Re Dziadecki

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Leszek Dziadecki

2024 CIRO 35

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: January 30, 2024, in Toronto, Ontario (via videoconference)
Decision: January 30, 2024
Reasons for Decision: March 11, 2024

Hearing Panel:
Frederick H. Webber, Chair
Kenneth P. Mann, Industry Representative
Guenther W.K. Kleberg, Industry Representative

Appearances:
Alan Melamud, CIRO Senior Enforcement Counsel
Leszek Dziadecki, the Respondent (present)

REASONS FOR DECISION (PENALTY)

I. MISCONDUCT DECISION

¶ 1 Following the hearing on the merits held on February 27, 28, March 29 and May 16, 2023, the Hearing Panel found that the Respondent contravened his regulatory obligations by engaging in the following conduct:

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 ["the Bionorth SMI"] 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).

¶ 2 The relevant facts are set out in the Reasons for the Decision in the misconduct hearing, dated September 26, 2023.

II. PENALTY HEARING RULES

¶ 3 Pursuant to s. 24.1.1(i) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(i)), if, in the opinion of a hearing panel, an Approved Person has failed to comply with the provisions of any By-law, Rule, or Policy of the MFDA, a hearing panel can impose any of the penalties set out in s. 24.1.1(a)-(f) (now Mutual Fund Dealer Rules 7.4.1.1(a)-(f)), including a permanent prohibition of the authority of the Approved Person to conduct securities related business and a fine, not exceeding the greater of $5,000,000 or three times the profit obtained or loss avoided by engaging in the misconduct.

¶ 4 Pursuant to s. 24.2 of MFDA By-law No.1 (now Mutual Fund Dealer Rule 7.4.2), the Hearing Panel has the discretion to require a Member or Approved Person to pay the whole or part of the costs of the proceeding before the Hearing Panel and any investigation relating to that proceeding.

III. PROPOSED SANCTIONS

¶ 5 The Canadian Investment Regulatory Organization ("CIRO") submitted that the appropriate sanctions to impose are:

(a) the Respondent be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any Dealer Member of CIRO who is registered as a Mutual Fund Dealer, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

(b) the Respondent pay a fine in the amount of at least $300,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

(c) the Respondent pay costs in the amount of $30,000 which would constitute part of the costs Staff incurred conducting the investigation and prosecution of the Respondent as set out in the CIRO bill of costs, pursuant to s. 24.2 of MFDA By-law No. 1.

IV. APPROPRIATENESS OF PROPOSED PENALTY

¶ 6 Following numerous prior cases which need not be cited here, this Hearing Panel agrees with and has followed the principles stated in paragraphs 7 and 8, and has taken into account the factors listed in paras. 9 and 10, in determining the appropriate penalty in this case.

¶ 7 The primary goal of securities regulation is the protection of investors and fostering public confidence in the capital markets and the securities industry. Disciplinary sanctions imposed in a securities regulatory context are intended to restrain future misconduct in furtherance of these goals.

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

Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132 at para. 42,

Tonnies (Re), 2005 LNCMFDA 7 at para. 45.

¶ 8 Sanctions imposed by a hearing panel should therefore be protective and preventative to prevent likely future harm to the markets. However, this aim does not prevent a sanction that has the effect of punishing a respondent in appropriate circumstances. To achieve deterrence, sanctions must inevitably impose a burden on those who contravene CIRO's regulations. A sanction that is too low would not only fail to achieve deterrence but could erode public confidence in the disciplinary process. As stated by the Hearing Panel in *Kowalsky (Re)*:

> While the primary objective of sanctions is to prevent future misconduct by the Respondent and other industry participants, and not to punish the Respondent, some element of punishment of the Respondent is the inevitable result [sic] of any sanctions. But the fact that some punishment of the Respondent may occur, should not inhibit the Panel from imposing sanctions, so long as the primary goal of those sanctions is the prevention of future misconduct.

Kowalsky (Re), 2022 LNCMFDA 31 at para. 11,

Fauth (Re), 2019 LNABASC 90 at para. 100,

Mutual Fund Dealers Association of Canada Sanction Guidelines, dated November 15, 2018, pp. 2-3 ("Public Confidence") [MFDA Sanction Guidelines].

¶ 9 Many prior cases, including *Tonnies (Re)*, *supra* at paras. 44, 46, have held that, to determine whether a sanction 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.

¶ 10 Hearing panels have also previously considered the following factors when determining whether a sanction is appropriate:

(a) the seriousness of the allegations proved against the respondent;

(b) the respondent's past conduct, including prior sanctions;

(c) the respondent's experience and level of activity in the capital markets;

(d) whether the respondent recognizes the seriousness of the improper activity;

(e) the harm suffered by investors as a result of the respondent's activities;

(f) the benefits received by the respondent as a result of the improper activity;

(g) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;

(h) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;

(i) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

(j) the need to alert others who are permitted to participate in the capital markets to the consequences of inappropriate activities; and

(k) previous decisions made in similar circumstances.

