Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Joel Henry Attis

Heard: November 10, 2022 by electronic hearing in Moncton, New Brunswick
Decision: November 10, 2022
Reasons for Decision (Penalty): December 22, 2022

REASONS FOR DECISION (PENALTY)

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, K.C.	Chair
Edward Jackson	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Alan Melamud	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Edwin G. Ehrhardt, K.C	)	Counsel for the Respondent
Joel Henry Attis	)	Respondent

I. FINDINGS OF MISCONDUCT

1. On July 5, 2022, the Hearing Panel issued its Decision and Reasons (Misconduct) with respect to Joel Henry Attis ("Respondent"). We, unanimously, concluded that Staff, on a balance of probabilities, had established that:

> Allegation #1: Between December 2015 and August 2017, the Respondent engaged in discretionary trading in respect of four series of bulk trades he processed in client accounts, contrary to the Member's policies and procedures, and MFDA Rules 2.3.1(b), 1.1.2, 2.5.1, or Rule 2.1.1.
>
> Allegation #2: Between December 2015 and August 2017, the Respondent failed to maintain adequate records of the clients' authorization for trades, contrary to the Member's policies and procedures and MFDA Rules 5.1, 1.1.2 and 2.5.1, or Rule 2.1.1.

II. PENALTY HEARING

2. On November 10, 2022, a Penalty Hearing took place before this Hearing Panel by videoconference.

3. Prior to the Penalty Hearing, both Staff and the Respondent had made fulsome written submissions as to Penalty.

4. In the written submissions, made on behalf of the Respondent, it was stated: The Respondent "now" recognizes his misconduct and is remorseful and accepts responsibility for his conduct" (emphasis added).

5. Through his counsel, the Respondent requested an opportunity to address the Hearing Panel at the Penalty Hearing.

6. The Respondent testified, in part, as follows:

> "The Cambridge dictionary defines remorse as a feeling of sadness and being sorry for something that you have done. The Merriam-Webster dictionary goes on to explain the concept of self-reproach, which arises upon one's harsh criticism or disapproval of oneself for wrongdoing and where the individual must live with the tumult of his emotions, being sick with shame.
>
> Let there be no confusion or doubt. I am profoundly remorseful for the actions I took that have led us here today. I have let everyone down, my dealer, my regulator, this panel, myself. As a consequence, not a day passes that I'm not distressed by my never – my never-ending feelings of self-reproach.
>
> Even though I do not believe my clients were negatively impacted by the actions I undertook, skirting rules to achieve the desired outcome is unacceptable, and I

sincerely apologize. I am chastened; I am disgraced. I'm so very sorry for all this trouble. . . .

A little background. In first-year law school, students are taught about a concept called strict offence. Essentially means that if it can be proven that the act – that an individual committed an act, a finding of guilt must ensue. In other words, there's no defence permitted, but an offence falls into this category.

I raise this concept to illustrate a point. In what must have been a monumental naivety or utter self-delusion, I always believed that protecting clients was the first and foremost concern of the industry. I believed that the rules were there to keep advisors between the lines, especially advisors who might otherwise deliberately or inadvertently harm clients.

All along I was convinced that I did the right thing for my clients, and I couldn't understand why no one seemed to care that my mind was in an honest place, and all I wanted to do was protect my clients. I kept asking myself, why are they all treating this like a strict offence and disregarding my arguments about how clients were helped.

What I failed to see, and in fact, this realization did not dawn on me until after I read the decision and had a lot of time to contemplate the entire matter. The proverbial light came on. All along, I had been thinking that this can't be happening. All I did was serve my clients to the best of my ability.

Well, perhaps I did. But what I failed – but what failed to register in my mind was the fact that even though I may have been serving my clients well, I was, in fact, not serving my industry well. In order for the industry to thrive, it must have structure. Structure entails rules, and rules entail enforcement.

What I failed to see in my misguided logic was that from the perspective of compliance, there must be zero tolerance for discretionary trading. In other words, it must be treated in similar fashion to a strict offence. Otherwise, how would it be possible to control discretionary trading? The MFDA can't excuse one advisor because he had a good record and no clients were hurt. How in the world could the MFDA manage the numerous complexities that would naturally arise?

. . . .

I take full ownership of my failings. I recognize the confusion I created by the misleading statements I gave throughout the early stages and how insincere and deceptive my explanations would have appeared to this panel, insofar as trying to explain my prior inconsistent statements. I was afraid, confused, and essentially a nervous wreck.

