**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Re Eisenberg, 2022 ABASC 22** **Date: 20220315**

**Tamar Michelle Eisenberg**
**Appeal of Mutual Fund Dealers Association Decision**

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|---|---|
| **Panel:** | Tom Cotter<br>Steven Cohen |
| **Representation:** | W.E. Brett Code, Q.C.<br>Gillian Broadbent<br>for Tamar Michelle Eisenberg and Portfolio Strategies Corporation<br><br>Shelly Feld<br>Sakeb Nazim<br>for the Mutual Fund Dealers Association |
| **Submissions Completed:** | January 7, 2021 |
| **Decision:** | March 15, 2022 |

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## I. INTRODUCTION AND OVERVIEW

[1] Tamar Michelle Eisenberg (**Eisenberg**) is a registered mutual fund salesperson (now known as a "Dealing Representative" or **DR**) subject to the jurisdiction of the Mutual Fund Dealers Association of Canada (the **MFDA**). The MFDA is a self-regulatory organization (**SRO**) recognized by the Alberta Securities Commission (the **ASC**) under s. 64 of the *Securities Act* (Alberta) (the **Act**): see *Re MFDA/ACFM*, 2018 ABASC 53 and 2021 ABASC 32.

[2] Under the oversight of the ASC, the MFDA is responsible for regulating the operations, standards of practice, and business conduct of mutual fund dealing firms and Dealing Representatives (which are described in MFDA By-law No. 1 as "Members" and "Approved Persons", respectively).

[3] On July 27, 2020, a hearing panel of the MFDA's Prairie Regional Council (the **MFDA Panel** or **Panel**) rendered a decision and imposed penalties against Eisenberg relating to conduct contrary to MFDA Rules and her previous Member firm's policies and procedures (the **MFDA Decision** or **Decision**). As both the Act and MFDA By-law No. 1 provide that appeals from MFDA decisions are to be heard by the ASC, Eisenberg submitted a notice of appeal from the Decision to the ASC Registrar on August 6, 2020 (the **Notice of Appeal** and the **Appeal**, respectively). Her current Member firm, Portfolio Strategies Corporation (**PSC**), applied for status as an intervenor on the Appeal (for convenience, in these reasons we sometimes refer to Eisenberg and PSC collectively as the **Applicants**).

[4] We received written submissions from Eisenberg and PSC on September 22, 2020, as well as an amended version on December 18, 2020 (referred to collectively as the **Appeal Submissions**). We received written submissions from staff counsel for the MFDA (**MFDA Staff** or **Staff**) on October 16, 2020. We also received the record of the proceedings before the MFDA Panel (the **Record**) and affidavit evidence from the parties that is discussed later in these reasons. We heard oral argument on January 7, 2021 (the **Appeal Hearing**).

[5] For the reasons set out below, we allow the Appeal in part and set aside the term of suspension ordered against Eisenberg in the Decision. The orders directing Eisenberg to pay a fine of $15,000 and costs of $5000 to the MFDA are confirmed, as is the order directing Eisenberg to comply with MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1 in the future.

[6] We also allow PSC's application to intervene in the Appeal and the admission of all of the affidavit evidence submitted by the parties.

## II. BACKGROUND

[7] Eisenberg has been registered as a mutual fund salesperson or DR since 1999. She was registered in Alberta with Desjardins Financial Security Investments Inc. (**Desjardins**) from June 2006 through May 2009. Like PSC, Desjardins is a "Member" of the MFDA, as defined in MFDA By-law No. 1. Eisenberg resigned from Desjardins in May 2009 and joined PSC in June 2009, where she has remained since.

[8] On June 7, 2019, MFDA Staff issued a notice of hearing (the **NOH**) alleging that:

In or around February 2009, [Eisenberg] engaged in securities[-]related business that was not carried on for the account, or through the facilities of the Member by recommending, referring, or facilitating the sale of shares totaling $40,000 in a mortgage investment corporation to one client, contrary to the Member's policies and procedures and MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1 [the **Allegation**].

[9] The relevant parts of the MFDA Rules referenced in the NOH state:

**1.1.1 Members**

No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities[-]related business (as defined in By-law 1.1) except in accordance with the following:

a. all such securities[-]related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules . . .

b. all revenues, fees or consideration in any form relating to any business engaged in by the Member is paid or credited directly to the Member and is recorded on the books of the Member;

c. the relationship between the Member and any person conducting securities[-]related business on account of the Member is that of:

   i. an employer and employee, in compliance with Rule 1.1.4,

   ii. a principal and agent, in compliance with Rule 1.1.5, or

   iii. an introducing dealer and carrying dealer, in compliance with Rule 1.1.6;

. . .

**1.1.2 Compliance by Approved Persons**

Each Approved Person who conducts or participates in any securities[-]related business in respect of a Member in accordance with Rule 1.1.1(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.

**2.1.1 Standard of Conduct**

Each Member and each Approved Person of a Member shall:

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

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

c. not engage in any 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 described in this Rule 2.1.1, or as may be prescribed by the [MFDA].

**2.5.1 Member Responsibilities**

Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.

[10] "[S]ecurities[-]related business" as mentioned in MFDA Rule 1.1.1 is defined in s. 1 of MFDA By-Law No. 1 as "any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities for the purposes of applicable securities legislation in any jurisdiction in Canada".

[11] At the hearing before the MFDA Panel on June 24, 2020 (the **MFDA Hearing**), Staff introduced into evidence an affidavit sworn by an MFDA investigator on March 3, 2020 (the **West Affidavit**). From the West Affidavit and other evidence led at the MFDA Hearing, the Decision summarized the facts that gave rise to the Allegation:

- From June 2006 to May 2009, Eisenberg was registered with Desjardins as an Approved Person. In addition to the requirements of MFDA Rules 1.1.1 and 1.1.2, Desjardins' policies and procedures required that its Approved Persons only engage in securities-related business through Desjardins.

- TG became a Desjardins client in approximately March 2009, and Eisenberg looked after her account.

- Prior to that, in approximately February 2009, TG said that she told Eisenberg she wanted to put $40,000 into a low-risk investment she could redeem on short notice so she could use the funds towards a down payment on a house. Without Desjardins' knowledge or approval, Eisenberg recommended that TG buy shares in CareVest Blended Mortgage Investment Corporation (**CareVest** and the **Original CareVest Shares**, respectively) on the understanding that the shares could be redeemed on short notice as TG required.

- Eisenberg obtained CareVest's marketing materials, gave them to TG, and completed TG's subscription agreement. However, TG's purchase of the Original CareVest Shares was not carried on for the account or through the facilities of Desjardins.

- In approximately December 2012, CareVest underwent a corporate restructuring. It amalgamated the Original CareVest Shares with other CareVest products and reclassified them as CareVest Mortgage Investment Corporation Class A shares (the **CareVest Class A Shares**). Following the amalgamation, the ability of shareholders to retract their CareVest Class A Shares became subject to limits: they could submit requests once every 12 months at a specific time of year, and only a certain number of CareVest Class A Shares could be retracted on each occasion.

- In 2013, TG wanted to purchase a house but was unable to redeem her CareVest Class A Shares. She was therefore unable to use her investment funds to make her down payment as planned. Since she had no other savings apart from unspecified amounts in a retirement savings plan, she testified that she had to borrow money from her partner's parents for her down payment.

- In June 2017, TG submitted a complaint to the MFDA about Eisenberg's recommendation eight years earlier that she invest in CareVest. She has had difficulty retracting her funds over the years, and as of December 2019, had only been able to retrieve approximately $22,877 of her original $40,000 investment. She testified that she had noticed the size of the retractions permitted seemed to decline each year, and she was concerned she would never be able to retract her remaining funds or sell the investment to anyone else.

[12] In her reply to the NOH dated July 2, 2019, Eisenberg initially took the position that: (a) in February 2009, TG was not (yet) her "client", and (b) she had not "recommended" that TG purchase the Original CareVest Shares as alleged. According to Eisenberg, TG was a personal friend, and while she had assisted TG informally on occasion with various matters including TG's personal finances, she had never been compensated for it.

[13] However, prior to the MFDA Hearing, Eisenberg filed written submissions in which she admitted the Allegation as set out in the NOH. She argued that the appropriate sanction against her would be a fine of $15,000, plus costs of $5000. In response, MFDA Staff filed written submissions indicating that since the Allegation had been admitted, the only issue remaining for determination was sanction. They argued that in addition to the fine and costs Eisenberg suggested, she should also be suspended from conducting securities-related business in any capacity for six months.

[14] On July 27, 2020, the MFDA Panel issued its Decision finding that Staff had proved the Allegation. It ordered that Eisenberg:

(i) was suspended from conducting securities-related business in any capacity while in the employ of or associated with any Member of the MFDA for a period of three months;

(ii) must pay a fine in the amount of $15,000 and costs in the amount of $5000; and

(iii) must in the future comply with MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1.

[15] Shortly after the Decision was issued, Eisenberg submitted her Notice of Appeal to the ASC. In correspondence to the ASC Registrar, PSC stated that as a party directly affected by the Decision, it sought to join the Appeal as either a party or an intervenor.

[16] According to the Notice of Appeal, the Decision was incorrect in fact and law, and the sanctions ordered were disproportionate to the misconduct and the resulting harm. The Applicants contended that a suspension of any length was unjustified in the circumstances, and would cause

irreparable harm to both Eisenberg and PSC. Moreover, the suspension was contrary to the public interest as represented by Eisenberg's clients, many of whom rely on her and do not want to replace her. The Notice of Appeal also indicated that MFDA Staff originally advised Eisenberg that they would be seeking a three-month suspension, and the Panel erred by allowing Staff to change their position at the last minute and seek a six-month suspension instead.

[17] With the agreement of the parties, on August 10, 2020, we issued an order staying the sanctions pending the issuance of these reasons for decision on the Appeal, or the issuance of a further order varying or revoking the stay (the **Stay Order**). We further ordered that during the term of the stay, Eisenberg would be subject to PSC's close supervision in accordance with Canadian Securities Administrators Staff Notice 31-349 *Change to Standard Form Reports for Close Supervision and Strict Supervision Terms and Conditions*.

[18] On September 22, 2020, we received an affidavit sworn on September 21, 2020 by the President and Chief Executive Officer of PSC, Mark Kent (**Kent** and the **September Kent Affidavit**, respectively). The September Kent Affidavit was submitted in support of PSC's application to join the Appeal and clarified that PSC sought status as an intervenor rather than as a party.

[19] In opposition to PSC's application, MFDA Staff submitted a response affidavit sworn on October 15, 2020 by its Manager of Membership Services, Candace Marshall (**Marshall** and the **Marshall Affidavit**, respectively). While there was some indication before the Appeal Hearing that the parties might seek to cross-examine each other's affiants, neither did so. However, on November 20, 2020, Kent swore a further affidavit in reply to the Marshall Affidavit (the **November Kent Affidavit**, and together with the September Kent Affidavit, the **Kent Affidavits**).

[20] We determined that we would rule on PSC's application to intervene and the use of the affidavit evidence when we decided the Appeal. Our reasons for decision are set out herein.

## III. THE MFDA HEARING AND DECISION

[21] Both Staff and Eisenberg were represented by legal counsel at the MFDA Hearing, and both TG and Eisenberg provided oral evidence. Each party also provided documentary evidence, including the aforementioned West Affidavit that was submitted by Staff. Eisenberg's counsel had but declined the opportunity to cross-examine on the affidavit.

[22] At the outset of the MFDA Hearing, Staff counsel advised the Panel that because Eisenberg had admitted the Allegation in her written submissions, the hearing could proceed as a penalty hearing. Since the parties agreed on the appropriate fine and costs, the sole remaining issue was whether or not a suspension was warranted and, if so, for how long.

[23] However, when Eisenberg testified, she stated that TG was not her client when TG purchased the Original CareVest Shares and that she had not advised or recommended that TG proceed with the investment. She said TG was a personal friend at the time, and while Eisenberg acknowledged that she did her friend a favour by giving her some information about CareVest and helping her with the paperwork, she did not feel that she had given a recommendation.

[24] In the Decision, the MFDA Panel indicated that as a result of this testimony, it had to review the Allegation with Eisenberg at the MFDA Hearing to clarify whether she intended to resile from the admission made in her written submissions. After some discussion between Eisenberg and the Panel chair about wording, Eisenberg confirmed that she was admitting the Allegation as framed in the NOH. The Panel was therefore satisfied that the only issue for determination was sanction.