Tonnies (Re), *supra* at para. 48,

Breckenridge (Re), 2007 LNCMFDA 38 at para. 77.

V. APPLICATION IN THIS CASE

(i) Seriousness of the misconduct

¶ 11 Securities related business outside the Member is undoubtedly very serious misconduct as it undermines the regulatory regime, exposes clients to potential harm, and can bring the mutual fund industry into disrepute. The seriousness of such misconduct was well expressed by the Hearing Panel in *Qi (Re)*, 2013 LNCMFDA 87 at para. 11:

> Conducting securities related business or outside business activity without the approval or knowledge of the Member is serious misconduct. The Member loses its ability to supervise the transactions and to assess the suitability of the transactions for the investors. The misconduct can have dire consequences for the investors involved as the off-book investments may not be suitable for the investors or even legitimate investments. The misconduct may bring the Member or the mutual fund industry into disrepute.

Chang (Re), 2016 LNCMFDA 59 at paras. 10, 24,

Breckenridge (Re), *supra* at paras. 63-64,

Kowalsky (Re), *supra* at paras. 15, 19.

¶ 12 In this case, the potential adverse consequences of securities related business outside the Member to the investors and the mutual fund industry were manifested, as the Investors, which comprised clients of the Member and other individuals, suffered losses in excess of $1.3 million as a result of the Respondent's conduct. Furthermore, that such substantial losses arose as a result of recommendations by an Approved Person who subverted Member supervision that was intended to protect clients, undoubtedly brings the mutual fund industry into disrepute.

¶ 13 The seriousness of the misconduct is further aggravated by the fact that the Respondent preyed on the Investors to have them invest in the BioNorth SMI. A number of the Investors testified that they put their trust in the Respondent both as a mutual fund advisor for some of the Investors, and also as part of the same cultural and linguistic community as the Investors. The Respondent capitalized on this trust by going beyond merely offering the BioNorth SMI to the Investors, to actively persuading them, giving the Investors repeated assurances in response to any expression of concern about the safety of the investment.

¶ 14 Several of the Investors testified to their trust in, and reliance on, the Respondent as follows:

(a) IJ, a client whose accounts were serviced by the Respondent, gave evidence that the Respondent gave her repeated assurances that the "investment in BioNorth was guaranteed and essentially no risk" in response to her expressions of concern about making the investment. In addition, the Respondent persuaded her and her husband (also a client) to use both the proceeds from a mutual fund that was being discontinued and to borrow money from a home equity line of credit to invest in the BioNorth SMI.

Affidavit of IJ, sworn February 17, 2023, paras. 3-8.

(b) MS gave evidence that he trusted the Respondent because they shared a common language and that the Respondent persuaded him and his wife to invest twice in the BioNorth SMI, the second time mortgaging their home to do so.

Affidavit of MS, sworn February 6, 2023, paras. 3-4, 8-10.

(c) AF, a client of the Member, gave evidence that the Respondent repeatedly assured her of the security and safety of the BioNorth SMI, despite her repeated expressions of concern, telling her the investment was "100% safe and legal", and further suggested to her and her then-husband to invest $500,000.

Affidavit of AF, sworn February 23, 2023, paras. 4-6, 8, 12.

(d) HJ, a client whose accounts were serviced by the Respondent, gave evidence that the Respondent assured her of the safety of the BioNorth SM in response to her expressions of concern over investing in the SMI, describing the investment as "100% safe". Further, to have her invest in the BioNorth SMI, the Respondent told her he was leaving the Member and recommended that she use her savings in her TFSA account to invest in the BioNorth SMI.

Affidavit of HJ, sworn February 6, 2023, paras. 3-5.

¶ 15 It is also a significant aggravating factor that the Respondent recommended that certain clients redeem mutual funds from their Member accounts in order to invest in the BioNorth SMI, even though those investors were not looking to change their investments from mutual funds.

Misconduct Reasons for Decision, *supra* at para. 16.

¶ 16 Finally, it is fundamental that Approved Persons comply with Members' policies and procedures. Members have an obligation to supervise Approved Persons and protect clients, which can only be accomplished when Approved Persons follow the rules that have been established. As stated by the hearing panel in *Franco (Re)*, 2011 LNCMFDA 55 at paras. 38, 68, "clients rely upon Approved Persons to act in compliance with MFDA rules and regulations, including the requirement to conform to Members' policies and

procedures."