My eyes have been opened wide, and – and it is with these wide-open eyes that I offer my most sincere apologies to the panel, to Mr. Melamud, and to the Staff of the MFDA. I am truly and completely remorseful. At this – at this point, with time and perspective at my back, I can only tell you that I am extremely contrite."

III. JOINT SUBMISSION AS TO PENALTY

7. At the Penalty Hearing, the parties made a Joint Submission as to Penalty. This Submission differed from the positions in their respective written submissions.

8. The parties also made oral submissions as to why, in law and on the facts of this particular case, the Joint Submission should be accepted by this Hearing Panel.

IV. DECISION ON PENALTIES

9. At the completion of the oral submissions, the Hearing Panel retired to consider whether, in all of the circumstances, we were in a position to accept the Joint Submission as to Penalty. After careful consideration of the Joint Submission, the applicable law, as well as the facts and circumstances set out in our Decision and Reasons (Misconduct) we, unanimously concluded that we should accept the Joint Submission as to Penalty and we, accordingly, caused an Order to be issued, the operative paragraphs of which are as follows:

a) The Respondent is prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of two (2) years from the date of this Order, pursuant to section 24.1.1(e) of the MFDA By-law No. 1.

b) The Respondent shall pay a fine in the amount of $50,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1.

c) The Respondent shall pay costs in the amount of $15,000, pursuant to s. 24.2 of MFDA By-law No. 1.

d) The Respondent shall pay the fine and costs as follows:

   i. $10,000 (costs) on the date of this Order;

   ii. $50,000 (fine) and $5,000 (costs) on or before November 30, 2022.

e) If at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No.1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedur*e.

V. REASONS FOR DECISION (PENALTY)

10. At the time of issuing the Order, on November 10, 2022, we advised the parties that Reasons would follow: These are those Reasons.

I. The Law

11. The law is clear that the Hearing Panel is not obligated to accept a joint submission as to penalty. On the other hand, multiple MFDA Hearing Panels have indicated that a joint recommendation should not be rejected unless it is manifestly unfit.

> *Rempel (Re),* 2015 LNCMFDA 154 at para.13.
>
> *Fauth (Re),* 2017 LNCMFDA 29 at para. 9.
>
> *Edward S. Brown*, 2015 LNCMFDA 32 at para. 30.
>
> *Barry Allan Hunt*, 2014 LNCMFDA 54 at para. 12.
>
> *Chris McAuley* (Re), 2011 LNCMFDA 9 at para. 5.

12. Investor protection is the primary goal of securities regulation.

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

II. Factors Concerning the Appropriateness of the Proposed Sanctions

13. Sanctions imposed by a Hearing Panel should be protective and preventative to prevent likely future harm to the markets. To determine whether a sanction is appropriate, the Hearing Panel should consider:

a) the protection of the investing public;
b) the integrity of the securities markets;
c) specific and general deterrence;
d) the protection of the MFDA's membership; and
e) the protection of the integrity of the MFDA's enforcement processes.

> *Tonnies (Re),* 2005 LNCMFDA 7 at paras. 44 and 46.

14. Hearing Panels have also previously considered the following factors when determining whether a sanction is appropriate:

a) the seriousness of the allegations against the Respondent;
b) the Respondent's past conduct, including prior sanctions;
c) the Respondent's experience and level of activity in the capital markets;
d) whether the Respondent recognizes the seriousness of the improper activity;
e) the harm suffered by investors as a result of the improper activity;

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

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

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

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

j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, from engaging in similar improper activity; and

k) previous decisions made in similar circumstances.

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

15. When considering whether the joint recommendation as to penalty is appropriate, the Hearing Panel should also refer to the MFDA's Sanction Guidelines. The Sanction Guidelines are not mandatory or binding on the Hearing Panel, but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of MFDA Hearing Panels, are also reflected and described in the Sanction Guidelines.

III. Considerations in the Present Case

(a) Nature of the Misconduct

16. As was stated in paragraph 107 of our Decision and Reasons (Misconduct), quoting from the Hearing Panel in *Rounthwaite (Re)*, 2012 LNCMFDA 60 at paras. 7-8:

> "Discretionary trading is fundamentally wrong . . . Member Rule 2.3.1 absolutely prohibits it. It:
>
> (i) Undermines the client's right and ability to make informed decisions about their financial affairs;
>
> (ii) Subverts the ability of a Member to properly supervise trading activity; and
>
> (iii) Destroys the integrity of the audit trail.

