Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

Citation: MFDA (Rojas Diaz) (Re), 2021 ONSEC 24
Date: 2021-10-05
File No. 2021-7

IN THE MATTER OF THE MUTUAL FUND DEALERS ASSOCIATION AND OMAR ENRIQUE ROJAS DIAZ (ALSO KNOWN AS OMAR ROJAS)

REASONS AND DECISION
(Sections 21.7 and 8 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	August 12, 2021	
Decision:	October 5, 2021	
Panel:	Lawrence P. Haber	Commissioner and Chair of the Panel
Appearances:	Omar Enrique Rojas Diaz	For himself
	Shelly M. Feld Alan Melamud	For Staff of the Mutual Fund Dealers Association of Canada
	Jacob Millar	For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

[1] Omar Enrique Rojas Diaz (the **Respondent**) was a dealing representative with Royal Mutual Funds Inc. and regulated by the Mutual Fund Dealers Association of Canada (**MFDA**).

[2] On December 8, 2020, the Respondent entered into an Agreed Statement of Facts with MFDA Staff, in which the Respondent admitted that between September 8, 2017 and June 29, 2018, he misappropriated approximately $39,270 from one client, contrary to MFDA Rule 2.1.1.

[3] In a decision issued on January 29, 2021 (the **Decision**),[1] the MFDA panel ordered that the Respondent:

a. be permanently prohibited from conducting securities related business while in the employ of or affiliated with a Member of the MFDA; and

b. pay costs of $2,500.

[4] On March 2, 2021, MFDA Staff applied to the Ontario Securities Commission (the **Commission** or the **OSC**) for a hearing and review of the Decision.

[5] MFDA Staff seeks an order varying the Decision by imposing a fine on the Respondent in the amount of $52,270, or in the alternative, an order returning the matter to the MFDA panel for a penalty hearing.

[6] The Respondent asks that MFDA Staff's application be dismissed. Staff of the Commission (**OSC Staff**) asks that MFDA Staff's application be granted and that some financial sanctions be ordered against the Respondent but takes no position on the quantum of those sanctions.

[7] For the reasons set out below, I find that that the Decision is varied to include a fine payable by the Respondent in the amount of $52,270.

II. BACKGROUND

[8] From December 9, 2013 to July 17, 2018, the Respondent was an Approved Person registered in Ontario as a dealing representative with Royal Mutual Funds Inc. (the **Member**), a Member of the MFDA. The Respondent was also an employee of the Member's bank affiliate (the **Bank**).

[9] In 2017, the Respondent advised client MC that she had been pre-approved for a line of credit in the amount of $10,000. Client MC was not interested in opening a line of credit; however, the Respondent continued encouraging client MC to do so, and on or about February 23, 2017, client MC opened the line of credit.

[10] The Respondent subsequently changed the contact details (address, telephone number, and email) on client MC's client profile to fictitious details without client MC's knowledge or authorization. On or about October 3, 2017, the Respondent opened a new bank account in the name of client MC in order to pay the minimum interest on client MC's line of credit from the new account, without

[1] *Rojas (Re),* 2021 CanLII 15682 (CA MFDAC), MFDA File No. 202002

client MC's knowledge or authorization. The Respondent falsified client MC's signature on a letter of direction to facilitate these changes.

[11] Between September 8, 2017 and June 29, 2018, without the knowledge or authorization of client MC, the Respondent processed approximately:

a. 30 increases to the credit limit on client MC's line of credit;

b. 30 withdrawals from client MC's line of credit; and

c. 15 deposits to pay monthly interest charges so that the line of credit would not go into default. By means of these unauthorized transactions, the Respondent misappropriated approximately $39,270 from client MC's line of credit and used the monies for his personal benefit.

[12] Following the discovery of the Respondent's conduct by the Bank, the Bank compensated client MC by reimbursing the misappropriated amounts. The Respondent's employment was subsequently terminated by the Member on July 17, 2018.