(ii) Respondent's Past Conduct

Prior Discipline by the Ontario Securities Commission (OSC)

¶ 17 In 2006, the Respondent was prosecuted by the OSC for precisely the same misconduct that is at issue in this case, securities related business outside the Member. In that case, the Respondent sold approximately $200,000 of debentures outside the Member for a business operated by Edward Tsang ("ET"). The Respondent settled with the OSC and agreed to a sanction including the payment of $28,200, representing the commissions he had earned by selling the debentures; two years close supervision by the Member; a reprimand; and the payment of costs in the amount of $5,000. Fortunately, in that case, there were no investor losses.

Settlement Agreement between Staff of the Commission and Leszek Dziadecki, dated March 2, 2006, paras. 4-10, 17, 19.

¶ 18 The OSC proceeding had no deterrent effect on the Respondent. In the present case it was again ET who approached the Respondent to recommend and sell an outside investment, the BioNorth SMI. This should have reminded the Respondent of the prior discipline imposed by the OSC for the same conduct. The Respondent nonetheless proceeded to offer the BioNorth SMI to his clients and other individuals and did so to a far greater degree than previously, resulting in the clients and other individuals investing in excess of $1.3 million. In addition, unlike the situation before the OSC, the Respondent's failure to heed the lessons from his prior disciplinary proceeding resulted in the Investors suffering devastating losses, totalling $1,378,200.

Misconduct Reasons for Decision, *supra* at paras. 2, 12, 19, 23-24.

¶ 19 The Respondent's prior discipline by the OSC is a significant aggravating factor. That the Respondent chose to proceed with the recommendation and sale of the BioNorth SMI, notwithstanding his prior discipline and knowledge that the Member did not permit him to sell SMIs, CIRO advised the Panel that they are unaware of any precedent where an Approved Person has twice engaged in such serious misconduct.

MFDA Sanction Guidelines, *supra* at p. 4 (no. 7),

Misconduct Reasons for Decision, *supra* at para. 29.

Prior Discipline by MFDA

¶ 20 Pursuant to a settlement agreement with the MFDA, the Respondent admitted that between August 2013 and August 2018, he obtained, possessed, and, in some instances, used to process transactions, 9 pre-signed account forms. The Respondent was a branch manager during much of the period of misconduct. On January 19, 2021, a MFDA hearing panel accepted the settlement agreement and imposed a sanction, including a fine in the amount of $7,000; a six-month prohibition from acting in a supervisory role with a Member; a course requirement prior to acting as a branch manager or in a supervisory role; and costs in the amount of $2,500.

Dziadecki (Re), 2021 LNCMFDA 8.

¶ 21 While the misconduct was unrelated to the matters at issue in this proceeding, that the Respondent, as a branch manager, engaged in signature falsification further demonstrates his disregard for regulatory requirements and investor protection, and is therefore an aggravating factor.

MFDA Sanction Guidelines, *supra* at p. 4 (no. 7).

(iii) Respondent's Experience in the Capital Markets

¶ 22 The Respondent was first registered in the securities industry in 1995 and had been a branch manager between May 7, 2004 and June 1, 2006 and between July 15, 2008 and October 1, 2018. The Respondent therefore had considerable experience and held a supervisory position when he commenced engaging in the misconduct in 2015. This is an aggravating factor. As stated by the hearing panel in *Cavalli (Re)*, 2013 LNCMFDA 82 at para. 71, a case also dealing with securities related business outside the Member:

Instead, the Panel concluded that the fact that the Respondent held the position of Branch Manager

during some of the material times was an aggravating factor as he knew, or should have known, that such status would have instilled additional trust in him as a competent and reliable financial advisor.

(iv) Recognition by the Respondent of the Seriousness of the Misconduct

¶ 23 As held by the Alberta Court of Appeal, a respondent's failure to "admit guilt" or express remorse should not be treated as an aggravating factor. The Respondent is entitled to mount a defence to the allegations made by Staff.

Walton v. Alberta (Securities Commission), 2014 ABCA 273.

¶ 24 However, to the extent that expression of remorse and a commitment by a respondent to not reoffend could be considered a mitigating factor, such mitigation is absent in this case. There is no evidence that the Respondent recognizes the seriousness of his misconduct.

Chow (Re) (2022), MFDA File No. 202054 at paras. 84-87.

¶ 25 The Panel is further confirmed in its conclusion that the Respondent does not admit his guilt or express remorse, by the submission of the Respondent in the penalty phase of the proceeding. Rather than address factors relevant to sanctions, the Respondent continued to deny that he had engaged in any misconduct.