[25] Before turning to its analysis, the MFDA Panel reviewed the law setting out the factors and principles to be applied when determining an appropriate regulatory penalty. It cited the decision of the Alberta Court of Appeal (the **ABCA**) in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273, as well as the MFDA Sanction Guidelines dated November 15, 2018 (the **MFDA Sanction Guidelines**) and prior MFDA sanction decisions. It identified the following factors from the MFDA Sanction Guidelines as particularly relevant to the matter before the Panel:

- the seriousness of the misconduct and whether Eisenberg recognized its seriousness;
- the harm suffered by the investor, TG;
- the need to maintain public confidence;
- the need for specific and general deterrence; and
- the guidance provided by previous decisions made in similar circumstances.

[26] Applying these factors, the Panel concluded that Eisenberg's misconduct was serious. It found that conducting business without the knowledge or approval of a DR's Member firm undermines the regulatory regime, exposes clients to potential harm, and can bring the mutual fund industry into disrepute, because the Member cannot supervise the transactions and assess their suitability for the investors involved. Eisenberg said during her investigative interview with the MFDA that one reason she did not feel she had "recommended" the investment to TG was because she knew little about the product and therefore was not in a position to discuss its risks. From this and its finding that Eisenberg knew TG was reasonably relying on her as a financial advisor, the Panel concluded that Eisenberg's conduct constituted reckless behaviour.

[27] Eisenberg testified that at the time of TG's investment, she did not know that her conduct was a breach of the MFDA's Rules. She was not compensated for the trade and said that TG made her own investment decision. However, the MFDA Panel concluded that Eisenberg either knew or ought to have known of the MFDA's and her Member firm's requirements.

[28] The Panel observed that even though Eisenberg was not compensated for the trade and therefore received no direct financial benefit from it, she had not yet suffered any financial or professional consequences from her misconduct – for example, sanctions imposed by her firm.

[29] By contrast, the Panel was satisfied that TG suffered and would continue to suffer "dire consequences" and "significant financial harm". In the Panel's view, this included emotional and social harm: TG was left with an investment that was tied up indefinitely, lost an opportunity to use her savings to increase her home equity or make other real estate investments, had to borrow money from her partner's retired parents, was unable to pay down a mortgage as her peers were doing, and did not have the opportunity to travel.

[30] The Panel concluded that in addition to the personal harm suffered by TG, Eisenberg's misconduct harmed the integrity and reputation of the mutual fund industry. TG testified that she no longer trusts financial advisors. The Panel found that this underscored the need for specific and general deterrence. In its view, the imposition of a significant penalty would warn Eisenberg and other industry participants that serious consequences will follow from circumventing a Member's supervisory processes. This would ensure that the public would be protected and maintain confidence in the regulatory system.

[31] The MFDA Panel acknowledged that there were several mitigating factors in Eisenberg's favour. It accepted her expression of remorse and her evidence that she suffered an emotional toll from the expense and negative publicity from the MFDA proceedings. She received no benefit from her misconduct and had no history of professional discipline. She saved time and expense for the MFDA by agreeing that only sanction was in issue. The Panel acknowledged Eisenberg's testimony that she considered offering to buy TG's CareVest Class A Shares to alleviate the harm, but found that this had no mitigating effect because she never acted on the thought.

[32] The Panel also found that Eisenberg did not recognize the seriousness of her misconduct. It mentioned her "ambivalent attitudes" and "conflicting testimony" as to whether she committed the alleged misconduct, leaving the Panel "in doubt as to whether [she] has yet unequivocally accepted and fully recognized the seriousness of her misconduct". The Panel concluded that Eisenberg had mischaracterized the financial harm to TG as a mere inconvenience, which also left it "in doubt as to whether she fully recognizes the seriousness of the consequences of her misconduct".

[33] In considering prior decisions, the MFDA Panel noted that both parties referenced several cases in support of their respective positions on sanction, but none of the cases was on "all fours" with this case. However, the Panel discerned a number of additional considerations that were factored into the analysis in those cases, including whether:

- the client was content with the investment regardless of the misconduct,
- the client had complained to the Member or to the MFDA about the misconduct,
- a suspension would prevent the respondent from returning to work in the industry,
- the respondent had an honest but mistaken belief that the misconduct was not contrary to MFDA Rules, and
- a suspension would prevent or impair the respondent's ability to pay any monetary sanctions.

[34] Both parties cited *Re Kruss*, 2010 CanLII 85819. In that case, the respondent engaged in securities-related business that was not carried on for the account of or through the facilities of his Member firm by selling, referring, or facilitating the sale of $50,000 in investments to one client on two occasions. The client lost her entire investment, whereas the respondent received a $4000 commission. The parties settled and agreed that the sanction would include a one-month suspension, a fine of $10,000, costs of $2500, and an order that the respondent reimburse the client $50,000.

[35] Although the MFDA Panel noted that *Kruss* involved the same type of misconduct and a similar investment amount (described as "the amount of the loss"), it viewed Eisenberg's misconduct as more serious because of the "extent and ongoing nature of the financial harm" to TG. Even though Eisenberg did not receive a commission as had the respondent in *Kruss*, she did not repay any of TG's financial loss. The Panel also pointed out that the penalty was contested in this case, not settled as in *Kruss*. Because it received evidence from the complainant, the Panel concluded that it had more information about the circumstances and the impact of the misconduct than the *Kruss* panel would have.

[36] Similarly, the MFDA Panel distinguished the cases cited by Eisenberg in support of her contention that a suspension was unwarranted. It emphasized that in those cases the respondents repaid the clients, had been subject to discipline by the Member (including monetary penalties), were placed under a period of close supervision, invested in the same product and also lost money, were led to believe their conduct was not wrongful by their Member firm's branch manager, or were impecunious – factors the Panel found inapplicable here.

[37] In concluding that Eisenberg should be suspended for three months, the Panel referred to the MFDA Sanction Guidelines, which it said recommended a suspension if "the misconduct in question undermines the regulatory regime, caused some measure of harm to the integrity of the securities industry as a whole and brings the mutual fund industry into disrepute". In the Panel's view, that type of harm occurred in this case.

[38] The Panel acknowledged Eisenberg's testimony that PSC's management told her no one else from the firm would be able to cover for her and assist her clients in her absence during a suspension, and that she feared that her clients would be prejudiced because they would not receive proper service during that time. Nonetheless, the Panel concluded that "there are many competent Approved Persons capable of serving her clients for such an interval, even if associates in her own Member are unable or unwilling to assist her".

[39] Likewise, Eisenberg testified that she believed a suspension would effectively end her career in the investment industry, but the MFDA Panel did not accept her evidence. The Panel pointed out that based on certain letters in evidence, PSC and at least one client continued to support her.

[40] Eisenberg also testified that a large fine would be a substantial hardship for her because she only earned approximately $50,000 per year and would have to use retirement savings to pay a fine and costs (especially if she earned no income during a term of suspension). Regardless, the Panel said that it was not satisfied that a suspension would prevent Eisenberg from paying, because she had retirement funds and had not asked for time to pay.

[41] In the result, the MFDA Panel found that the package of sanctions imposed would achieve the necessary goals of specific and general deterrence, was proportionate to the range of sanctions in similar cases, and would foster the public's confidence in the integrity of the financial industry and the Canadian capital market.

[42] Citing *Walton*, the Panel further concluded that the sanctions did not breach the principles set out by the ABCA, and were not objectively "crushing or unfit".

## IV. ISSUES

[43] The issues for our determination on this Appeal are:

(a) PSC's standing as an intervenor;

(b) the admissibility of the affidavit evidence submitted by the parties on the intervenor application as new evidence on the merits of the Appeal;

(c) the standard of review to be applied; and

(d) whether the sanctions imposed against Eisenberg by the MFDA Panel should be varied.

## V. APPLICATION FOR STANDING AND ADMISSION OF NEW EVIDENCE

[44] Since the first two issues identified above are related, we consider them together in this section of our reasons.

### A. The Evidence and Arguments of the Parties

[45] As mentioned, in support of its application to intervene, PSC submitted the September Kent Affidavit. PSC stated that its application was brought pursuant to s. 6.1 of ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (**Rule 15-501**):

> When a non-party requests to be designated as a party to a proceeding or to be heard by a panel during a proceeding, the panel may consider the following in determining whether or not to grant the request:
>
> (a) the nature of, and the issues raised in, the proceeding;
>
> (b) the extent to which the non-party will be affected by the proceeding;
>
> (c) the likelihood that the non-party will make a useful contribution to the proceeding;
>
> (d) any delay or prejudice to the parties; and
>
> (e) any other factor the panel considers relevant.

[46] PSC argued that the nature of the issues under appeal is such that it will be directly affected by the outcome. According to Kent, suspending Eisenberg means that her clients – who are also PSC's clients – will most likely be without service during her absence. This would not only harm the clients, it could also have a drastic impact on PSC's business, as the clients may either leave PSC, or PSC will be required to spend time and resources permanently reassigning their accounts to other Approved Persons.

[47] PSC further argued that it would make a useful contribution to the Appeal by providing additional information that would assist us in reaching our decision. A panel of the Ontario

Securities Commission (the **OSC**) described a "useful contribution" in *Re Hollinger Inc.*, 2005 LNONOSC 858 (at para. 48):

> When deciding if a proposed intervenor will make a useful contribution to the proceedings, the [OSC] will consider whether the proposed intervenor will advance arguments or evidence that would not otherwise be presented. In *MacMillan Bloedel Ltd. v. Mullin*, [1985] B.C.J. No. 2076 (C.A.) . . . at paragraph 9, the British Columbia Court of Appeal said that a successful intervenor should "bring a different perspective to the issue before the Court". [The OSC] held in [*Re Albino*, (1991), 14 O.S.C.B. 365] that where an existing party can adequately advance a position, then interventions may be neither helpful nor necessary.

[48] PSC submitted that the evidence in the Kent Affidavits would not otherwise be before us. That evidence corroborates Eisenberg's testimony at the MFDA Hearing about the unavailability of anyone else at PSC to look after her clients in her absence, which the Panel did not accept. Kent confirmed that PSC does not have anyone who can temporarily take over, travel, and provide service to Eisenberg's 110 clients, many of whom are elderly and live in various places around Alberta. Kent deposed that unlike most PSC DRs, Eisenberg is also qualified as an exempt market dealer dealing representative. This difference presents another obstacle to finding someone who could look after Eisenberg's accounts during a suspension.

[49] According to Kent, a commission-based financial advisor – whether working for PSC or another firm – would not be willing to take on the work and the associated liabilities of someone else's clients for three months while receiving little or no personal benefit or compensation. Another advisor would want the clients on a long-term basis, which is why he and PSC's chief compliance officer told Eisenberg they thought a long suspension would end her career.

[50] PSC argued that this evidence is important to the Appeal because the MFDA Panel did not accept Eisenberg's testimony on the subject, even though it was not challenged by MFDA Staff and there was no evidence to the contrary. In PSC's view, the Panel erroneously concluded that there were many Approved Persons who could assist Eisenberg's clients during her absence, and therefore a suspension would not harm PSC, its clients, or the public interest.

[51] MFDA Staff tendered the Marshall Affidavit, which set out the number of PSC's Approved Persons working at its numerous offices across the country as of October 1, 2020. This included 121 in Alberta, 52 of whom were Alberta residents registered as exempt market dealer DRs.

[52] PSC argued that this information is not determinative of whether it has personnel who can cover for Eisenberg during a protracted absence. In its view, Marshall erroneously assumed that PSC's other exempt market dealer DRs would be willing and able to assist Eisenberg's clients temporarily. In the November Kent Affidavit, Kent deposed that all of PSC's advisors are occupied with their own client loads. Most of its advisors do not live within reasonable travelling distance of Eisenberg's clients, and PSC's business model does not provide an incentive for advisors to take over another advisor's clients temporarily.

