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CASE SUMMARY # 200719
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MFDA Case Summary

Enforcement

This case summary was prepared by Staff of the MFDA.

HEARING PANEL ACCEPTS SETTLEMENT WITH BERKSHIRE INVESTMENT GROUP INC.

Nature of Proceeding

A Hearing Panel of the Pacific Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) has accepted a Settlement Agreement between the MFDA and Berkshire Investment Group Inc. (“Berkshire”), a member of the MFDA.

By-Laws, Rules, Policies Violated

The Hearing Panel considered the Settlement Agreement at a hearing held on December 13, 2007 in Vancouver. In the Settlement Agreement, Berkshire admitted that on two occasions it failed to conduct reasonable supervisory investigations of the activities of Ian Gregory Thow (“Thow”), contrary to MFDA Rules 2.5.1 and 2.1.1(c).

MFDA Rule 2.5.1 states that:

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.

Standard of Conduct

MFDA Rule 2.1.1 states that:

Each Member and each Approved Person of a Member shall:

...

- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest;

Penalty Under the terms of settlement, Berkshire agreed to pay a fine in the amount of \$500,000 and costs to the MFDA in the amount of \$50,000.

Summary of Facts Berkshire has been a Member of the MFDA since March 8, 2002 and is registered to carry on business as a mutual fund dealer throughout Canada. Its Head Office is located in Burlington, Ontario.

Ian Thow

Between November 1998 and June 2005, Thow was registered in British Columbia as a mutual fund salesperson, branch manager and officer with Berkshire. Thow held the titles of Senior Vice-President of Berkshire and co-Branch Manager of its Victoria branch office.

Prior to his resignation from Berkshire on June 1, 2005, Thow persuaded more than 40 individuals (65 counting spouses and related companies separately) to provide him with at least \$18 million for the purchase of investments outside of Berkshire which did not really exist (the “investment schemes”). Many of the individuals who provided money to Thow in connection with the investment schemes were clients or former clients of Berkshire. Thow did not use the monies that he received from the individuals to purchase investments on their behalf. Instead, Thow used the monies for his personal benefit.

Although Thow did apparently repay approximately \$3.2 million to certain individuals prior to his resignation (using monies received from some individuals to repay others) he has not repaid or otherwise accounted for the rest of the money obtained in connection with the investment schemes.

Berkshire had not approved the sale of any of the investment scheme products and none of the money paid for those investments was made payable to Berkshire or deposited in any account of Berkshire or its clients. Thow actively concealed his misconduct from Berkshire and Berkshire did not benefit from his misconduct. Berkshire did not receive any client complaints about Thow’s misconduct until after Thow’s resignation.

The Report from LV

On approximately September 16, 2004, Berkshire’s legal department received information from a lawyer concerning the fact that a wealthy businessman, LV, was one of three or four individuals who had given money to Thow to invest in a Jamaican bank. LV was seeking information about his investment. LV was not a Berkshire client. Berkshire was informed that LV had

transferred \$1.2 million to Thow's bank account for the purchase of shares in the Jamaican bank. When LV requested documentation from Thow concerning his purchase, Thow instead provided LV with \$1.2 million in travel vouchers relating to Thow's aircraft leasing business.

Berkshire notified its Compliance Department about the information received concerning Thow's dealings with LV but did not inform anyone in Thow's branch in Victoria, including the co-Branch Manager.

Thow denied that he received monies from LV to invest in Jamaican bank shares and claimed that LV had purchased a block of flight time on his aircraft and was now "playing hardball" to recover money from Thow.

On September 22, 2004, Berkshire's legal department received a call from LV who said that the information previously conveyed to Berkshire was "a misunderstanding". LV said Thow was his personal friend and that one of his companies intended to do business with Thow's aircraft leasing company. Berkshire heard nothing further about the matter and considered it resolved.

Berkshire was not aware that Thow had contacted LV and agreed to repay the \$1.2 million if LV would tell Berkshire that the information provided by the lawyer was a misunderstanding.

The Report From DS

On April 20, 2005, Berkshire received a call from DS who claimed that he had provided U.S. \$200,000 to Thow to purchase shares in the same Jamaican bank. In response to requests by DS for documentation concerning his investment, Thow sent DS a receipt from Thow's aircraft leasing company for credit towards flight time. DS was not a client of Berkshire, but after pursuing Thow for between 6 months and 1 year he asked for assistance from Berkshire to recover his money.

The report by DS was substantially similar to the information previously communicated to Berkshire by the lawyer concerning LV.