(v) Harm Suffered by Investors and Benefits Received by the Respondent

¶ 26 In total, the Investors affected by the Respondent's conduct suffered financial harm of $1,378,200. As testified by several Investors, the losses were devastating, psychologically and financially. In addition to lost savings, several of the Investors mortgaged their homes to invest in the BioNorth SMI. As a consequence, these Investors are now left with substantial debts that they are required to repay from their income or must otherwise sell their homes. Client MS testified that he had been required to delay his retirement so that he could continue to earn enough money to repay the mortgage obtained to invest in the BioNorth SMI. Client AF testified that she will be required to sell her matrimonial home as a consequence of mortgaging it to invest in the BioNorth SMI at the Respondent's recommendation. Client AF described herself as "destroyed".

¶ 27 With respect to benefit to the Respondent, the Hearing Panel found that the Respondent engaged in the misconduct in anticipation of future commissions when the Investors returned to invest with him at the end of the BioNorth SMI term.

Misconduct Reasons for Decision, *supra* at para. 43.

(vi) Deterrence

¶ 28 Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors. As stated by the Supreme Court of Canada in *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at para. 61:

> The Oxford English Dictionary (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". 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 under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

¶ 29 This Panel agrees with CIRO, that the proposed sanction satisfies the goal of deterrence, taking into account the nature and the circumstances of the misconduct.

(vii) Previous Decisions Made in Similar Circumstances

¶ 30 This Panel reviewed comparator cases provided by CIRO counsel, and agrees that the sanction suggested by the MFDA is consistent therewith.

¶ 31 The most comparable cases are *Breckenridge (Re)* and *Larson (Re)*, which had penalties including a

permanent prohibition and fines of $350,000 and $200,000, respectively. In both cases the respondents engaged in securities related business outside the Member in an amount exceeding $1 million, caused substantial investor losses, and did not financially benefit. The remaining cases, in which lower fines were ordered, are distinguishable: (1) the quantum of securities related business was substantially less; (2) there was no evidence of investor loss; and/or (3) the respondents entered into agreed statements of facts with Staff. It is also critical that in none of the comparable cases, including *Breckenridge (Re)* and *Larson (Re)*, had the respondents been previously prosecuted for the same misconduct.

¶ 32 Accordingly, a fine of at least $300,000 is consistent with the comparator cases, considering the nature and the circumstances of the Respondent's misconduct.

(viii) Appropriate Sanction

¶ 33 The Respondent knowingly engaged in misconduct that undermined Member supervision and resulted in substantial harm to clients and other individuals, all in anticipation of future commissions. The sanction proposed by CIRO reflects the gravity of the misconduct in this case, the investor losses, the myriad of aggravating factors, and that the Respondent is a repeat offender. A permanent prohibition is the ultimate specific deterrent as it ensures that the Respondent will not be allowed again to participate in the mutual fund industry. As stated by the Hearing Panel in *Gomes (Re)*, "the misconduct [securities related business outside the Member] goes to the heart of the MFDA regulatory regime". Accordingly, a permanent prohibition is warranted and appropriate in this case. A significant fine is also necessary to ensure general deterrence. The proposed sanction will serve as a significant deterrent to prevent the Respondent and other Approved Persons in the industry from engaging in similar misconduct, which can have devastating effects on investors and undermine confidence in the mutual fund industry.

Gomes (Re), 2020 LNCMFDA 33 at para. 21,

Breckenridge (Re), *supra* at para. 80.

(ix) Costs

¶ 34 Costs orders are not sanctions, but rather serve as means of recovering costs incurred in enforcing CIRO's By-law, Rules, and Policies, which would otherwise be paid by the Approved Persons and Members who are not subject to CIRO proceedings. This Panel agrees with CIRO, that costs of $30,000 is reasonable. It is considerably less than the costs of the full amount of time and resources expended by the MFDA (now CIRO) as set out in the Bill of Costs. The investigation and prosecution involved the gathering and presentation of evidence from 4 complainants and the Respondent. The matter was also fully contested, involving the presentation of live evidence, with the misconduct hearing being heard over 3 days and the sanction hearing scheduled to be heard over a half-day. Finally, the CIRO also had to address an unsuccessful last-minute motion by the Respondent to adjourn the proceeding.

Fauth (Re), 2019 ABASC 102 at para. 115.

VI. DECISION

¶ 35 Accordingly it is this Panel's decision that the following sanction is appropriate:

(a) the Respondent be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any Dealer Member of CIRO who is registered as a Mutual Fund Dealer, pursuant to s. 24.1.1(e) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(e));

(b) the Respondent pay a fine in the amount of $300,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(b)); and

(c) the Respondent pay costs in the amount of $30,000, pursuant to s. 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2).

Dated at Toronto, Ontario this 11 day of March 2024

"Frederick H. Webber"

Frederick H. Webber, Chair

"Kenneth P. Mann"

Kenneth P. Mann, Industry Representative

"Guenther W. K. Kleberg"

Guenther W.K. Kleberg, Industry Representative