[53] The September Kent Affidavit included copies of six letters of support for Eisenberg, signed on behalf of eleven of her clients. Kent deposed that the letters demonstrated how much Eisenberg's clients rely on her – especially during the uncertainties associated with the COVID-19

pandemic – and do not want to replace her. In his opinion, the MFDA Panel should have considered these concerns before clients were deprived of their advisor. He further deposed that PSC has never received any complaints about Eisenberg, has never had any concerns about her, and does not consider her to be a risk of harm to the public or the public interest.

[54] With reference to the final factor for consideration under s. 6.1 of Rule 15-501, PSC argued that granting it standing in this proceeding would not cause delay or prejudice the parties.

[55] In opposition to PSC's application, MFDA Staff submitted that a Member's intervention in a matter such as this is not necessary, because the case does not have broad implications for the public interest or the industry as a whole. They pointed out that most, if not all, disciplinary decisions against an Approved Person will have incidental effects on the Approved Person's Member firm, but this has not been a basis for standing in past proceedings.

[56] In Staff's submission, the scope of this Appeal is narrow and personal to Eisenberg, and though PSC may be incidentally affected by its outcome, it will not be "directly affected" in a manner that would justify its intervention. They relied on *Re Investment Dealers Association*, 2001 BCSECCOM 49, in which the British Columbia (**B.C.**) Securities Commission (the **BCSC**) concluded that the phrase "directly affected" includes only those who are parties to the proceeding or those to whom the terms of the order or decision under consideration relate (at para. 13, cited with approval in *Re Ironside*, [2002] A.S.C.D. No. 158 at paras. 74-75).

[57] MFDA Staff also argued that PSC will not make a useful contribution to this Appeal. They noted that in *Re Lutheran Church – Canada, the Alberta-British Columbia District*, 2019 ABASC 43 (at para. 70), the ASC panel cited *Hollinger* in finding that a non-party seeking standing makes a "useful contribution" if the non-party can advance evidence or arguments that would not otherwise be before the decision-maker. In *Lutheran Church* only the non-parties who could bring a different perspective and make different arguments than the parties were granted standing. Staff emphasized that PSC is represented by the same counsel as Eisenberg, advances the same arguments, and relies on the same submissions. Accordingly, its participation would not be useful.

[58] MFDA Staff further argued that even if PSC's application to intervene is granted, the Kent Affidavits should not be admitted into evidence on the Appeal. They cited the ABCA in *Jonsson v. Lymer*, 2019 ABCA 113, which held that even where applications to intervene are granted, the intervenor is not normally permitted to add new evidence to the record unless all parties consent. This is because a contested application for new evidence and potential cross-examination on new affidavits generally prejudices the existing parties and creates delay.

[59] In Staff's view, the Kent Affidavits do not meet the test for admission of fresh evidence on an appeal from an SRO decision, as their content is neither new nor compelling as described by the OSC panel in *Re Hahn Investment Stewards & Co. Inc.*, 2009 LNONOSC 752. According to the *Hahn* decision, evidence is new if it is "information that was not known to the party purporting to introduce it as new at the time of the SRO's decision", and it is compelling if it "would have changed the SRO's decision, had it been known at the time of the decision" (at paras. 197-198).

[60] MFDA Staff also cited *Re Northern Securities Inc.*, 2013 LNONOSC 1023. There the OSC panel referred to *Hahn* in considering a new evidence application submitted further to its hearing and review of an Investment Industry Regulatory Organization of Canada (**IIROC**) decision. The proposed new evidence included evidence about the impact of the sanctions ordered against the applicants by the IIROC panel.

[61] The OSC panel found that the evidence was neither new nor compelling. It noted that the evidence concerning the impact of the sanctions ordered could have been submitted in the first instance, since the applicants were aware that the impact of any potential sanctions was in issue. In addition, the panel said, "we do not accept that, as a general principle, a respondent should be entitled after the imposition of sanctions to submit new evidence as to the impact that those sanctions would have on the respondent" (at paras. 29-34).

[62] From these decisions, MFDA Staff argued that the evidence in the Kent Affidavits was neither new nor compelling. Eisenberg and PSC were both aware at the time of the MFDA Hearing that a suspension was a possibility, and could have adduced that evidence then.

[63] Staff contended that the Kent Affidavits amount to "bald assertions" that PSC would not be able to attend to Eisenberg's clients during her suspension. Eisenberg made the same assertions at the MFDA Hearing without effect, and there was no reason to think the Panel would have found them more persuasive coming from Kent. Staff therefore submitted that Eisenberg's counsel could make the same arguments on this Appeal without the Kent Affidavits.

**B. Analysis and Conclusion**

[64] In *Lutheran Church*, an ASC panel reviewed the law concerning applications by non-parties for leave to be heard during a proceeding. It noted that the factors set out in s. 6.1 of Rule 15-501 are essentially a codification of principles from the case law on applications for standing, and are intended to guide a panel's exercise of discretion (at paras. 67-68). A panel should take into account the specific facts and circumstances of both the proceedings and the applicant.

[65] We accept that the Appeal and the primary issue raised – whether Eisenberg's suspension should be upheld – will affect PSC in the manner that Kent described: if Eisenberg is suspended for three months, her clients may either leave PSC, or PSC will have to dedicate resources to reassigning them to other DRs if possible. In *Re HudBay Minerals Inc.* (2009), 32 O.S.C.B. 3733, an OSC panel observed (at para. 73):

> Where a decision affects an applicant's rights or economic interests, the [OSC] has found that such an applicant is "directly affected" by the decision . . . . The [OSC] will also consider whether an applicant has a personal and individual interest in the decision and its effects, as distinct from a general interest . . . [citations omitted].

[66] The *HudBay* panel concluded that the applicant should be given standing because its economic interests were directly affected by the decision under review (at para. 74).

[67] Although PSC may not be directly affected in the manner described in *Investment Dealers Association* or *Ironside*, that is not a requirement under s. 6.1 of Rule 15-501 (which was promulgated after *Ironside*). Section 6.1 provides that we consider, among the other factors listed,

"the extent to which the non-party will be affected by the proceeding". This recognizes that there are degrees of impact, and is different from the statutory condition at issue in *Investment Dealers Association* and *Ironside*. In those cases, individuals sought to initiate proceedings under statutory provisions that specifically limit applicants (in B.C.) and appellants (in Alberta) to those "directly affected" by the decision below. PSC's application for standing as an intervenor is not governed by such a provision.

[68] We agree with PSC that granting it standing in this Appeal would not cause undue delay or prejudice. As MFDA Staff pointed out, PSC is represented by the same counsel as Eisenberg. Other than the application for standing, there were no separate submissions that took additional time. Neither Staff nor PSC found it necessary to cross-examine on the other party's affidavit(s). Moreover, Staff did not complain about delay or suggest they would be prejudiced by PSC's participation.

[69] We are also satisfied that PSC will make a useful contribution to our determination of this Appeal. PSC will be affected by the outcome, but we agree with MFDA Staff that the impact of an individual registrant's discipline on the Member firm is not typically relevant when deciding sanction. It is the public interest that is of primary concern, and in these circumstances, Eisenberg's clients represent a segment of the public whose interests are relevant to our consideration of the MFDA Decision.

[70] We find the evidence contained in the Kent Affidavits – and, to a lesser extent, the rebuttal evidence in the Marshall Affidavit – helpful in this regard. It informs the public interest and would not otherwise be before us. It includes Kent's direct corroboration of Eisenberg's testimony that there is no one available to assist her clients in her absence and that a lengthy suspension could end her career. His evidence also confirms the unique characteristics of some of Eisenberg's clientele: elderly investors uncomfortable with technology who rely on her to travel to see them at their homes throughout Alberta. This helps us understand the impact of her suspension and whether the MFDA Decision was in the public interest and reasonable in the circumstances.

[71] Though Eisenberg gave similar evidence at the MFDA Hearing based at least in part on what she said she had been told by her superiors, we are satisfied that through Kent, PSC brings a different perspective. Staff disparaged Kent's evidence as "bald assertions", but we find that his evidence is based on his direct knowledge of PSC and its business model, given his position as the head of the firm.

[72] Eisenberg testified about her willingness to help a colleague in a similar position, but Kent has the most direct knowledge of what PSC could do to support her clients during a suspension. Kent knows the firm's Approved Persons, their capacity to offer assistance, and their willingness to do so without compensation. This is very different from *Investment Dealers Association*, where a client sought to bring an application for a hearing and review, and from *Ironside*, where a complainant applied to appeal a decision not to pursue enforcement action against a third party.

[73] Kent's evidence that PSC has no concerns about Eisenberg and does not consider her a risk to the public is also useful in determining public interest considerations.

[74] In our view, the ABCA's position on the submission of new evidence by an intervenor on an appeal to that court (as discussed in *Jonsson*) does not apply here. Such applications are brought under the Alberta *Rules of Court*, Alta. Reg. 124/2010 (as amended), and different rules of procedure govern ASC hearing panels.

[75] We are to make decisions in the public interest, not adjudicate disputes between private litigants. The primary concern in *Jonsson* appears to have been whether the intervenor's evidence on appeal would prejudice the existing parties (see paras. 25 and 27-29). We considered that issue, but we are more concerned with whether PSC's intervention and Kent's evidence will make a useful contribution to this proceeding, especially as it pertains to the public interest. We are persuaded that it does for the reasons discussed.

[76] The proposition that evidence proposed on appeal must be new and compelling is based on *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3565, and later decisions following it setting out the grounds for a securities commission's intervention on review or appeal from an SRO decision (as discussed in the next section of these reasons). One of those grounds is whether new and compelling evidence is presented to the commission that was not before the SRO.

[77] *Canada Malting* was applied in *HudBay*, where the OSC panel noted that it had broad powers on hearing and review under the *Securities Act* (Ontario) (the **Ontario Act**) – similar to those in ss. 36 and 73 of the Act. The panel held that those powers conferred discretion to admit new evidence if the panel found that the *Canada Malting* test for intervention was satisfied (at para. 111). It went on to explain (at paras. 112-113):

> Our review is not, however, a review only of the information record that was before the TSX when it made its decision. The question we must decide is not whether we would have come to the same conclusion as the TSX based on the information record that was before it. **The question is whether, given all of the information and evidence that is now before us, we have grounds to interfere with the TSX Decision. In our view, we are entitled to consider not only the information and documents that were before the TSX in making its decision but also the additional information and evidence before us on this Application** (recognizing, however, that the [OSC] has the discretion to determine the evidence that it is prepared to admit in a review under section 21.7 of the [Ontario] Act). It is important to note that we have concluded that **we have before us more extensive information, documents and evidence with respect to HudBay, Lundin and the Transaction than the TSX had before it in making the TSX Decision.**
>
> If any additional support for that conclusion is necessary, it can be found in the grounds established by *Canada Malting* for intervention in a decision of the TSX. One of the grounds for intervention established in *Canada Malting* is whether the [OSC] has received new and compelling evidence that was not before the TSX. In the matter before us, we have received what we consider to be new and compelling evidence with respect to HudBay's governance practices relating to the approval of the Transaction that was not before the TSX. **In addition, we are entitled to intervene where our perception of the public interest differs from that of the TSX. The exercise of our public interest jurisdiction requires us to consider all of the relevant evidence before us, not only the information record that was before the TSX at the time it made the TSX Decision.** [emphasis added]

[78] *Northern Securities* referenced some of these statements from *HudBay*, but went on to cite *Hahn*'s interpretation of "new and compelling", noting that generally, the OSC "has taken a restrained approached in exercising its discretion to allow new and compelling evidence to be

tendered" (at paras. 27-28). The *Northern Securities* panel further observed that parties do not have a right to introduce new evidence on an application for hearing and review under the Ontario Act, but may be permitted to do so if the evidence is "new and compelling" within the meaning of *Canada Malting* (at para. 30).

[79] Although *Northern Securities* cited both *HudBay* and *Hahn*, the panel did not comment on the difference between their respective approaches. *HudBay* did not condition the meaning of new and compelling evidence on its prior unavailability. Relying on the *Canada Malting* test for intervention in an SRO decision, it found that all evidence before the reviewing commission ought to be considered if there are diverging perceptions of the public interest.

[80] Though decided after *HudBay*, *Hahn* mentioned *HudBay* only once in passing. One member of the OSC was on both panels, and dissented from the majority reasons in *Hahn* because he did not agree on the new evidence issue. The majority found that the proposed evidence was neither new nor compelling because it existed at the time of the original decision, could have been presented to IIROC then, and would not have changed the result in any event (see paras. 197-200). The dissenting member found otherwise (see paras. 233-234, 248, and 250), but concurred in the result.