[13] In November 2018, the Respondent entered into a consumer proposal (the **Proposal**), which his creditors accepted. Pursuant to the Proposal, the Respondent was required to make monthly payments of $350 to the administrator of the Proposal, to a required total of $21,000 after 60 months. The Respondent has been making the required payments, however, as of November 3, 2020, the Respondent was behind by two payments.

[14] The Member conducted an investigation and no evidence of additional misconduct affecting other clients of the Member or the Bank was identified. There have been no other client complaints to the Member or to the MFDA.

[15] On August 5, 2020, the MFDA commenced a disciplinary proceeding against the Respondent by issuing a Notice of Hearing. On December 8, 2020, the MFDA and the Respondent entered into an Agreed Statement of Facts, wherein the Respondent admitted he misappropriated approximately $39,270 from one client, contrary to MFDA Rule 2.1.1.

[16] The merits and penalty hearing was conducted on December 14, 2020. The Respondent was self-represented throughout the MFDA proceeding. On January 29, 2021, the MFDA Panel issued its Decision accepting the admission of the Respondent that he had misappropriated $39,270 from a client, contrary to MFDA Rule 2.1.1, and imposing the following sanctions against the Respondent:

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; and

b. an order that the Respondent pay costs to the MFDA in the amount of $2,500.

[17] The MFDA panel declined to order a fine against the Respondent. The MFDA panel determined that in light of the circumstances, to impose a financial penalty on the Respondent in addition to a permanent ban on the Respondent's ability to

conduct securities related business with a member of the MFDA would be to punish the Respondent for his past conduct.[2]

III. ANALYSIS

A. Introduction

[18] Before turning to the substantive issue raised by this application, I set out the legal framework and standard of review for this proceeding.

[19] MFDA Staff brings this application under s. 21.7 of the *Securities Act*[3] (the **Act**) which provides that a person directly affected by a decision of a recognized self-regulatory organization, such as the MFDA, may apply to the Commission for a review of that decision.

[20] On an application such as this, the Commission may confirm the MFDA decision or make such other decision as the Commission considers proper.[4] The Commission's review of an MFDA decision is a hearing *de novo* rather than an appeal. In other words, the Commission exercises original jurisdiction rather than a more limited appellate jurisdiction.[5]

[21] The Commission has chosen as a matter of practice to limit the circumstances under which it will substitute its own decision for that of a self-regulatory organization such as the MFDA.[6] This choice is consistent with the requirement in the Act that the Commission have regard to the fundamental principle that the Commission should "use the enforcement capability and regulatory expertise of recognized self-regulatory organizations."[7]

[22] The Commission will interfere with a decision of a self-regulatory organization only if one of the following five grounds has been established:

a. the hearing panel proceeded on an incorrect principle;

b. the hearing panel erred in law;

c. the hearing panel overlooked material evidence;

d. new and compelling evidence is presented to the Commission that was not presented to the hearing panel; or

e. the hearing panel's perception of the public interest conflicts with that of the Commission.[8]

[23] MFDA Staff submits that the first, second and fifth grounds are met in this case.

B. Has MFDA Staff established that the Commission should interfere with the MFDA Decision?

[24] MFDA Staff submits that the MFDA panel erred in the following ways, each of which I will consider in turn:

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[2] Decision at para 76
[3] RSO 1990, c S.5
[4] Act, s 8(3) and 21.7(2)
[5] *Boulieris (Re),* 2004 ONSEC 1, (2004) 27 OSCB 1597 (***Boulieris***) at paras 29-30; *Ziaian (Re),* 2021 ONSEC 9, (2021) 44 OSCB 2584 (***Ziaian***) at para 26
[6] *Northern Securities Inc. (Re),* 2013 ONSEC 48, (2014) 37 OSCB 161 at para 57
[7] Act, s 2.1, para 4
[8] *Canada Malting (Re),* (1986) 9 OSCB 3565 at para 24; *Ziaian* at para 28

a. imposed a penalty that permitted the Respondent to retain the benefit from his misconduct;

b. relied on irrelevant factors; and

c. placed undue emphasis on the Respondent's inability to pay a financial penalty and concluded that a financial sanction would be punitive in the circumstances.

