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: Gerard H. Brake and Mavis E. Brake

Reconvened: February 19, 2009, Winnipeg, Manitoba
Panel Decision: February 19, 2009

REASONS FOR DECISION
(Penalty)

Hearing Panel of the Prairie Regional Council:

Robert Hucal	Chair
M.E. (Elaine) Bradley	Industry Representative
Erwin Granson	Industry Representative

Appearances:

Maria Abate Charles Toth	))	For the Mutual Fund Dealers Association of Canada
Mavis Brake	)	Attended Personally
Gerard Brake	))	Not in attendance personally or represented by counsel – represented by Mavis Brake

1. The Hearing Panel, having rendered its decision on December 3, 2008 on the merits and unanimously concluded that the allegations of misconduct had been proven against the Respondents, reconvened to hear submission from MFDA Counsel and the Respondents as to penalty.

2. The allegations, in respect of which misconduct was found, in summary, are as follows:

> Allegation #1 – Respondents failed to disclose or obtain approval to conduct outside business activities, contrary to MFDA Rule 1.2.1(d);
>
> Allegation #2 – Respondents engaged in securities-related business outside the Member by selling more than $1 million in shares of corporations, which sales were neither for the account of nor through the facilities of the Member, contrary to MFDA Rule 1.1.1(a);
>
> Allegation #3 – Respondents' sale of more than $1 million shares of corporations owned or operated by the Respondents, which ownership was not disclosed to the clients, giving rise to at least a conflict of interest, contrary to MFDA Rules 2.1.4 and 2.1.1;
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> Allegation #4 – Respondents failed to return or account for the invested funds, contrary to MFDA Rule 2.1.1;
>
> Allegation #5 – Respondent, Mavis Brake, failed to fulfill her obligation as a branch manager by intentionally concealing from the Member certain conduct and outside business activities of the Respondents, contrary to MFDA Rules 2.5.3(b) and 2.1.1;
>
> Allegation #6 – Respondents failed to cooperate with the MFDA in its investigation, contrary to section 22.1(b) of MFDA By-law No. 1.

3. Submissions were heard from MFDA Counsel, but not from Mavis Brake, who although claiming to be present on her own and Gerard Brake's behalf, chose not to make a submission.

4. In its deliberation as to penalty, the Panel recognized that the following should be taken into account in determining appropriate sanctions:

a) protection of the investing public, MFDA Membership and its enforcement process;
b) integrity of the securities markets; and
c) specific and general deterrence.

5. Other hearing panels have often considered additional factors in determining the appropriate penalty, which include the following:

- seriousness of the allegations proved;
- past conduct of the Respondent, including prior sanctions;
- whether the Respondent recognizes the seriousness of the improper activity;
- harm suffered by investors as a result of the improper activity;
- risk to investors and capital markets if the Respondent continued to operate in the capital markets;
- damage caused to the integrity of capital markets due to improper activity;
- the need to deter, not only the Respondents, but also others from engaging in similar improper activities;
- the clear message regarding consequences of inappropriate activities; and
- previous decisions in similar circumstances.

6. The MFDA penalty guidelines also provided a source of direction in our determining the appropriate penalties. The penalties expressed are guidelines only and not mandatory. The fines levied are minimums and it is clear that larger fines, including disgorgement of financial benefits are appropriate in the right situation.

7. In considering the appropriate penalty, we focused in particular on the matter of disgorgement of possible benefits to the Respondent.[1] We also considered previous decisions regarding protection of the investor[2] and decisions dealing with sanctions intended to be preventative and protective.[3]

8. In reaching our December 3, 2008 decision, we made a clear finding of misconduct against the Respondents. The Respondents disregarded regulatory requirements, ignored or interfered with MFDA investigations, continuously sought to delay the investigation and hearing process, failed to cooperate after feigning cooperation, made no restitution or accounted for invested funds, showed no remorse and likely had no recognition of the seriousness of their improper activity. Even at the penalty hearing, Mavis Brake, after indicating she wished to make a presentation, immediately launched into a diatribe about the misbehaviour of everyone but herself, the fact that she was a victim, not her investors and attempted, before being silenced, to deflect blame to others. We mused about the fact that possibly neither Mavis Brake nor Gerard Brake thought they did anything improper in any respect. We were advised by MFDA Counsel (this was new information presented at the penalty phase) that Mavis Brake was found unsuitable to hold a life insurance agent license in Manitoba for misconduct not dissimilar from the misconduct which brought her before us originally. Without question, the actions of Gerard and Mavis Brake were improper and damaged the integrity of the securities markets. We determined there was no reason to take any position that approached even a modicum of leniency in determining the penalty.

9. As to the penalty suggested for Mavis Brake relating to Allegation 5, we considered the fact that she, as a branch manager, was in a position of trust and her actions did not reflect the high standards which should be attributed to that role.

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[1] In the Matter of Earl Crackower, 2005 MFDA file #200506.
In the Matter of Joseph Van Der Velden & Andrew Stokman, 2005 MFDA file #200507.

[2] In the Matter of Robert Roy Parkinson, 2005 MFDA file #200501.

[3] In the Matter of Arnold Tonnies, 2005 MFDA file #200503.

IT IS HEREBY ORDERED THAT:

(a) In order to protect the privacy of the clients named and affected by the Respondents' conduct and in accordance with the MFDA Rules of Procedure, those portions of all exhibits to the Hearing which make reference to former clients of the Respondents shall be redacted so that only initials of such clients are reflected on the public record and any reference to the names of clients of the Respondents that were made during oral submissions at the Hearing shall be recorded on the transcript of the Hearing only with initials of the clients;

(b) The Respondent, Gerard Brake, is permanently prohibited from conducting securities-related business while in the employ of or associated with any MFDA Member, pursuant to MFDA By-law No. 1, Section 24.1.1(e);

(c) The Respondent, Mavis Brake, is permanently prohibited from conducting securities-related business while in the employ of or associated with any MFDA Member, pursuant to MFDA By-law No. 1, Section 24.1.1(e);

(d) The Respondents, Gerard Brake and Mavis Brake, shall pay a fine of at least $1,222,966.00, pursuant to MFDA By-law No. 1, Section 24.1.1(b), which is the approximate amount received by the Respondents that remains unaccounted for with respect to Allegations 1, 2, 3 and 4. In this regard, the total fine is payable by the Respondents in respect of those Allegations;

(e) A fine of $50,000.00 is payable by the Respondent, Gerard Brake, with respect to Allegation 6, being refusal to cooperate, pursuant to MFDA By-law No. 1, Section 24.1.1(b);

(f) A fine of $50,000.00 is payable by the Respondent, Mavis Brake, with respect to Allegation 6, being refusal to cooperate, pursuant to MFDA By-law No. 1, Section 24.1.1(b);

(g) With respect to Allegation 5, a fine of $75,000.00 payable by Mavis Brake for her failure to fulfill her obligations as branch manager, pursuant to MFDA By-law No. 1, Section 24.1.1(b);

(h) Costs in the amount of $10,000.00 are payable by Mavis Brake, pursuant to MFDA By-law No. 1, Section 24.2; and

(i) Costs in the amount of $10,000.00 are payable by Gerard Brake, pursuant to MFDA By-law No. 1, Section 24.2.

DATED this 26th day of February, 2009.

"Robert Hucal"
Robert Hucal
Chair

"M.E. (Elaine) Bradley"
M.E. (Elaine) Bradley
Industry Representative

"Erwin Granson"
Erwin Granson
Industry Representative

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