[81] *Hahn* has been cited in some later OSC decisions (including *Northern Securities*), but *HudBay* has been more widely cited, including by other ASC panels. No ASC panel appears to have followed *Hahn*, and of course it is not binding on us.

[82] The panel in *Re Hemostemix Inc.*, 2017 ABASC 14, followed *HudBay*. It quoted from *HudBay* and an earlier ASC decision, *TSX Venture Exchange Inc. v. McLeod*, 2005 ABASC 607 (***McLeod #2***), aff'd. 2006 ABCA 231. In the latter, the panel referred to a preliminary decision in the same matter (*TSX Venture Exchange Inc. v. McLeod*, 2005 ABASC 191 (***McLeod #1***), aff'd. 2006 ABCA 231), and a separate panel's conclusion that even though the appeal was on the record, the appellants could "supplement the [r]ecord by adducing their own oral testimony" and any related documentation, subject to relevance (*McLeod #2* at para. 6). The *Hemostemix* panel was therefore satisfied that it had the authority to receive new evidence on the appeal, though it did not end up giving the evidence any weight (at para. 67).

[83] In *McLeod #1*, the panel cited the test for admission of new evidence on appeal to a superior court articulated by the Supreme Court of Canada in *R. v. Palmer*, [1980] 1 S.C.R. 759: "[t]he evidence should generally not be admitted if, by due diligence, it could have been adduced at trial", and should only be admitted if "it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result" (*McLeod #1* at para. 60, citing *Palmer* at p. 775). However, the panel concluded (at para. 64):

> In our view, while the Palmer test can properly be applied in the administrative context, it should not necessarily be applied as strictly in securities regulation cases, **because of our overriding public interest mandate**. That is, while we generally will not allow oral evidence to be presented at an appeal, it may be appropriate to permit such evidence if it is new and compelling. [emphasis added]

[84] This statement from *McLeod #1* is consistent with the *HudBay* panel's comments about the importance of the public interest as a consideration in deciding whether new evidence is admissible. We have the discretion to decide whether evidence outside the record may be admitted on appeal from an SRO decision, but like our discretion to determine whether a party will be permitted to intervene, the exercise of that discretion must be guided by our assessment of the specific facts and issues of the case and the public interest. As noted by the ABCA in *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, in the context of decisions of the Law Enforcement Review Board on appeal, "[t]he starting point is that the appeal is on the record", but there is "an ability to admit new evidence when warranted by the issues on appeal" (at para. 51).

[85] Our decision here should not be construed as an open invitation for Member firms to intervene in registrants' disciplinary proceedings or appeals therefrom. Nor does it mean that evidence outside the record will be routinely admissible on appeal. Here we find that it is in the public interest to allow PSC standing as an intervenor and to admit the Kent Affidavits and the Marshall Affidavit. PSC brings a different perspective, and the Kent Affidavits are pertinent to the public interest and would not otherwise be before us. The Marshall Affidavit provides context for Kent's evidence.

[86] It is not determinative in this case that the evidence could have been provided at the MFDA Hearing. Eisenberg could not have known beforehand that the MFDA Panel would disbelieve her uncontroverted testimony that there is no one to serve her clients if she is suspended. Staff correctly pointed out that the MFDA Panel was not bound to accept Eisenberg's testimony, whether or not there was contrary evidence or a challenge by Staff. However, the Panel did not give any reasons or identify any basis for its conclusion that "there are many competent Approved Persons capable of serving [Eisenberg's] clients" during her absence (Decision at para. 78). The mere existence of other Approved Persons does not mean that any of them would be willing to help Eisenberg, uncompensated, for a protracted length of time.

[87] We cannot know if this evidence would have changed the MFDA Decision, but it may have if the Panel had considered it in light of the public interest. We cannot simply assume that the Panel would have found Kent's evidence on the point as unpersuasive as it found Eisenberg's, given his very different position at PSC. MFDA Staff suggested that Eisenberg's counsel could have made the same arguments on this Appeal without the Kent Affidavits, but without an evidentiary foundation, those arguments would have amounted to "bald assertions".

[88] Accordingly, we exercise our discretion to allow PSC's application to intervene and adduce additional evidence – the Kent Affidavits – on the merits of the Appeal. We also consider the Marshall Affidavit.

## VI. STANDARD OF REVIEW

[89] Before turning to the merits, we must first determine the standard of review to be applied.

[90] The Appeal is governed by s. 26.1 of MFDA By-Law No. 1 and ss. 36 and 73 of the Act.

[91] Section 26.1 of MFDA By-Law No. 1 states in part:

> 26.1 . . . any . . . Approved Person or other person directly affected by a decision of . . . a Regional Council . . . in respect of which no further review or appeal is provided in the By-laws may request any securities commission given jurisdiction in the matter under its enabling legislation to review such decision . . . .

[92] Section 73 of the Act gives the ASC the necessary jurisdiction:

> (1) . . . a person or company directly affected by a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized . . . [SRO] . . . may appeal that direction, decision, order or ruling to the [ASC].
>
> (2) Section 36 applies to an appeal made under this section.

[93] Section 36(3) of the Act sets out the ASC's powers on appeal. We may:

> (a) make any decision that the person who heard the matter in the first instance could have made and substitute the [ASC's] decision for the decision of that person;
>
> (b) confirm, vary or reject the decision;
>
> (c) direct the person whose decision is being appealed to re-hear the matter.

[94] As noted in Eisenberg's written submissions, these powers are very broad and may suggest a standard of review of correctness – that we need not show deference to the MFDA Panel's Decision and can substitute our own. However, as a matter of practice and policy, ASC panels have been reluctant to interfere on appeal for the sole reason that they might have reached a different decision had they heard the matter in the first instance (see, e.g., *Re Lamontagne*, 2009 ABASC 490 at para. 42; *Hemostemix* at para. 62; and *Re Botha*, 2021 ABASC 11 at paras. 42-43). Appeal panels have therefore inclined toward a standard of reasonableness and shown deference to the decision on appeal if it was made in accordance with the law, the evidence, and the public interest (*Lamontagne* at paras. 42-43).

[95] The ABCA gave the rationale for deference in its recent decision, *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98, in which it considered an appellate tribunal's review of another tribunal's decision. Not according deference would "undermine the integrity of the first level of the disciplinary structure" and make the proceedings before the panel below "an ineffectual waystation along the path to a final decision" (at para. 33). Further, despite the powers in s. 36, s. 73 of the Act is clear that we are to hear appeals, "not to re-conduct the entire proceeding *de novo*" (*Yee* at para. 34).

[96] In *Re O'Brien*, 2020 ABASC 160 – an appeal from an IIROC decision – an ASC appeal panel made the same observations (see paras. 39-42). With reference to the factors set out by the ABCA in *Newton* for determining the proper standard of review on administrative appeals, the *O'Brien* panel (at paras. 31 and 43) confirmed the applicability of the test described by MFDA Staff as the "Five Factors" test from *Canada Malting*, which was discussed in *HudBay* (at paras 105-106) and adopted in *Hemostemix* (at para. 63). An appeal panel will intervene if it finds that:

- the panel below proceeded on an incorrect principle;

- the panel below erred in law;
- the panel below overlooked material evidence;
- new and compelling evidence is presented to the ASC that was not before the panel below; or
- the ASC's perception of the public interest conflicts with that of the panel below.

[97] The *O'Brien* panel concluded that "[u]nless one of those grounds is present, deference is warranted," and it would interfere only if it found that the decision below was unreasonable (at para. 43, citing *Hemostemix* at paras. 62-63). Stated another way, on this Appeal, the Decision is owed deference and the reasonableness standard of review applies – unless we find that one of the five *Canada Malting* factors is engaged, in which case the correctness standard applies (*O'Brien* at para. 47).

[98] We agree with MFDA Staff that the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, does not affect the standard of review in this case. *Vavilov* addresses the standards of review that should be applied by courts on judicial review or appeal from decisions of administrative tribunals, and does not apply to appeals from one administrative tribunal to another. However, where we are required to assess reasonableness, we adopt without restating here the principles set out in *O'Brien* (at para. 44), summarized from *Vavilov* and other relevant case law.

[99] As in *O'Brien* and *Botha*, we also adopt the guidance given in *Yee* concerning appellate tribunal review (*O'Brien* at para. 32 and *Botha* at para. 47, citing *Yee* at para. 35). Among other principles, the ABCA stated that an appeal tribunal "is entitled to apply its own expertise and make findings about what constitutes professional misconduct", although it should still have regard for the views of the tribunal below (at para. 35). Consistent with *Canada Malting*, the ABCA also noted that, "where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so", and should ensure that the decision below "properly protects the public and the reputation of the profession" (*ibid.*). In *Walton*, the ABCA pointed out that "deference to fact findings is not the same thing as immunity from review" (at para. 17).

[100] This Appeal differs in structure from that considered in *Yee*, because in that case the tribunal of first instance and the appeal tribunal were both constituted by the Chartered Professional Accountants of Alberta and had the same expertise. In cases such as this, the SRO tribunal and the ASC panel sitting on appeal are not part of the same organization and the scope of expertise may differ depending on the issue under consideration.

## VII. MERITS OF THE APPEAL – ARGUMENTS OF THE PARTIES

[101] We set out below the parties' arguments in their written and oral submissions. Though we may not touch on every detail of each argument, we considered all of the submissions carefully in arriving at our decision.

### A. Eisenberg and PSC

[102] The Applicants argued that whether we review the Decision for correctness or for reasonableness, it will lead to the conclusion that we should overturn the sanction imposed by the

MFDA Panel and substitute a "proportionate and reasonable" sanction. They submitted that the sanction ordered is contrary to the public interest, and both disproportionate and unreasonable given the degree of fault at issue.

[103] With reference to the *Canada Malting* grounds warranting appellate interference, the Applicants submitted that:

- the MFDA Panel proceeded on an incorrect principle, as it misunderstood the nature of the MFDA Hearing and Eisenberg's admissions;

- the MFDA Panel overlooked or ignored uncontradicted material evidence, took judicial notice of facts that required evidence, and substituted its own opinions;

- new and compelling evidence from PSC is before this panel that demonstrates the MFDA Panel's evidentiary errors and misapprehension of the public interest; and

- given the MFDA Panel's approach to sanctioning and proportionality, its perception of the public interest conflicts with and differs from that of the ASC.

[104] In addition to the facts from the Decision summarized above, the Applicants highlighted the following:

- When TG invested in CareVest, Eisenberg and TG were friends, and were not in a client-DR relationship. In a social setting, they discussed the possibilities for TG to invest her $40,000. Eisenberg warned TG not to invest in the company that employed TG and her partner. This turned out to be good advice, as the company failed and TG would have lost her entire investment.

- TG asked Eisenberg about CareVest (referred to in the Appeal Submissions as "Canadian Horizon") as a possible investment. Eisenberg was aware that another senior financial advisor she knew had clients who had invested in it, so she asked him about it and he assured her it was a good investment. She passed this on to TG, and because TG remained interested, Eisenberg obtained and sent her CareVest's marketing brochure and offering memorandum. After reviewing those materials, TG decided to invest.

- Eisenberg told TG she could not sell her the investment, but that TG could invest directly with CareVest. She also made it clear to TG that she did not know much about the investment. Her role was limited to giving TG the marketing materials and the paperwork. She had no referral relationship with CareVest and received no compensation or benefit from TG's investment.

- Eisenberg believed that TG made her own investment decision. She acknowledged that she played a role, but did not believe that she had "recommended" CareVest to TG. However, if facilitating or helping TG with the investment constituted an

investment recommendation, Eisenberg admitted that she made a recommendation. Her written admission deliberately referred to TG as the "complainant" rather than as a "client" because at the time they were friends and had not yet entered into a formal client relationship.

- The changes that occurred with CareVest and the CareVest Class A Shares several years later were unforeseeable. When TG made the investment, it met her requirement that it be redeemable at any time. In written correspondence to TG, Desjardins made the same point, and also noted that TG had not suffered any financial loss on the investment. To the contrary, she received dividends (in the Decision, the MFDA Panel noted that TG acknowledged she had received dividends "in the range of $3000", and that further dividends may be paid in the future, but at the MFDA Hearing, TG testified that she had received $3632). Eisenberg therefore argued that the harm to TG was more of an inconvenience than a loss.