1. Did the MFDA panel err in law and in principle by imposing a penalty that permitted the Respondent to retain the benefit from his misconduct?

[25] The MFDA panel concluded that removing the Respondent from the mutual fund industry alone, without a financial penalty, was sufficient to protect investors, deter the Respondent from engaging in this type of misconduct and send a strong message to the industry that abusing the client trust relationship will not be tolerated.[9]

[26] MFDA Staff submits that the MFDA panel erred in law, proceeded on an incorrect principle, and adopted and applied a perception of the public interest that is inconsistent with that of the Commission by deciding not to order disgorgement or any financial penalty against the Respondent, thereby permitting him to retain the benefit from his misconduct. In particular, MFDA Staff submits that the MFDA panel failed to consider the importance of disgorgement to achieve the protective and preventative objectives of securities regulation and failed to explain how specific and general deterrence could be achieved while permitting the Respondent to keep the financial benefit that he derived from his wrongdoing.

[27] The Respondent submits that he has not retained the benefit from his misconduct because since 2018, he has been making yearly payments to the Bank for the monies he misappropriated as part of the Proposal.

[28] I find that the MFDA panel erred in law, proceeded on an incorrect principle, and adopted and applied a perception of the public interest that is inconsistent with that of the Commission by deciding not to order disgorgement or any financial penalty against the Respondent.

[29] The primary goal of securities regulation is the protection of investors and fostering public confidence in the capital markets and the securities industry.[10] To this end, disciplinary penalties imposed in a securities regulatory context are intended to be protective and preventative by restraining future conduct that is harmful to the capital markets.[11]

[30] Disgorgement is an important tool to advance the remedial and protective aims of securities regulation and to ensure that specific and general deterrence of misconduct is achieved. The disgorgement remedy is intended to deprive a

[9] Decision at para 55

[10] *Pezim v British Columbia (Superintendent of Brokers),* [1994] 2 SCR 557 at para 59

[11] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission),* [2001] 2 SCR 132 at para 42

wrongdoer of gains obtained through misconduct and thereby remove the incentive to engage in similar future non-compliance with securities regulation.[12]

[31] In addition, disgorgement serves the important public interest of maintaining public confidence in the capital markets and securities regulation, by making it clear that contravening securities regulations does not pay.[13]

[32] By permitting the Respondent to retain the benefit of his misconduct, the MFDA panel ordered a penalty that failed to satisfy the protective and preventative objectives of securities regulation and that failed to achieve the desired level of specific and general deterrence that is required when applying sanctions.

[33] The Respondent did not file any evidence with respect to the yearly payments being made to the Bank. In any event, the MFDA panel did not base its decision on these payments and its decision must be reviewed based on the evidence before it at the time.

2. Did the MFDA panel err in law and in principle by relying on irrelevant factors?

[34] MFDA Staff submits that the MFDA panel erred in law and proceeded on an incorrect principle by relying on the following irrelevant factors in its decision:

a. the Bank's reimbursement of the amounts taken from the client's line of credit and the fact that the client never suffered a loss; and

b. the Respondent's motivation or reason for misappropriating the money.

(a) The Bank's reimbursement of the money taken and the fact that the client never suffered a loss

[35] In its assessment of the seriousness of the Respondent's misconduct, the MFDA Panel concluded that "[w]hile the client's trust was breached, the financial loss was that of the Bank."[14] Further, in its discussion of mitigating factors, the MFDA panel noted that the Bank forgave the amounts withdrawn from the client's line of credit and as a result the client was never out of pocket any money, only the Bank was.[15]

[36] MFDA Staff submits that the MFDA panel erred in law and proceeded on an incorrect principle by treating the following as mitigating factors: (i) the Bank's reimbursement of the amounts taken by the Respondent from the client's line of credit, and (ii) the fact that the Bank, not the client, ultimately suffered the loss. MFDA Staff submits that the determination of which party was victimized by the Respondent's misconduct and which party ultimately suffered the loss is irrelevant to the question of the appropriate penalty to impose.