Berkshire tried to arrange for senior representatives from its compliance department to attend at Thow's branch to conduct an investigation but Thow refused to meet for the purpose of discussing his dealings with DS.

Berkshire scheduled an in-person meeting with DS but DS subsequently cancelled the meeting when Thow and DS entered into negotiations for the return of DS's money. Berkshire was not aware of DS's reasons for cancelling the meeting. DS subsequently stated he was never repaid by Thow.

On May 5, 2005, Thow attended a meeting at Berkshire's head office and submitted a letter of resignation. Thow refused to answer most of Berkshire's questions concerning his dealings with DS and denied that he had sold DS

shares in the Jamaican Bank. Thow insisted that DS had purchased a block of flight time from Thow's aircraft leasing business.

Berkshire accepted Thow's resignation, but agreed to defer the effective date to June 1, 2005. Berkshire did not conduct any further supervisory investigations.

Losses Sustained After The LV and DS Reports

Between September 16, 2004, when Berkshire received the report about LV and April 20, 2005 when Berkshire received the report from DS, Thow obtained more than \$5.8 million from individuals. Of that amount, more than \$4.3 million was obtained from clients of Berkshire.

Between April 20, 2005 when Berkshire received the report from DS and June 1, 2005 when Thow's resignation became effective, Thow obtained approximately \$510,000 CDN and \$30,000 USD from individuals. Of that amount, approximately \$210,000 was obtained from clients of Berkshire.

In response to complaints from some individuals concerning losses sustained in connection with Thow's investment schemes, Berkshire voluntarily initiated mediations with 29 of its clients. These mediations resulted in Berkshire paying \$4.1 million to the 29 clients in settlement of their claims.

Berkshire's Failure To Conduct Reasonable Supervisory Investigations

Berkshire admitted that in light of the potentially serious implications of the information communicated to Berkshire by the lawyer about Thow's dealings with LV, Berkshire should have conducted a reasonable supervisory investigation concerning Thow's dealings with LV and continued it even after LV told Berkshire that the matter was a misunderstanding.

Berkshire also admitted that between April 20, 2005 and May 5, 2005, after receiving the report from DS, Berkshire did not take sufficient steps in furtherance of a reasonable supervisory investigation of Thow's activities and did not impose any interim supervisory measures to protect its clients' interests until such time as it could assess the merits of DS's report. The Hearing Panel accepted that, in the circumstances, Berkshire had an obligation, at a minimum, to suspend Thow immediately on May 5, 2005 and to take other appropriate interim supervisory and disciplinary measures to protect its clients' interests and preserve relevant documentation.

The Hearing Panel also accepted that if Berkshire had conducted reasonable supervisory investigations after receiving the reports relating to LV and DS, it would have increased the likelihood that Thow's misconduct would have been discovered and Thow would have been prevented from continuing to engage in such conduct while registered with Berkshire.

The Hearing Panel accepted that Berkshire's failure to conduct reasonable supervisory investigations did not arise from any general failure to maintain and adhere to appropriate supervisory policies and procedures or from any intentional non-compliance on its part. The Hearing Panel also accepted that prior to the hearing, Berkshire had reviewed its policies and procedures and supplemented them to address deficiencies that may have accounted in part for the failure to conduct reasonable supervisory investigations in this case.

The Hearing Panel determined that reasonable supervisory investigations following receipt of the reports concerning LV's and DS's dealings with Thow would have included, at a minimum, the following:

- (1) Contacting LV and the lawyer to confirm the nature of the purported misunderstanding between them regarding LV's transactions with Thow;
- (2) Taking steps to ascertain whether Thow obtained money for investments from any other individuals who attended the fishing trip hosted by Thow;
- (3) Taking steps to ascertain whether DS was aware of any other individuals who had given money to Thow for investments outside of Berkshire;
- (4) Ascertaining whether Thow's co-Branch Manager at the Victoria branch was aware of any unusual activity on Thow's part which might suggest that Thow was conducting securities related business outside Berkshire, or was engaging in undisclosed outside business activities;
- (5) Conducting a review of Thow's office and client files; and
- (6) Requiring Thow to provide written disclosure to individuals involved in his outside business activities that the activities were not the business or responsibility of Berkshire.

The Hearing Panel also stated that if Berkshire had conducted an investigation of its clients over the 12 months prior to the date of the LV information, a pattern may have emerged. If Berkshire had contacted clients who cashed in accounts or transferred monies out, they may have discovered Thow's off book activities.

For greater detail, see the Settlement Agreement, accepted on December 13, 2007 and the Decision and Reasons, dated January 3, 2008, posted on the MFDA's website in the "Completed Cases" section under "Enforcement".