- Eisenberg acknowledged that TG would not have been in the position she was if Eisenberg had not facilitated the investment. Eisenberg expressed her remorse, shame, and embarrassment, and said she had changed her practice to avoid making the same mistake. In August 2013, she proposed alternatives to resolve the situation for TG – including selling TG's position to someone else – but there was no evidence in the Record of TG's response to those overtures, if any.

- Eisenberg had never been disciplined before in her long career, either by the MFDA or by her Member firm. PSC management and her clients still supported her, as shown by the testimonial letters in evidence (including letters attached as exhibits to the September Kent Affidavit).

- Eisenberg did not understand that she was breaching MFDA Rules at the time, because she thought TG was making her own decision about the CareVest investment. She now understands that facilitating the investment breached both those rules and Desjardins' internal policies and procedures.

- The MFDA investigation and proceedings have had a significant deterrent effect on Eisenberg. In anticipation of sanction, she stopped accepting new clients and has therefore already incurred financial loss.

- Eisenberg has approximately 100 to 110 clients, some of whom she has had for as long as 30 years. Many are elderly and live in various parts of Alberta. They rely on her to travel to meet with them. If she were suspended, her clients would suffer stress, anxiety, and possible financial loss.

- Eisenberg and PSC believe that a suspension of even one month would mean the end of Eisenberg's career as a DR. Eisenberg testified that she has no other skills and no idea what other career she could pursue. Before the MFDA Panel, she also

pointed out that the loss of her career would affect her ability to pay the fine and costs order.

[105] According to the Applicants, the MFDA Panel proceeded on an incorrect principle by considering whether the Allegation was proved, since Eisenberg had admitted the Allegation before the MFDA Hearing commenced. The Applicants acknowledged that some evidence going to liability was relevant to sanction, but submitted that the Panel failed to appreciate the distinction between a liability hearing and a sanction hearing and improperly relied on the evidence to increase the severity of the sanctions.

[106] The Applicants noted that according to the ABCA in *Walton*, a sanction must be proportionate and reasonable for the individual involved. This requires the adjudicator to consider all of the facts and circumstances of the offence and the offender. According to the Applicants, Eisenberg testified about those facts and circumstances not to re-litigate the merits of the Allegation, but to argue for a more lenient sanction. The MFDA Panel erred by misconstruing this evidence as a lack of remorse, a failure to understand the gravity of the misconduct and its consequences, and an attempt to resile from the admission to the Allegation. The Panel therefore erroneously treated Eisenberg's evidence as aggravating, instead of following *Walton* and ensuring the sanction was appropriate.

[107] Eisenberg and PSC further argued that the MFDA Panel erred by overlooking or failing to give sufficient weight to the following evidence:

- At the time TG made her investment, it was exactly what she wanted: a safe investment with a good return that could be redeemed on short notice. By the Applicants' calculation, the value of the Original CareVest Shares increased by nearly 30 percent between 2009 and 2012.

- TG has not lost any money, and the investment is not tied up indefinitely. She has redeemed most of it, and continues to receive redemption funds. By contrast, if TG had pursued her original intention to invest with her employer (contrary to Eisenberg's advice), she would have lost all of her money.

- Eisenberg did not cause and could not have foreseen the retraction issues TG encountered later as a result of CareVest's restructuring. In the Applicants' submission, no amount of review or supervision by Desjardins at the time would have revealed or prevented that situation. Even if Eisenberg had brought the transaction to Desjardins at the time, it would have been approved because it suited TG perfectly – and the result would have been the same.

- Eisenberg extended written offers to TG to help her with her house purchase or have a client buy her position. According to the Applicants, the MFDA Panel erroneously suggested there had been no attempt to compensate or assist TG.

- The Panel found Eisenberg "reckless", but the evidence was to the contrary. She testified that she read the materials provided by CareVest, checked it out with her

> mentors, and received assurances that it was a good investment. Eisenberg's clean disciplinary record during her long career in the industry demonstrates that she does not act recklessly.

[108] In overlooking this evidence or giving it insufficient weight, the Applicants argued that the Panel mistakenly concluded that Eisenberg's conduct caused TG to suffer "serious client harm" and "dire consequences". This incorrect characterization overstated the harm suffered by TG, the seriousness of Eisenberg's conduct, her moral culpability, and her role in the minimal harm that resulted. Further, the Panel did not give Eisenberg sufficient credit for the mitigating circumstances, and overemphasized the need for deterrence over the need for proportionality. All of these errors resulted in an unnecessarily harsh sanction.

[109] The Applicants pointed out that at the MFDA Hearing, Eisenberg's uncontradicted evidence was that no one at PSC would be able to assist her clients if she were suspended. The MFDA Panel disbelieved this testimony and instead speculated by assuming a fact not in evidence: i.e., that someone would step in to assist Eisenberg's clients during her absence. According to the Applicants, the Kent Affidavits confirm that this assumption was fallacious and that those clients would likely be without service during a suspension. The affidavits therefore constitute new and compelling evidence that warrants our intervention in the Decision.

[110] The Applicants argued that the MFDA Panel's errors demonstrate that in sanctioning, its perception of the public interest conflicts with that of the ASC. That divergence pertains both to proportionality and the sanctions necessary to protect the public interest, and also to the impact a suspension would have on the segment of the public represented by Eisenberg's clients. They could suffer financial harm as a result of a suspension, which would be contrary to the public interest.

[111] The Applicants again cited *Walton*, and the ABCA's comments concerning the need to provide reasons that allow a respondent to understand why a lesser penalty would not have sufficient deterrent effect, how the penalty is appropriate for that individual, and how the penalty addresses the public interest. In Eisenberg's and PSC's submission, the Decision did not give those reasons.

[112] In the event that we intervene based on the *Canada Malting* factors or unreasonableness, Eisenberg and PSC made submissions on the appropriate sanction in this case. They relied on the foregoing mitigating facts and arguments to show a reduced need for deterrence, and emphasized that Eisenberg's actions were not planned or deliberate. She did not intend to act outside of regulatory requirements for her own gain – she was simply trying to help a friend. Any breach of the MFDA Rules and Desjardins' processes was inadvertent or, at worst, negligent. Even if Eisenberg's conduct could be considered "reckless" (as characterized by the MFDA Panel), the Applicants pointed out that she has not repeated it in the many years that have followed this incident, and she has taken active steps to ensure it does not recur.

[113] The Applicants argued that the evidence at the MFDA Hearing showed there is no risk Eisenberg will repeat her mistake: she had a clean disciplinary history, felt guilt and remorse, and neither sought nor received any benefit from TG's investment. In fact, this has brought her years of distress, including that arising from the MFDA proceedings. According to the Applicants,

Eisenberg's history and personal characteristics demonstrate the low risk she presents, the minimal deterrence required, and the disproportionality of the sanctions the Panel ordered.

[114] Turning to comparable decisions that could assist in assessing proportionality, the Applicants urged us to reject the proposition that if a sanction falls within the range suggested by precedents, it is reasonable. Instead, we should focus on the public interest and the unique facts of this case. Although the misconduct at issue in *O'Brien* was completely different, Eisenberg and PSC relied on the reasons given by the ASC panel for reducing the suspension and the fine imposed by IIROC. They argued that as in *O'Brien*, the Panel here erred in law and principle by considering irrelevant factors, failing to disregard speculative facts, and imposing a disproportionate and unreasonable penalty.

[115] Eisenberg and PSC also relied on the decisions in *Re Steinhoff*, 2013 BCSECCOM 308 (***Steinhoff #1***) and 2014 BCSECCOM 23 (***Steinhoff #2***), an appeal to the BCSC from an IIROC decision. Steinhoff made an inappropriate investment for a couple who wanted to invest $125,000 short-term before using the funds to buy a home. The couple lost over half of their investment within a few months. Steinhoff also engaged in unauthorized discretionary trading and made false statements to her employer. The BCSC panel varied the IIROC sanction and vacated the one-year suspension.

[116] The Applicants pointed to the BCSC panel's findings that Steinhoff's misconduct could be addressed appropriately by a fine alone, and its caution that before imposing a suspension beyond the length of a normal vacation, a panel should consider its impact on a registrant's career and whether a suspension is necessary to protect the public interest. Despite the harm suffered by the clients and the benefit Steinhoff received by way of commissions, the BCSC panel took into account the deterrent effect of the proceedings, Steinhoff's lack of a disciplinary history, and the fact that there was no evidence of dishonesty, an improper motive, or an ongoing risk of future misconduct.

[117] Finally, Eisenberg and PSC relied on *Re Hagerty*, 2014 ABASC 348. They cited the hearing panel's comments concerning the sufficiency of a monetary sanction to effect general deterrence in that case, and the reduced need for specific deterrence in light of the impact of the ASC proceedings on the respondent. In the latter regard, the ASC panel stated, "[w]e are prepared to accept that the unpleasantness endured by Hagerty in connection with the entire process likely diminishes the prospect of a repetition of her misconduct, and thus the need for specific deterrence is somewhat lessened" (at para. 45).

[118] Eisenberg and PSC urged us to apply the reasoning in *O'Brien*, *Steinhoff #1*, *Steinhoff #2*, and *Hagerty*, and vacate the suspension. In their view, the fine of $15,000 was significant and sufficient for deterrence. They reiterated that the unforeseeable change to the CareVest investment does not aggravate the misconduct or increase the degree of fault. The outcome for TG would have been the same if the transaction had been conducted through Eisenberg's Member firm.

[119] However, the Applicants also contended that Eisenberg only agreed to the $15,000 fine and the $5000 in costs proposed by MFDA Staff on the understanding that Staff would ask for a one-month suspension. Instead, Staff sought six months and, according to the September Kent

Affidavit, "undermined the deal made". The Applicants argued that in light of this unfairness, the evidence, and the Panel's errors, we should set aside the suspension and the costs order, and reduce the fine to $5000.

**B. MFDA Staff**

[120] MFDA Staff asserted that Eisenberg did not establish any of the *Canada Malting* factors. In Staff's view, the penalties imposed were reasonable, proportionate, and consistent with previous decisions. They submitted that Eisenberg was simply rearguing the same case before this panel, but by emphasizing facts that were not raised at the MFDA Hearing.

[121] In past decisions, MFDA hearing panels have commented on the importance of both MFDA Rule 1.1.1 and Member policies and procedures that prohibit DRs from engaging in securities-related business outside of their Member firms. These provisions protect Members by ensuring that they are aware of and can supervise their DRs' transactions, and protect clients by ensuring Members will take responsibility for the investment products offered and their suitability for individual investors. Staff argued that the MFDA Panel was correct in concluding that the misconduct in this case was serious, undermined the regulatory regime, and could bring the mutual fund industry into disrepute.

[122] Staff disagreed that the Panel misunderstood its role at the MFDA Hearing and inappropriately questioned Eisenberg to confirm her admission of the Allegation. To the contrary, Staff argued that this became necessary when Eisenberg gave testimony that was inconsistent with her earlier admission, because a panel must be assured that admissions are voluntary, informed, and unequivocal. Further, the Panel had to determine the contested facts relevant to sanction.

[123] MFDA Staff pointed out that although the Applicants disputed whether TG was a client at the time of the misconduct, Eisenberg admitted that fact in both her written submissions and her testimony at the MFDA Hearing. Staff noted that in *Re Marek*, 2017 ONSEC 41, the OSC upheld an IIROC panel's finding that two individuals were clients even though, like TG, they did not open accounts at the Member firm until after the off-book investments were made. In any event, Staff argued, MFDA Rule 1.1.1 does not include the word "client" – it prohibits <u>all</u> securities-related business with any individual that is not carried on for the account and through the facilities of the Member. Therefore, even if we were to determine that the Panel erred in making the finding that TG was a client, that would not warrant intervention.

[124] Staff disagreed that the MFDA Panel overlooked material mitigating factors. Either the purported mitigation evidence was not relied upon by Eisenberg at the MFDA Hearing, the Panel did not accept the evidence, or the Panel found the evidence immaterial to its Decision. Specifically:

- The Panel did not accept Eisenberg's claim that she did not intentionally contravene MFDA Rules, because it found that she had considerable experience in the industry and either knew or ought to have known of the MFDA's and Desjardins' requirements. Staff cited *Re VerifySmart Corp.*, 2012 LNBCSC 138, for the proposition that even if a registrant did not intentionally contravene securities laws, that is not a mitigating factor in sanctioning.