[37] MFDA Staff submits that regardless of whether the client or the Bank suffered the loss, the seriousness of the Respondent's dishonesty, the amount of financial harm suffered, and the corresponding financial benefit obtained are all unaffected. MFDA Staff submits that schemes that involve taking advantage of client trust to misappropriate monies are incompatible with investor protection

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[12] *Northern Securities Inc. (Re),* 2014 ONSEC 27, (2014) 37 OSCB 8535 at paras 210-211; *Limelight Entertainment Inc. (Re)*, 2008 ONSEC 28, (2008) 31 OSCB 12030 (***Limelight***) at paras 47-48

[13] *Limelight* at para 54; *Fauth (Re),* 2019 ABASC 102 at para 56

[14] Decision at para 47

[15] Decision at para 64

and maintaining confidence in the capital markets. MFDA Staff submits that the sanctions imposed on a wrongdoer ought not to be affected by the good faith intervention of a third party who took steps to redress the harm caused by the wrongdoer.

[38] OSC Staff submits that the MFDA panel erred in law by treating the fact that the Bank reimbursed the amounts misappropriated by the Respondent as a mitigating factor. OSC Staff submits that the fact that a third party later compensated the original victim does nothing to mitigate the seriousness of the Respondent's conduct.

[39] I find that the MFDA panel erred in law and proceeded on an incorrect principle by treating the Bank's reimbursement to the client and the fact that the Bank, not the client, ultimately suffered the loss, as mitigating factors.

[40] The Commission has previously held, in the context of considering disgorgement as a sanction, the party which ultimately suffered the loss is irrelevant to the question of whether the amounts obtained by a wrongdoer ought to be disgorged. In *Pro-Financial Asset Management Inc. (Re),*[16] the respondents argued that disgorgement ought not to be ordered in respect of the amounts that had been obtained from banks as opposed to investors themselves. The Commission rejected the argument and made clear that when ordering disgorgement, the Commission should consider the loss suffered by third parties, not just "investors".[17] Whether the loss was suffered by the client who was targeted or the Bank that compensated that client, the seriousness of the Respondent's dishonesty, the amount of financial harm suffered and the corresponding financial benefit obtained are all unaffected. The MFDA panel erred by considering the steps taken by a third party to redress the harm to investors as a mitigating factor.

(b) The Respondent's motivation for misappropriation

[41] The MFDA panel noted that there was no evidence that the Respondent had used the misappropriated funds to support a lavish lifestyle, but instead had needed the money owing to financial difficulties.[18]

[42] MFDA Staff submits that the MFDA panel proceeded on an incorrect principle by treating the Respondent's motivation for misappropriating money taken from a client's account as a mitigating factor that diminished the seriousness of his misconduct. MFDA Staff submits that while the seriousness of the misconduct is a relevant factor to consider when determining the appropriateness of disgorgement, the Respondent's reason for misappropriating money does not diminish the seriousness of the misconduct or the justification for requiring disgorgement of the money that he took.

[43] I find that the MFDA panel proceeded on an incorrect principle by treating the Respondent's motivation for misappropriating money taken from a client's account as a mitigating factor that diminished the seriousness of his misconduct.

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[16] 2018 ONSEC 18, (2018) 41 OSCB 3512 (***Pro-Financial***)
[17] *Pro-Financial* at paras 53-55
[18] Decision at para 44

[44] Misappropriation is among the most serious forms of misconduct that securities regulators encounter.[19] Regardless of the motivation for the misappropriation, in order to maintain public trust in the securities industry it is essential that those entrusted with investor money strictly adhere to sound practices that reflect the importance of that trust.[20] Otherwise, an Approved Person facing financial difficulties may be motivated to misappropriate funds knowing that they may be able to retain the monies misappropriated in the end. Such an approach runs counter to the principles that inform sanctions and would send the wrong message to those individuals and the public. The fact that in this case the Respondent was motivated to misappropriate funds due to personal financial need, as opposed to outright greed, does not impact the seriousness of the Respondent's misconduct and the justification for requiring disgorgement of the funds taken from the client's account.

