation of financial benefits, albeit in the future. This will be one factor in determining the appropriate penalty when the hearing on penalty occurs.

DECISION

¶ 44 For the reasons set forth above, it is the decision of the panel that the misconduct of the Respondent set out in Allegations 1 and 2, has been proven.

DATED THIS 20 DAY OF SEPTEMBER, 2023.

“Frederick H. Webber”

Frederick H. Webber-Chair

“Guenther W. K. Kleberg”

Guenther W. K. Kleberg-Industry Member

“Kenneth P. Mann”

Kenneth P. Mann, Industry Member

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