- The MFDA Panel did not ignore the evidence of Eisenberg's attempts to help TG resolve her situation. To the contrary, it noted Eisenberg's testimony that she did not contact TG to buy out her position because she felt it would be inappropriate to do so while the MFDA proceedings were outstanding. In Staff's submission, it was not unreasonable for the Panel to disregard an intention upon which Eisenberg did not act.

- The MFDA Panel found that TG suffered serious harm as a result of the illiquidity of her CareVest Class A Shares, the harm was ongoing, and it did not amount to a mere inconvenience as Eisenberg contended. According to Staff, the Panel considered multiple factors in assessing the harm to TG, and its findings in that regard were both reasonable and entitled to deference.

- The MFDA Panel acknowledged the deterrent effect of the MFDA proceedings on Eisenberg, but correctly limited its significance when assessing sanction. Staff cited *Re Pariak-Lukic*, 2015 LNONOSC 357, aff'd. 2016 ONSC 2564, for the proposition that it was an error of law for an IIROC panel to have taken into account the effect of the proceedings on the respondent without evidence in that regard.

- The MFDA Panel correctly rejected Eisenberg's claims that if she were suspended, there would be no one who could serve her clients and they would be prejudiced. MFDA Staff characterized this evidence as "uncollaborated [sic] hearsay" that even appeared to surprise Eisenberg. Staff argued that the impact of her suspension on her Member firm or her clients is irrelevant to sanction, even in Eisenberg's circumstances. Again citing *Pariak-Lukic*, Staff contended that the impact of a suspension on a respondent's clients is outweighed by the importance of setting a penalty that will achieve sufficient deterrence.

[125] Staff also argued that IIROC and MFDA hearing panels do not typically consider foreseeability of harm. In Staff's view, investor harm is always foreseeable when a registrant circumvents the rules. That an off-book investment turns out well does not negate a breach of an important MFDA rule that exposed an investor to additional risk. Therefore, foreseeability of harm is irrelevant.

[126] In addition to the decisions the Panel considered at the MFDA Hearing, Staff listed several others in which the respondents admitted or were found to have conducted off-book business without the knowledge or approval of their employer firms (sometimes in addition to other breaches of securities laws, rules, or regulations). The sanctions imposed (sometimes with the agreement of the respondent in settlement) included fines from $20,000 to $50,000, suspensions from five months to two years, and in one case a permanent registration prohibition. Staff argued that these cases show that this type of misconduct is considered serious, and that it is rare for sanction orders for such misconduct not to include a suspension.

[127] Accordingly, Staff submitted that the sanction in this case was reasonable, proportionate, and in the public interest. The Panel thoroughly reviewed the facts, correctly referred to the

relevant law – including *Walton* – and applied the relevant sanctioning factors. It balanced the need for deterrence with the ABCA's caution in *Walton* that a penalty need not be crushing or unfit for the individual offender to achieve deterrence. The Panel took the restrained approach suggested in *Walton* by imposing a suspension that was not only shorter than what Staff sought, but also at the low end of the range imposed by other panels for similar misconduct.

[128] In the result, Staff submitted that the Appeal should be dismissed.

## VIII. ANALYSIS

[129] We find that based on the factors set out in *Canada Malting*, there are grounds to warrant our intervention in the MFDA Decision. By including the suspension, the MFDA Panel imposed penalties that were unreasonable and disproportionate in the circumstances, and therefore contrary to the public interest.

### A. The MFDA Panel Proceeded on an Incorrect Principle and Erred in Law

[130] The *Canada Malting* test sets out errors in principle and errors in law as two separate factors that may warrant intervention on review or appeal of an SRO decision. In practice, however, the two may overlap and can be difficult to distinguish. In the context of sentencing for criminal offences, the Supreme Court of Canada suggested that errors of law are a subset of errors in principle (*R. v. Friesen*, 2020 SCC 9 at para. 26):

> Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" [citations omitted].

[131] In *Northern Securities*, an OSC panel observed (at para. 78):

> When determining sanctions to be imposed on a respondent, an SRO (and the Commission) must apply the principle of proportionality. That means that the sanctions imposed must be proportionate to both the specific conduct of the respondent, and to the particular circumstances of the respondent including, for instance, the size of the respondent and the impact sanctions may have. **The failure to impose proportionate sanctions constitutes an error in principle or in law within the meaning of *Canada Malting*.** [emphasis added; see also *Re Magna Partners Ltd.*, 2011 LNONOSC 605 at para. 61]

[132] We agree, and for this Appeal nothing turns on the distinction.

#### 1. Nature of the Proceeding

[133] We do not agree with the Applicants' contention that the MFDA Panel proceeded on an incorrect principle by misapprehending the nature of the proceeding and by considering liability issues instead of sanction. Even though Eisenberg admitted the Allegation in writing before the hearing, it was nonetheless necessary for the Panel to be certain that her admissions supported a finding on the Allegation – particularly once she gave testimony that could be interpreted as recanting the earlier admissions.

[134] ASC hearing panels take the same approach when considering agreed facts and admissions. For example, before turning to sanction in *Re Stewart*, 2019 ABASC 47, *Re Currey*, 2018 ABASC

34, and *Re Bradbury*, 2016 ABASC 272, the ASC panels reviewed the admissions and confirmed that they supported findings on the contraventions alleged and admitted. In this case, Staff's written submissions for the MFDA Hearing included a request that the Panel make a finding that the Allegation had been proved. As the ASC panel in *Lamontagne* said on appeal from an IIROC decision, despite the respondent's "guilty plea", the hearing panel had to make findings on the allegations "in order to explicitly establish the foundation for the analysis then undertaken" to assess the appropriate penalty (at para. 47).

[135] Moreover, many of the facts relevant to liability are relevant to sanction. It was appropriate for the MFDA Panel to clarify facts it considered pertinent to its assessment of the orders that should follow.

**2. Nature and Seriousness of the Misconduct**

[136] In *Re Homerun International Inc.*, 2016 ABASC 95, an ASC hearing panel discussed at length the principles that should be applied in sanctioning. It explained that the seriousness of securities regulatory misconduct has three aspects: its nature, the respondent's intention (i.e., "whether the misconduct was planned and deliberate, not deliberate but attributable to recklessness, or simply inadvertent"), and the harm caused, either to specific investors or to the capital market in general (at para. 22).

[137] The MFDA Panel found that Eisenberg's misconduct was serious, viewed in light of the protective purposes of the MFDA Rules at issue. We agree that those rules are important elements of the regulatory scheme intended to ensure that investors have the benefit of a Member firm's supervision and review. However, not every breach of a rule or a statutory provision is the same. Seriousness is informed by a number of factors, including those mentioned in *Homerun*. As noted in the MFDA Sanction Guidelines, there are distinctions between misconduct that is "unintentional or negligent" and misconduct that is "intentional, manipulative, fraudulent or deceptive", and between isolated incidents and "repeated, pervasive or systemic violations" (at p. 3).

[138] We are of the view that there are a number of compelling reasons to conclude that the nature and seriousness of Eisenberg's misconduct are at the lowest end of the range.

[139] At the time of TG's CareVest investment in early 2009, TG and Eisenberg were friends discussing investment options in a social setting. Whether TG relied on Eisenberg's status as a DR or not, the discussion would necessarily have lacked the formality of a business meeting between an investment professional and her client. Not only would TG have had to recognize the difference at the time, but the informal context also would have affected Eisenberg's perception of the nature of her involvement.

[140] We do not dispute the MFDA Panel's conclusion that as an experienced registrant, Eisenberg should have been aware that her conduct was not in compliance with the rules. However, it is clear that she did not intentionally defy those rules or disregard her friend's interests. Intention may not be relevant to a respondent's liability for breaching a regulatory provision, but as observed in *Homerun*, it is relevant to sanction because it informs the seriousness of the breach. In more serious cases, respondents are fully aware of the requirements and proceed regardless, usually for

personal gain. Here, there was no evidence to suggest that Eisenberg had any malevolent intention, or was motivated by anything but a desire to help her friend.

[141] In that regard, we consider it significant that Eisenberg did not benefit in any way from the transaction, nor did she seek to benefit. To the contrary, assisting her friend brought Eisenberg disciplinary proceedings and years of stress, uncertainty, and expense. We are of the view that the MFDA Panel did not give sufficient weight to these facts, even though they are directly relevant to the seriousness of the misconduct at issue.

[142] The MFDA Panel also gave insufficient weight to the fact that the investment suited TG's requirements when she purchased the Original CareVest Shares. From our industry knowledge, we consider it unlikely that the involvement of Eisenberg's Member firm would have affected TG's investment decision, and it could not have prevented the changes to the investment that occurred several years later. At the Appeal Hearing, Staff suggested that TG would not have experienced harm had Eisenberg offered her a product approved by her Member, but we consider that pure speculation. According to Eisenberg's evidence, CareVest was on PSC's approved product shelf when she joined in 2009, but that did not prevent the corporate restructuring several years later and the attendant liquidity issues.

[143] We agree with the Applicants that Eisenberg did not cause and could not have foreseen those changes, and their resulting effect on TG should not have been ascribed to Eisenberg. It is true that tort law concepts of foreseeability and causation are generally irrelevant to registrant sanctioning, but that does not mean that foreseeability should be completely ignored in measuring the seriousness of regulatory misconduct.

[144] Further, we are of the view that the MFDA Panel gave insufficient weight to the comparatively modest investment amount in issue and the fact that only one investor was involved. Eisenberg made a single error; she did not engage in a deliberate or protracted course of misconduct. We do not condone a registrant's misapprehension of important regulatory requirements, but the severity of the sanction suggests that Eisenberg was unfairly singled out as a warning to others that harsh consequences will follow from even a relatively minor infraction of the MFDA Rules.

[145] When viewed objectively, the harm suffered by TG was also relatively minor. The evidence at the MFDA Hearing – including TG's evidence – was that she had retracted over half the funds invested and received dividends. Based on TG's own testimony, it was at worst unclear whether she could retract the balance, and whether she would receive additional returns. The Record indicates that when she made her complaint, TG's CareVest securities had both unrealized capital gains and paid dividends cumulatively exceeding her initial investment. There was no evidence of TG's opportunity costs, and only limited evidence of any social or emotional harm. In oral argument at the MFDA Hearing, Staff acknowledged that, "it is difficult to quantify exactly what harm [TG] suffered. Maybe just to say, if she did suffer harm, she was not able to redeem the money when she needed to for the purpose that she wanted".

[146] The Panel's findings that TG experienced "significant financial harm" and "dire consequences" were exaggerations. Those characterizations should be reserved for truly serious

cases involving life-altering consequences. The degree of harm does not diminish the fact that Eisenberg breached MFDA Rules, but it is directly relevant to gauging an appropriate protective sanction.

[147] As for the stated harm caused to the integrity of the capital market, we similarly conclude that any such harm was comparatively minor. This conclusion does not diminish the seriousness with which we view MFDA rule violations, but merely recognizes that there is a wide spectrum of conceivable harms that may result. The facts of this case unquestionably fall at the lower end of that spectrum.

### 3. Eisenberg's Recognition of Seriousness

[148] In our view, the MFDA Panel erred in its assessment of Eisenberg's recognition of the seriousness of her misconduct. As the Applicants pointed out, in *O'Brien* an ASC appeal panel found that an IIROC panel had erred in sanctioning the respondent by overemphasizing what it perceived as his lack of remorse and failure to recognize the seriousness and impact of his misconduct. This was contrary to the law as stated by the ABCA in *Walton* (at para. 155):

> It is not an aggravating factor that the respondent fails to "plead guilty" or fails to express remorse. It is unreasonable to suggest that these appellants will, despite the findings of culpability, nevertheless think that there is nothing wrong with what they did. The appellants were entitled to mount a defence before the Commission, and they were entitled to make arguments in their favour. Just because they were unsuccessful does not mean that they fail to understand the seriousness of what happened.