[45] Accordingly, the MFDA panel erred by considering the Respondent's motivation or reason for misappropriation as a mitigating factor. The Decision must be varied to uphold the principles of specific and general deterrence.

3. Did the MFDA panel err in law and in principle by placing undue emphasis on the Respondent's inability to pay a financial penalty and by concluding that a financial sanction would be punitive?

[46] In its discussion of the Respondent's inability to pay, the MFDA panel noted that while the Respondent's misconduct would ordinarily warrant a financial penalty, it would be neither fair nor appropriate to impose a financial penalty in the circumstances.[21] The MFDA panel ultimately concluded that "to impose a financial penalty on the Respondent in addition to a permanent prohibition on the Respondent's authority to conduct securities related business while in the employ of or affiliated with a Member of the MFDA, would be to punish past conduct".[22]

[47] MFDA Staff submits that the MFDA panel erred in law and proceeded on an incorrect principle by (i) overemphasizing the Respondent's inability to pay a financial penalty given the seriousness of his misconduct, and (ii) concluding that an order requiring disgorgement of the misappropriated funds would be punitive. MFDA Staff submits that the MFDA panel placed undue weight on the significance of the Respondent's inability to pay, and insufficient weight on other applicable factors such as the need for general deterrence and the damage that could be caused to confidence in the capital markets if wrongdoers are permitted to retain their ill-gotten gains.

[48] OSC Staff submits that the MFDA panel erred in law and proceeded on an incorrect principle by (i) placing too much emphasis on the Respondent's current inability to pay a financial penalty, and (ii) concluding that imposing a financial sanction on the Respondent would be punitive. OSC Staff submits that the MFDA panel overemphasized the Respondent's current financial circumstances and failed to adequately weigh other relevant principles, including deterrence, the seriousness of the Respondent's conduct, and the public interest in safeguarding

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[19] *Ng (Re),* 2016 LNCMFDA 81 at paras 106-107; *Ogalino (Re),* 2014 LNCMFDA 7 at para 15; *Cox (Re),* 2016 LNCMFDA 24 at para 84; *Davies (Re),* 2020 LNCMFDA 88 at para 25

[20] *Pro-Financial* at para 72

[21] Decision at para 65

[22] Decision at para 76

the capital markets. OSC Staff further submits that financial sanctions do not become punitive or inappropriate simply because the wrongdoer does not have the ability to pay them, especially where the wrongdoer is not elderly and may yet again find gainful employment in the future. OSC Staff also submits that the MFDA panel's decision to not impose financial sanctions is inconsistent with prior MFDA and Commission decisions regarding the purpose of financial sanctions and the factors to be considered when imposing them.

[49] The Respondent submits that he has already been punished for his wrongdoing as a result of his ban from the industry and that he does not have the ability to pay a financial penalty if one were ordered against him. The Respondent also submits that the cases cited by MFDA Staff and OSC Staff are distinguishable from the present case because those cases involved investment securities and individuals taking advantage of the capital markets. In the present case, the Respondent submits that he took monies from a banking product, not an investment security, and never took advantage of the securities industry.

[50] I find that the MFDA panel erred in law and proceeded on an incorrect principle by overemphasizing the Respondent's inability to pay a financial penalty given the seriousness of his misconduct and concluding that an order requiring disgorgement of the misappropriated funds would be punitive.

[51] While I have some sympathy for the financial circumstances the Respondent finds himself in, previous MFDA decisions have repeatedly emphasized that an "inability to pay" takes on less significance when determining a penalty in instances where a respondent engages in egregious misconduct that harms a client.[23]

[52] In *Re Sabourin,* the Commission similarly ordered disgorgement notwithstanding a respondent's claims of impecuniosity.[24] The Commission recognized that "ability to pay" was a relevant factor, but was careful to make clear that it was not a predominant or determining factor.[25] This approach is in line with the applicable principles of specific and general deterrence discussed above.