> Jurisprudence emanating from MFDA Hearing Panels is consistent that even when an Approved Person fully apprises a client of the details of a transaction, after it has been made, a discretionary trade is still wrong."

17. The seriousness of the misconduct is heightened by the fact that, as we found, the Respondent failed to maintain adequate records of the clients' authorizations for trades, contrary to both the Member's policies and procedures, as well as the Rules of the MFDA.

(i) The Respondent's Past Conduct

18. The Respondent has not previously been the subject of a MFDA disciplinary proceeding.

(c) The Respondent's Experience and Level of Activity in the Capital Markets

19. As detailed in paragraphs 16 and 20-23 of our Decision and Reasons (Misconduct), the Respondent commenced registration in the securities industry in 2003 and was a well-educated and experienced Dealer Representative who had significant familiarity with the applicable rules and regulations.

(d) The Respondent's Recognition of the Seriousness of the Misconduct

20. It is clear to the Hearing Panel, after listening to the Respondent at the Penalty Hearing, as partially outlined above in paragraph 6, that the Respondent now has a full recognition of the seriousness of his misconduct and is remorseful for same.

(e) The Harm Suffered by Investors

21. There is no evidence that any of the Respondent's clients suffered financial harm as a result of his misconduct.

(f) The Benefit Received by the Respondent

22. While it was agreed by the parties that the Respondent did not receive any direct commission from the Bulk Trades, there was a dispute as to whether, by engaging in discretionary trading, the Respondent was able to save himself time and potential expenses, which he would have incurred to obtain additional assistance from additional registrants or support staff to service his client base. We took these opposing views into account when considering the appropriateness of the proposed penalties.

(g) Deterrence

23. Deterrence is intended to capture both the specific deterrence of the wrongdoer, as well as the general deterrence of other participants in the market place in order to protect investors.

24. In our view, the proposed penalty will specifically deter the Respondent from engaging in similar activity by imposing a meaningful sanction upon him which reflects the seriousness of the misconduct at issue.

25. The Respondent has also detailed to us the effect which the publication of our Decision and Reasons (Misconduct) has had upon him and how it has caused him to reflect upon his past activities.

26. We also believe that the proposed penalty will deter others in the mutual fund industry from engaging in similar activity.

(h) Previous Decisions Made in Similar Circumstances

27. In its written Submissions, Staff provided the Hearing Panel with a detailed chart of what is referred to as "comparator" cases, although it pointed out that "there are several significant and critical delineations between those cases and the case before the Hearing Panel, rendering the precedents of limited value to establish an appropriate sanction."

28. In the written Submissions, filed on his behalf, the Respondent did a detailed analysis of all of the cases seeking to differentiate them from the case before the Hearing Panel.

29. It is also to be remembered that these cases were submitted and analyzed before the parties arrived at a Joint Submission as to Penalty.

30. For reference purposes, the following cases were submitted and analyzed:

a) *Arena (Re)*, 2020 LNCMFDA 117
b) *Martell (Re),* 2018 LNCMFDA 234
c) *Carney (Re*), 2017 LNCMFDA 100
d) *Garries (Re)*, 2016 LNCMFDA 174
e) *Moakler (Re*), 2016 LNCMFDA 60
f) *O'Brien (Re)*, 2008 LNCMFDA 17
g) *Li (Re),* 2016 LNIIROC 34

h) *Tersigni (Re),* 2016 LNIIROC 19

i) *Stefaniuk (Re),* 2015 LNIIROC 36

j) *Biron (Re),* 2012 LNIIROC 4

k) *Shamseer (Re),* 2011 LNIIROC 5

l) *Shamseer (Re),* [2007] I.D.A.C.D. No. 2

m) *Karcz (Re),* 2010 LNIIROC 22

n) *Bardsely (Re),* 2010 LNIIROC 15

o) *Osman (Re*), [2007] I.D.A.C.D. No. 3

VI. CONCLUSION

31. As indicated above, in paragraph 9 hereof, after carefully considering the Joint Submission, the applicable law, as well as the relevant facts and circumstances, we, unanimously, concluded that we should accept the Joint Submission as to Penalty.

DATED this 22nd day of December, 2022.

"Thomas J. Lockwood"
Thomas J. Lockwood, K.C.
Chair

"Edward Jackson"
Edward Jackson
Industry Representative

"Guenther W. K. Kleberg"
Guenther W. K. Kleberg
Industry Representative

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