[149] Despite quoting *Walton* that "it is not an aggravating factor that the respondent fails to plead guilty or express remorse" (Decision at para. 43), the Panel in this case made a similar error. Although Eisenberg did "plead guilty", she testified that she did not believe she recommended CareVest to a client, and characterized TG's inability to retract the full amount of her investment as an inconvenience. She acknowledged the seriousness of the misconduct and testified to her remorse, shame, and regret, but the Panel concluded that Eisenberg "demonstrated ambivalent attitudes" in this regard, and doubted whether she had "unequivocally accepted and fully recognized the seriousness of her misconduct" and its consequences (Decision at paras. 66-67 and 74).

[150] The Panel did not suggest that Eisenberg's "ambivalent attitudes" were an aggravating factor, but nor did it give her evidence of regret and remorse due weight as a mitigating factor. The Panel initially said it was unconvinced that this evidence "could be treated as mitigating" (Decision at para. 68). It then cited the evidence among a handful of other mitigating factors in the case, but concluded that the mitigating factors did "not outweigh the seriousness of the misconduct, the financial harm and other consequences to the client, [Eisenberg's] conflicted views about her misconduct, and the need for specific and general deterrence" (Decision at para. 74).

[151] As in *O'Brien*, the MFDA Panel did not recognize that what it described as Eisenberg's ambivalent attitudes and conflicted views were drawn from evidence adduced to minimize the harm and the seriousness of the misconduct so that she could argue for a more lenient sanction, as she was entitled to do. The *O'Brien* panel explained, "[t]here was nothing improper about [the respondent] making arguments in his defence that would minimize or negate their relevance so

that the resulting sanctions might be more lenient" (at para. 222). The panel went on to find that it was not inconsistent for the respondent in that case both to admit the contravention and to maintain that the client was not vulnerable and had not been harmed (at para. 223). The same reasoning should apply here.

[152] In the result, the Panel erred by overemphasizing the position Eisenberg took at the MFDA Hearing instead of focusing on the actual misconduct at issue, and by giving insufficient weight to her expressions of remorse, shame, and regret.

**4. Need for Specific and General Deterrence**

[153] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, the Supreme Court of Canada held that a Canadian securities commission's power to impose sanctions in the public interest is protective and preventative, not remedial or punitive (at para. 42). Accordingly, sanction orders should be aimed at "protect[ing] the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets" (at para. 43). As a recognized SRO exercising authority delegated by the Canadian securities commissions, the same principles apply to the MFDA.

[154] In *Re Cartaway Resources Corp.*, 2004 SCC 26, the Supreme Court recognized that when determining the sanction orders that will have the necessary protective and preventative effect, securities regulators may take deterrence into account. This includes both specific deterrence (intended to target the "individual wrongdoer" and deter repeated misconduct) and general deterrence (intended to target "society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing") (at paras. 52, 55, and 60).

[155] However, the Court cautioned, "[t]he 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" (at para. 61). The same may be said of specific deterrence. As explained in *Homerun* (at para. 14):

> The determination in a particular case of whether deterrence is required and, if so, the type and extent of sanctions appropriate for that purpose, will turn on the circumstances of the misconduct and of the particular respondent, and on an assessment of the risk posed to investors and the capital market by a particular respondent or by others who might be minded to emulate the respondent's misconduct.

[156] The MFDA Panel cited some of these principles in the Decision. It concluded that orders with both specific and general deterrent effect were required to "send a message . . . not only [to Eisenberg] but also to others in the mutual fund industry that the conduct engaged in by [Eisenberg] is serious and warrants the imposition of significant disciplinary penalties" (at para. 75). The Panel also cited a number of principles from *Walton* (Decision at para. 43).

[157] In our view, the Panel correctly summarized some of the relevant law, but erred in its application. The Panel acknowledged that Eisenberg had no disciplinary history, admitted the Allegation, received "no direct financial remuneration from the client", expressed remorse, and

"suffered some emotional stress as a result of the investigation and the proceedings" (Decision at para. 73). However, it did not give sufficient weight to the deterrent effect of these factors.

[158] Stating that Eisenberg received "no direct financial remuneration from the client" and "suffered some emotional stress as a result of the investigation and the proceedings" somewhat trivialized and understated Eisenberg's evidence. Eisenberg did not receive a benefit of any kind – monetary or otherwise – either directly or indirectly from TG or anyone else. Instead, her attempt to help her friend cost her financially, personally, and professionally. At the MFDA Hearing, she described the events as "life-changing", and testified in some detail about the expense and debt she incurred over the course of the proceedings, as well as her stress, regret, shame, embarrassment, and concern about her future. She also described her passion for her job and her clients.

[159] The evidence was unequivocal that there is little risk Eisenberg will engage in future misconduct. She has already been significantly deterred from repeating her error. By the time of the MFDA Hearing, over 11 years had passed without incident. Although it was not mentioned in the Decision, when she was asked by her counsel at the MFDA Hearing whether she was likely to make the same mistake again in the future, Eisenberg stated, "[a]bsolutely not" and described some of the changes she has made to her professional practices to prevent repetition.

[160] This was confirmed by a letter in evidence from PSC's Chief Compliance Officer, who stated that Eisenberg has "taken steps to ensure that she has a fulsome understanding of her responsibilities as an Approved Person". The letter also indicated that PSC continued to sponsor her registration "without hesitation", suggesting that it is unconcerned about Eisenberg's integrity or that she presents a future risk of harm.

[161] It is somewhat unclear from the Panel's reasons how general and specific deterrence were respectively measured, but we infer that significant weight was put on general deterrence. At the MFDA Hearing, Staff counsel submitted, "I have no doubt Ms. Eisenberg has learned from this and that she is not going to engage [in] such misconduct again. Pursuant to her testimony today, I believe she is . . . sincere in that intention". He therefore urged that "general deterrence is of paramount importance in this case". At the Appeal Hearing, Staff likewise submitted that "the focal point of the [MFDA Panel] in imposing the suspension, the three-month suspension . . . was [its] importance for general deterrence".

[162] It is an error to give disproportionate weight to any sanctioning factor, including general deterrence (see *Cartaway* at para. 64 and *Walton* at paras. 152 and 164). In *Walton*, the ABCA held that general and specific deterrence are "legitimate considerations, but at the end of the day the sanction must be proportionate and reasonable for each appellant. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant", whose individual circumstances must be taken into account (at paras. 154 and 156).

[163] We find that the MFDA Panel erred in law and principle by overemphasizing the need for deterrence in light of the facts and circumstances of the contravention and the individual registrant.

**B. The MFDA Panel Overlooked Material Evidence; New and Compelling Evidence**

[164] Given our conclusions concerning the MFDA Panel's errors in law and principle, it may not be strictly necessary for us to consider whether there are other grounds for intervening in the Decision. Nonetheless, we are of the view that the other *Canada Malting* factors apply here as well.

[165] Our discussion of errors of law and principle mentioned a number instances where the MFDA Panel either overlooked material evidence or gave it insufficient weight. We will not repeat that discussion here, but note that many of those errors would also warrant our intervention under the third part of the *Canada Malting* test.

[166] The Applicants argued that there was other evidence the MFDA Panel overlooked or ascribed insufficient weight, including the emails Eisenberg sent to TG in 2013 offering to help find alternatives to finance her home purchase or sell her CareVest Class A Shares. Staff disagreed that this evidence was overlooked, and pointed out that the Panel specifically referred to Eisenberg's testimony that she considered buying TG's position, but disregarded it because Eisenberg ultimately did not act on the thought.

[167] Staff and the Applicants were both correct: the Panel did not comment on that aspect of the emails in the Decision, but acknowledged Eisenberg's testimony about the reason she did not offer to buy TG out herself while the MFDA proceedings were ongoing. The Panel did not find that Eisenberg's "unacted upon thought" was a mitigating factor (Decision at para. 38), and we consider that conclusion reasonable in the circumstances. If a respondent has compensated someone who suffered a financial loss, it may be a factor when assessing sanction, especially the quantum of any monetary penalty. Good intentions will not have the same effect.

[168] However, in our view, Eisenberg's early written offers of assistance – made several years prior to TG's complaint and the MFDA proceedings – corroborate her evidence of remorse and the seriousness with which she viewed the unexpected outcome of TG's CareVest investment. This was additional evidence of the low risk that Eisenberg will repeat her misconduct, and should have been taken into account by the Panel.

[169] In addition, we were concerned with the MFDA Panel's treatment of Eisenberg's evidence that a suspension will prejudice her clients because they will be without service, since there is no one at PSC who can assist during her absence. As mentioned, the Panel found that "there are many competent Approved Persons capable of serving her clients for such an interval, even if associates in her own Member are unable or unwilling to assist her" (Decision at para. 78). The Panel gave no reasons for this conclusion, nor could we find any evidence of this in the Record. The only evidence on the point was Eisenberg's, and it was neither tested by cross-examination nor contradicted by other evidence.

[170] In advance of the Appeal Hearing, Staff provided us with a copy of the ABCA's decision in *R. v. Scheideman*, 2001 ABCA 94, where it was held that: (i) a trial judge does not have to accept a witness's testimony just because the witness was not cross-examined on it – if it is inconsistent with other evidence, the judge is free to accept the other evidence; (ii) a trial judge is free to give less weight to evidence he or she finds implausible; and (iii) even though the Crown

did not expressly contradict the accused's evidence, the judge was free to accept other evidence led by the Crown and find that the accused's testimony was implausible (at paras. 2 and 4).

[171] The issue here, however, is not that the MFDA Panel did not accept Eisenberg's evidence; it is that it drew the opposite conclusion based on no evidence whatsoever. Further, the Panel does not appear to have taken into account the nature of Eisenberg's client base, which she said was largely comprised of retired seniors living in small towns all over Alberta. Her practice was to meet with her clients in person because of their discomfort with technology.

[172] Staff described Eisenberg's testimony about the lack of anyone at PSC who could cover for her as "uncollaborated" hearsay, but the Panel's contrary conclusion was mere speculation, without evidence (see *O'Brien* at para. 227). This affected the Panel's assessment of the proportionality of the sanction ordered and whether its orders were in the public interest.

[173] The Kent Affidavits and the Marshall Affidavit assist by providing direct, independent evidence of PSC's business model and its available resources. That evidence corroborates and explains Eisenberg's evidence that there is no one available to cover for her, and refutes the Panel's assumption in that regard. In addition, it addresses the impact of a suspension on Eisenberg and the clients who represent a segment of the public interest that securities regulation is intended to protect. The client letters appended to the September Kent Affidavit expressed unreserved support for Eisenberg despite the MFDA proceedings, which is also of some relevance to the public interest.

[174] At the Appeal Hearing, in response to the Applicants' submissions on whether the MFDA Panel overlooked material evidence, Staff argued that the Applicants' counsel simply highlighted different evidence or argued its significance differently than Eisenberg's counsel had at the MFDA Hearing. For example, Staff said they entered a letter from Desjardins into evidence to prove that Desjardins had not compensated TG, not to prove whether TG suffered a loss on her investment. They argued, "[t]he hearing panel has to consider the facts that were brought out in evidence in the hearing before it and has to apply the law and . . . those facts as they were presented in the . . . submissions during the hearing before them, not arguments that could have been made but weren't".

[175] No authority was cited in support of this contention, and we are not aware of any that confines an adjudicator to assessing the evidence in the manner suggested by the parties and precludes consideration of the entire record. In our view, this is not a principle of general application for public interest administrative proceedings. It is our responsibility to review and understand all of the evidence before us to arrive at a just decision that is consistent with our public interest mandate.

[176] In *Botha*, also an appeal from an MFDA panel decision, Botha argued that the panel should not have relied on an interview transcript that was appended to an affidavit tendered into evidence at the hearing because neither party had referred to it either when questioning witnesses or in argument (see paras. 73-76). MFDA Staff disagreed, and pointed out that the transcript was properly before the panel and Botha did not object to its admission at the hearing (see para. 102). The appeal panel found that the MFDA panel was entitled to admit and rely on the transcript

evidence, and said it found "no basis on which to conclude that the [MFDA panel] was somehow limited in the extent to or purposes for which the [interview transcript] could be used" (at para. 132). We would say the same about the evidence before the MFDA Panel in this case. Whether specifically addressed at the hearing or not, the evidence was before the Panel and should have been considered.