[53] The MFDA Sanction Guidelines express the same principle, stating that "[ability to pay] is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA's disciplinary processes."[26] However, in this case, I find that the MFDA panel placed undue weight on the significance of the Respondent's inability to pay, and insufficient weight on other applicable factors such as the need for general deterrence and the damage that could be caused to confidence in the capital markets if wrongdoers are permitted to retain their ill-gotten gains.

[54] In light of its conclusion that the Respondent had a legitimate inability to pay, the MFDA panel concluded that ordering a financial penalty would constitute improper punishment of past conduct.[27] Disgorgement, however, is not a

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[23] *Brauns (Re),* 2014 LNCMFDA 9 at para 16; *Davis (Re),* 2016 LNCMFDA 172 at para 59; *Frank (Re),* 2015 LNCMFDA 83 at paras 3 and 13-16; *Visneskie (Re),* 2018 LNCMFDA 119 at paras 20-21; *Zamrykut (Re),* 2020 LNCMFDA 184 at para 35

[24] *Sabourin (Re),* 2010 ONSEC 10, (2010) 33 OSCB 5299 (***Sabourin***) at paras 24, 27 and 69

[25] *Sabourin* at para 60

[26] Mutual Fund Dealers Association of Canada, *Sanction Guidelines* (***Sanction Guidelines***) at 5

[27] Decision at paras 65 and 74-76

punishment, particularly in circumstances where the monies disgorged are amounts that the Respondent deliberately misappropriated from a client. As stated by the Divisional Court in *North American Financial Group*, the reason to focus on the amounts wrongly obtained as opposed to the amounts retained is precisely because the aim is deterrence and not punishment.[28]

[55] I do not accept the Respondent's submissions that his actions related to "banking products" as opposed to mutual funds and therefore the precedents relied upon by MFDA Staff are distinguishable. Firstly, there was no jurisdictional objection raised by the Respondent before the MFDA panel or on this application. Secondly, MFDA Staff identified case law where the MFDA imposed sanctions where funds were misappropriated from both mutual fund and non-mutual fund clients,[29] and where the vast majority of funds were misappropriated prior to the Respondent becoming registered.[30] The fact that in this case the Respondent misappropriated funds from a client's line of credit, as opposed to their invested funds, does not change the analysis regarding the appropriateness of the penalty.

[56] Accordingly, the MFDA panel erred when it declined to order disgorgement on the basis that it would constitute improper punishment.

C. If the MFDA panel did commit a reviewable error, what is the appropriate remedy?

[57] MFDA Staff submits that if the Commission decides to grant MFDA Staff's application, then the Commission ought to substitute its own decision for that of the MFDA panel. MFDA Staff submits that there is no further evidence nor argument to make in respect of the appropriate penalty, and as a result there is no reason to refer the matter back to the MFDA panel.

[58] MFDA Staff seeks an order imposing a fine of $52,270 against the Respondent. MFDA Staff submits that at a minimum, a fine of $32,270 should be ordered against the Respondent, reflecting disgorgement of the Respondent's profit from his misconduct less $7,000 that the Respondent has repaid to the Bank as part of the Proposal. However, MFDA Staff submits that an additional financial penalty of $20,000 above the amount taken from the client's line of credit without authorization should be imposed given the egregious nature of the Respondent's misconduct and the need for general deterrence as well as disgorgement in the circumstances. MFDA Staff submits that requiring the Respondent to merely disgorge the amount taken would be insufficient to deter similar misconduct. MFDA Staff submits that ordering the Respondent to disgorge the amounts misappropriated plus an additional fine of $20,000 for general deterrence would also be consistent with relevant MFDA precedents.

[59] OSC Staff submits that it would be appropriate for the Commission to substitute its own decision for that of the MFDA panel. OSC Staff submits that the facts before the MFDA panel were comprised entirely of an Agreed Statement of Facts and that as a result the Commission is in possession of all the necessary facts to substitute its decision. OSC Staff submits that imposing some financial sanctions

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[28] *North American Financial Group Inc v Ontario Securities Commission,* 2018 ONSC 136 at para 218
[29] *Hothi (Re),* 2020 LNCMFDA 187 at paras 23, 44 and 48
[30] *Lam (Re),* 2019 LNCMFDA 23 at paras 13 and 32-33

against the Respondent is appropriate in the circumstances but takes no position on the quantum or allocation of the sanctions that should be ordered.