**C. Perception of the Public Interest**

[177] With reference to the final part of the *Canada Malting* test, we are of the view that the MFDA Panel's decision to impose a three-month suspension against Eisenberg in the circumstances of this case demonstrates that the Panel's perception of the public interest – in particular, the measures necessary to protect the public interest – is inconsistent with ours.

[178] For the reasons discussed, we have found that the MFDA Panel overstated the seriousness of the misconduct, including Eisenberg's blameworthiness and level of fault. It also overstated the seriousness of the harm to TG and the capital market. Conversely, it understated Eisenberg's recognition of the seriousness of her actions and misconstrued her defence on sanction as evidence of a failure to appreciate the gravity of the contravention and its consequences. Specific and general deterrence thus prevailed over proportionality.

[179] If, as Staff argued, the MFDA Panel was primarily concerned with general deterrence to protect the public interest from others who might emulate Eisenberg's misconduct, it exceeded what was necessary and did not give adequate recognition to pertinent facts. In *Walton*, the ABCA stated that, "[a]n administrative penalty that is imposed for general and specific deterrence should be sufficient to reasonably accomplish that end, but no more" (at para. 164). We would say the same is true of all parts of a sanction order. A very strong message about conducting business off book may have been necessary on different facts, but here the message needed only be enough to warn of the consequences of unwittingly facilitating a single transaction off book for no personal advantage. Given the deterrent effect of the expense and ordeal of these proceedings, the significant monetary penalty imposed in combination with the costs order would have been more than sufficient to have that effect and would have adequately protected the public interest.

**D. Appropriate Sanction**

[180] Having determined that the package of sanctions imposed by the MFDA Panel was unreasonable, based on error of law and principle, and beyond what was necessary to protect the public interest and prevent future harm (see *Walton* at para. 23), we have decided to substitute a proportionate sanction order.

[181] Section 36(3)(c) of the Act provides that we may direct the MFDA Panel to reconsider its decision, but it is more efficient and less costly for the parties for us to vary the Panel's order pursuant to ss. 36(3)(a) and (b). There is a complete Record before us as well as detailed arguments from the parties at the MFDA Hearing and on this Appeal, along with an extensive amount of case law. The ASC panel observed in *O'Brien* (at para. 262) that IIROC's sanctioning principles are very similar to the ASC's, and the same is true of the MFDA. In *Vitug v. Investment Industry Regulatory Organization of Canada*, 2010 ONSC 4464, the Ontario Superior Court of Justice noted (at para. 2):

> In considering the decision reached by IIROC, the Commission is engaged in an exercise that is at the core of its specialized expertise. In particular, the Commission is uniquely placed to determine what conduct, by persons engaged in the securities industry such as investment advisors, would be detrimental to the public interest.

[182] This also applies when a securities commission is considering an MFDA decision.

[183] The ABCA recently stated, "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*R. v. Chen*, 2021 ABCA 382 at para. 20). Similarly, for a securities commission's review of an SRO's sanctioning order, "[u]ltimately, the total sanction must be proportionate to the overall misconduct" (*Re Sutton*, 2018 ONSEC 42 at para. 180).

[184] Eisenberg breached MFDA Rules and Desjardins policies that are important to the regulatory regime, and TG suffered adverse consequences from that breach. There is thus a need for deterrence. We have taken into account the facts and considerations discussed in these reasons, and in particular the evidence that:

- Eisenberg worked in the industry for a number of years without incident before these events, and continued to work in the industry without incident at least up to the date of the MFDA Hearing;
- the misconduct at issue was inadvertent and unintentional, not planned, deliberate, or deceitful;
- the misconduct was an isolated event that involved one $40,000 transaction for a single investor – a friend – on one occasion, not a protracted course of conduct;
- Eisenberg realized no benefit as a result of the misconduct, and did not act with the intention of receiving a personal benefit;
- at the time TG purchased the Original CareVest Shares and for several years afterward, the investment was suitable for her;
- Eisenberg's culpability did not increase because CareVest restructured;
- TG suffered negative consequences as a result of the CareVest restructuring, but by the date of the MFDA Hearing, she had received regular dividends and retracted a significant portion of her investment;
- Eisenberg acknowledged the seriousness of what occurred and expressed her remorse and regret, both before and after the MFDA investigation and proceedings;
- Eisenberg has modified her business practices to avoid similar mistakes in the future;

- Eisenberg continues to have the support of clients and her Member firm, PSC;
- Eisenberg's clients would likely suffer some measure of harm from a suspension;
- PSC indicated no concern that Eisenberg presents a future risk;
- Eisenberg has incurred considerable expense and has experienced several years of stress and anxiety as a result of the MFDA proceedings, with deterrent effect; and
- Eisenberg took the Allegation against her seriously and cooperated with Staff throughout the investigation and the MFDA Hearing.

[185] We also took account of several prior decisions cited by the parties as comparable to this case both before the MFDA Panel and on this Appeal. As is frequently observed in sanction decisions, they were of somewhat limited utility given the importance of the specific facts and circumstances of each case (see, e.g., *Re Workum and Hennig*, 2008 ABASC 719, aff'd. 2010 ABCA 405, at para. 121). The MFDA Sanction Guidelines similarly note (at p. 4) that, "[w]hile prior decisions are instructive, the nature and extent of the sanction to be imposed will depend on the facts of the case." This is particularly true of settlement cases, which often involve circumstances and considerations that are not readily apparent.

[186] In *Sutton*, an application for review of an IIROC decision, an OSC panel stated (at para. 190): "It is rare that substantially similar precedents can be found to assist in determining appropriate sanctions. That is particularly true here, given the unusual facts of this case." We would say the same of the matter before us.

[187] Between the MFDA Hearing and the Appeal, the parties cited at least 20 MFDA and IIROC decisions that they argued were sufficiently similar to suggest a range for appropriate sanctions. Most of the cases involved allegations that the respondent engaged in securities-related business that was not carried on for the account of or through the facilities of the respondent's Member firm (or similar outside business conduct), but some involved additional allegations. The monetary sanctions that were imposed ranged from $1000 to $50,000 and, in a few cases, included orders to compensate for client losses. In a small number of cases, no suspension was ordered, while in the others the suspensions ranged in duration from one week to three years. In some, the panels ordered permanent prohibitions against registration. The facts and circumstances varied enormously, and many involved facts far more egregious than those here.

[188] In *Steinhoff #1* and *Steinhoff #2*, cited by the Applicants, the contravention was not the same as Eisenberg's, but it similarly engaged regulatory measures intended to protect investors. The misconduct was more serious, as there were other allegations, the clients lost at least $62,500, and Steinhoff benefited from commissions. IIROC's fine of $100,000 and disgorgement order of $6813 (representing the commissions paid to Steinhoff) were upheld by the BCSC, but its one-year suspension order was vacated. The BCSC panel reasoned (*Steinhoff #1* at para. 91):

> Steinhoff made a serious mistake. Does the public interest demand that she lose her career over it? She has been in the business now for 25 years. She has no previous regulatory sanctions. There is

> no basis to conclude that she acted dishonestly or for an improper motive, or has ever done so. Although her mistake unquestionably harmed the Ks, there is no evidence that she represents any ongoing threat to her clients, to potential new clients, to the reputation of the securities markets or of IIROC or its members. Although a significant sanction is appropriate given Steinhoff's contravention of the suitability requirement, the parties should address whether a suspension in these circumstances would be appropriate.

[189] We agree with this analysis. We also agree with the panel's conclusion in *Steinhoff #2* that, "we can appropriately address Steinhoff's misconduct through a fine alone" (at para. 31), and that the stress and cost of the enforcement proceedings were "an experience Steinhoff will surely strive not to repeat" (at para. 34). We would say the same of Eisenberg.

[190] In the Decision, the Panel said that it followed the MFDA Sanction Guidelines in imposing the suspension, because that document indicates that a suspension is appropriate where the misconduct undermines the regulatory regime, causes harm to the integrity of the securities industry, and brings the mutual fund industry into disrepute – and it concluded "that this type of harm occurred in the instant case" (at para. 72). Since the version of the MFDA Sanction Guidelines that is in the Record does not contain any such statement, we presume the Panel was referring to an earlier or outdated version.

[191] If such a statement exists and is still in effect, we are of the view that it should be applied cautiously by hearing panels. If it is interpreted too broadly, panels may feel that it constrains their discretion and they are bound to order suspensions in cases where they are unwarranted.

[192] As the facts of any given case may vary dramatically, we are hesitant to give general guidelines for suspensions beyond the principles governing sanctions already discussed. Here we have concluded that a suspension is not appropriate for the reasons given in this decision, including that there was no evidence of dishonesty, no personal benefit was sought or obtained, the investor harm was minimal, the misconduct was an isolated event attributable to an honest mistake rather than a pattern of misconduct, and the registrant has not been disciplined before or since. However, even in cases with similar factors, we recognize that there may be circumstances that justify a suspension.

[193] This is not such a case. Maintaining the $15,000 fine ordered provides sufficient specific and general deterrence. Having regard to Eisenberg's modest income and the debt she has incurred to defend these proceedings, a penalty and costs order amounting to nearly six months' earnings is a significant sanction, yet is proportionate to both the seriousness of the misconduct and her personal circumstances. Regardless of whether suspensions have been imposed in other cases MFDA Staff consider similar, we are satisfied that on these facts, a more severe penalty is not necessary to deter others or to protect investors and the capital market. The public interest does not require further measures that will disrupt or perhaps end Eisenberg's career.

[194] At the Appeal Hearing, counsel for the Applicants indicated that Eisenberg had a pre-hearing agreement with Staff whereby she agreed not to contest a $15,000 fine and a $5000 costs order if Staff sought no more than a one-month suspension, which both parties would argue at the MFDA Hearing. As mentioned, because Staff allegedly reneged on the purported agreement and ultimately sought first a three- to five-month suspension and then a six-month suspension, counsel

argued that fairness plus the evidence and the errors in the Decision suggest that the fine should be reduced to $5000 and both the suspension and costs orders should be vacated. Staff vehemently denied that there was any such agreement, and argued that even if there had been discussions of that nature, they were protected by privilege and should not have been raised at the Appeal Hearing.

[195] There was insufficient evidence before us about any such communications. Accordingly, we decline to consider further the Applicants' submissions in this regard. Moreover, we note that in both Eisenberg's written submissions for the MFDA Hearing and in the Applicants' Appeal Submissions, it was acknowledged that as long as no suspension was ordered, a $15,000 fine and a $5000 costs order were "reasonable and proportionate".

[196] We do not consider a costs order part of a sanction for the reasons discussed in many ASC decisions (see, e.g., *Homerun* at para. 48). We note that in their written submissions for the MFDA Hearing, Staff advised that their actual costs of the proceedings were approximately $21,825. Eisenberg contributed to the efficiency of the proceedings by making admissions, but the admissions were made late in the process. As she has therefore been given considerable credit for her cooperation, we consider the Panel's costs order reasonable and appropriate.

## IX. CONCLUSION AND ORDERS

[197] We find that there are grounds to warrant our intervention in the Decision based on the *Canada Malting* test. The MFDA Panel erred in law and principle, and overlooked or gave insufficient weight to material evidence. There was also new and compelling evidence before us corroborating Eisenberg's testimony concerning the impact of a suspension. In addition, the Panel's approach to determining the appropriate sanction for this misconduct in these circumstances demonstrated that its perception of the public interest conflicts with ours.

[198] We therefore conclude that it is in the public interest to vary the Decision and vacate the three-month suspension ordered against Eisenberg because it is disproportionate to the gravity of the offence and the degree of responsibility of the offender. The other elements of the MFDA Panel's sanction order are confirmed.

[199] In accordance with s. 36 of the Act:

(a) the Appeal is allowed in part;

(b) the three-month suspension ordered against Eisenberg is vacated; and

(c) as ordered by the MFDA Panel, Eisenberg shall:

(i) pay a fine of $15,000 to the MFDA;

(ii) pay costs of $5000 to the MFDA; and

(iii) in the future comply with MFDA Rules 1.1.1, 1.1.2, 2.1.1, and 2.5.1.

[200] As this Appeal is now concluded, the Stay Order ceases to have effect as of the date of this decision.

March 15, 2022

**For the Commission:**

"original signed by"
Tom Cotter

"original signed by"
Steven Cohen