[60] On an application for a hearing and review of a MFDA decision, the Commission can substitute its own decision in instances where it finds that the MFDA panel has erred. I find that this is an appropriate situation to do so.

[61] In reaching a decision on the appropriate penalty, I weighed a number of factors that included:

- the seriousness of the allegations that have been proved;
- the Respondent's experience in the marketplace;
- the level of the Respondent's activity in the marketplace;
- whether or not there has been any recognition by the Respondent of the seriousness of the improprieties;
- whether the misconduct was isolated or recurrent and part of a pattern of misconduct;
- whether there are any mitigating factors that should be considered;
- whether or not the sanctions may deter the Respondent and other like-minded individuals from engaging in similar abuses of the capital markets in the future;
- the size of any profit (or loss avoided) from the illegal conduct; and
- the Respondent's ability to pay any monetary sanctions.

[62] I also consider the following principles applicable to sanctions:

- the protection of the investing public;
- the integrity of the securities market;
- specific and general deterrence;
- the protection of the governing body's membership; and
- the protection of the integrity of the governing body's enforcement processes.

[63] The only aspect of the Decision which I found appropriate to substitute was the MFDA panel's failure to impose a monetary penalty. Accordingly, the factors of the seriousness of the misconduct, the protection of the investing public, specific and general deterrence, and the Respondent's ability to pay were the primary factors in my decision.

[64] While I sympathise with the Respondent's apparent financial difficulties and accept that he was in my view, genuinely contrite and remorseful, to the extent that those factors are relevant, the other factors far outweigh them, and disgorgement must be ordered in order to achieve the goals of appropriate sanctions.

[65] Part II of the MFDA Sanction Guidelines lists types of sanctions that an MFDA hearing panel may impose and states the following with respect to fines:

> Fine
>
> A fine is a monetary sanction imposed on a Member or an Approved Person found to be in contravention of MFDA By-laws, Rules and Policies. Fines are frequently imposed in disciplinary proceedings, but are not required in all cases. Generally, the amount of a fine should, at a minimum, have the effect of disgorging the amount of the financial benefit received by the Respondent as a result of the misconduct.[31]

[66] I find that this is an appropriate case to impose such a fine. Accordingly, I order that a fine of $32,270 be imposed, representing disgorgement of the amounts obtained by the Respondent through his misconduct, which had not been repaid.

[67] MFDA Staff also requested that I impose an additional amount to the fine, in the amount of a minimum of $20,000, representing an administrative penalty.

[68] Section 24.1.1 of the MFDA By-Laws provides the forms of sanctions that can be awarded against an Approved Person.[32] Pursuant to that section, a MFDA panel can order a fine that is the greater of either $5 million or three times the amount of profit obtained or loss avoided by the wrongdoer's misconduct. OSC Staff submits that in instances where the wrongdoer has expressed genuine remorse for their actions, the maximum penalty may not be appropriate. MFDA Staff did not oppose this submission but added that remorse is not sufficient to bring the penalty below the minimum (in this case, disgorgement of the amounts obtained) and maintained that an additional penalty of $20,000 was appropriate in the circumstances.

[69] I agree that an additional fine to the disgorged amount is appropriate in this case. The seriousness of the misconduct and the principles of public protection and deterrence require a more onerous financial penalty than simply disgorgement. I substitute my decision for that of the MFDA panel in this regard and impose a fine of $20,000 in addition to the disgorgement.

IV. CONCLUSION

[70] For the above reasons, I find that the MFDA panel erred in failing to impose a financial penalty on the Respondent. I therefore impose a financial penalty of $52,270 in addition to the other sanctions set out in the decision, which will remain undisturbed.

Dated at Toronto this 5th day of October, 2021.

"*Lawrence P. Haber*"
Lawrence P. Haber

[31] *Sanction Guidelines* at 6
[32] Mutual Fund Dealers Association of Canada, *By-Law No 1*