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: Michael Robert Breuer

Heard: January 8, 2015 in Vancouver, British Columbia
Reasons for Decision (Penalty): January 30, 2015

REASONS FOR DECISION
(Penalty)

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill	Chair
Sharon Moskalyk	Industry Representative
Cecilia Wong	Industry Representative

Appearances:

David Babin	)	Enforcement Counsel, Mutual Fund Dealers Association of Canada
Michael Robert Breuer	)	Not in attendance or represented by Counsel

BACKGROUND

1. By a Notice of Hearing dated December 10, 2013, as amended on May 27, 2014, the Mutual Fund Dealers Association of Canada ("MFDA" or the "Association") commenced disciplinary proceedings against Michael Robert Breuer ("Breuer" or the "Respondent").

2. A Hearing on the Merits was held on July 28 and 29, 2014 in Vancouver, B.C.; the Respondent did not attend either personally or through counsel.

3. In its Decision and Reasons (Misconduct) dated November 13, 2014 the Panel, in the Summary stated:

> "This Hearing Panel, based upon the evidence adduced, including the admissions of the Respondent in his written statement, has concluded that the MFDA has, by clear and convincing evidence, proven Allegations #1 to #6 as set forth in the Amended Notice of Hearing and paragraph 9 hereof."

4. The six allegations that were proven are as follows:

> **Allegation #1**: Between December 30, 2008 and June 30, 2010, the Respondent engaged in personal financial dealings with client ES by entering into an agreement with client ES whereby the Respondent personally guaranteed to compensate client ES for any shortfall in the value of client ES's account below $150,000, thereby giving rise to a conflict or potential conflict of interest between the Respondent and client ES which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.2.1.
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> **Allegation #2**: Between June 28 and July 8, 2010, the Respondent engaged in unauthorized discretionary trading by processing two redemptions, totalling approximately $17,400, in client ES's account, and depositing the proceeds in client ES's bank account, all without the client's knowledge, instructions or approval, contrary to MFDA Rules 2.3.1(a) and 2.2.1.
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> **Allegation #3**: Between June 28 and July 8, 2010, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by using client ES's own monies to compensate her for losses sustained in her account, without her knowledge or approval, contrary to MFDA Rule 2.1.1
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> **Allegation #4**: On or about July 2, 2010, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and

practice in the conduct of business by changing the mailing address for statements sent by a mutual fund company to client ES from client ES's home address to the Respondent's branch office address, without the client's knowledge, instructions or approval, contrary to MFDA Rule 2.1.1.

Allegation #5: Between July 16, 2008 and September 28, 2011, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by misrepresenting to clients GL and ML that the principal amounts of the investments in their account were fully guaranteed, contrary to MFDA Rule 2.1.1.

Allegation #6: Commencing July 19, 2013, the Respondent has failed or refused to provide documents and information to, and to attend an interview requested by, the MFDA during the course of an investigation, contrary to s. 22.1 of MFDA By-Law No. 1 and MFDA Rule 2.1.1.

5. With respect to penalty, MFDA By-law No. 1, Section 24 sets out the disciplinary power of Hearing Panels. With respect to Approved Persons, which applies to the Respondent in this case, the By-law states:

> 24.1.1 *Approved Persons*
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> A Hearing Panel of the applicable Regional Council shall have the power to impose upon an Approved Person or any other person under the jurisdiction of the Corporation any one or more of the following penalties:
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> a) a reprimand;
> b) a fine not exceeding the greater of:
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> (i) $5,000,000.00 per offence; and
> (ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation;
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> c) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;
> d) revocation of the authority of such person to conduct securities related business;
> e) prohibition of the authority of the person to conduct securities related business in any capacity for any period of time;

f) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel;

if, in the opinion of the Hearing Panel, the person:

g) has failed to carry out any agreement with the Corporation;
h) has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or of any regulation or policy made pursuant thereto;
i) has failed to comply with the provisions of any By-law, Rule or Policy of the Corporation;
j) has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or;
k) is otherwise not qualified whether by integrity, solvency, training or experience.

6. In the MFDA decision Re: Arnold Tonnies[1] the Panel stated:

> The courts, and other tribunals, have set out a number of factors to be taken into account in determining penalties to be imposed under provisions similar to s. 24 of Bylaw No. 1. In determining an appropriate penalty, the Supreme Court of Canada has indicated that tribunals must keep in mind the primary goal of securities regulation which is the protection of the investing public (see Pezim v. British Columbia (Superintendent of Brokers, [1994] 2 S.C.R. 557.) The Court also has indicated that sanctions imposed in the securities regulatory context should be protective and preventative, intended to be exercised to prevent likely future harm to the capital markets (see Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132).
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> The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in Re Mithras Management Ltd. et. al. (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:
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> > …[T]he role of this Commission is to protect the public interest by removing from the capital

[1] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Reasons for Decision dated June 27, 2005.

> markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

Several previous decisions of industry tribunals, including an MFDA tribunal (Re Parkinson, [2005] MFDA Case N. 200501), have found the following factors should be taken into account in determining the appropriate sanctions to impose:

a) the protection of the investing public;
b) the integrity of the securities market;
c) specific and general deterrents;
d) the protection of the governing body's membership; and
e) the protection of the integrity of the governing body's enforcement processes.

Moreover, the Supreme Court of Canada in the Cartaway decision, supra, has indicated that general deterrence is an appropriate consideration in making orders that are both protective and preventative. At para. 61 of that case, the Court stated:

> In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s.162. The 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.

Previous tribunals have set out a number of additional factors that should be considered in determining penalty. They include:

- The seriousness of the allegations proved against the respondent;
- The respondent's past conduct, including prior sanctions;
- The respondent's experience in the capital markets;
- The level of the respondent's activity in the capital markets;

- Whether the respondent recognizes the seriousness of the improper activity;
- The harm suffered by investors as a result of the respondent's activities;
- The benefits received by the respondent as a result of the improper activity;
- The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
- The damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;
- 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;
- The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- Previous decisions made in similar circumstances.

See Belteco Holdings Inc. (1998), 21 OS.C.B. 7743; M.C.J.C. Holdings and Michael Cowpland (2002), 25 O.S.C.B. 1133; and Lamoureux (Re), [2002] A.S.C.D. No. 125.

7. Staff of the MFDA ("Staff") submitted that it would be appropriate under the circumstances of this case to impose the following penalty:

a) a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
b) a fine in the range of $100,000 to $150,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
c) costs of $7,500, pursuant to s. 24.2 of MFDA By-law No. 1.

8. Staff submitted that these proposed penalties reflect the seriousness of the Respondent's misconduct, and are consistent with the mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.

9. Staff submitted, and we agree, that clients trust Approved Persons to act in compliance with the policies and procedures of their Members, as well as with MFDA rules and regulations. It is trite that every case depends on its particular facts, and the penalties imposed for contravening those rules and breaking the trust of clients and the investing public should reflect the gravity of such breaches.

10. In Re: Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill[2], the Panel stated:

> 3. The breaches of rules and regulations by HCIM and Mr. Hill indicate a certain irresponsibility and lack of reasonable care in their attempts to meet the requirements and to obey the rules and regulations of the MFDA. Mutual fund dealers carry on a business which is based upon the trust of their clients. Their clients rely upon the dealer for care and maintenance of the funds that they invest with them and rely upon them to act in compliance with MFDA rules and regulations. The punishments that are imposed must reflect the gravity of the breaches and the importance of the maintenance of the trust of clients and members of the public generally in the work of MFDA dealers.
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> 4. A business which is of necessity based upon trust must always do its utmost to preserve that trust and when that trust is breached, to ensure that penalties which are imposed will help to re-establish the trust of the public in the dealers.

11. Staff also referred the Panel to the MFDA Penalty Guidelines. Clearly the Penalty Guidelines, while not mandatory, are intended to assist Hearing Panels, MFDA staff and respondents in considering the appropriate penalties in MFDA disciplinary proceedings. The MFDA Penalty Guidelines recommend the following minimum penalties for the misconduct that has been proven in this case:

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
Rule 2.1.4 Personal Financial Dealings	• Fine: Minimum of $10,000. • Write or rewrite an	1) Whether there were circumstance which may make the offensive activity less objectionable – pre-existing/family relationship between client and

[2] *Re: Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill,* Hearing Panel of the Central Regional Council, MFDA File No. 200834, Reasons for Decision dated June 23, 2009.

	appropriate industry course. • Period of increased supervision for 12 – 24 months. • Suspension. • Permanent prohibition in egregious cases.	the Respondent. 2) Whether the activity was an isolated incident or part of a larger pattern of conduct involving multiple clients. 3) Whether the conflict of interest was explained to the client. 4) Whether the conflict of interest was disclosed to the Member and consent obtained. 5) Whether the Respondent was aware of the prohibited nature of the activity. 6) Level of client sophistication: client's ability to appreciate conflict of interest and provide informed consent. 7) Whether the Respondent concealed or attempted to conceal the activity from the client and/or the Member. 8) Whether the client was harmed by the activity and if so to what extent.
Rule 2.1.1 Standard of Conduct	• Fine: Minimum of $5,000. • Write or rewrite an appropriate industry course. • Suspension. • Permanent prohibition in egregious cases.	1) Nature of the circumstances and conduct. 2) Number of individuals affected. 3) Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.
Rule 2.3.1(a) Discretionary/Unauthorized Trading	• Fine: Minimum of $5,000. • Write or rewrite an appropriate industry course. • Suspension. • Permanent prohibition in egregious cases.	1) Number of trades. 2) Whether client provided verbal authority to engage in discretionary trading. 3) Underlying reason for engaging in trading (e.g. For personal financial gain). 4) The number of clients affected. 5) Period of time over which the trading took place. 6) Suitability of trades. 7) Magnitude of clients' losses.
Section 22.1 of By-law No.1 Failure to Cooperate	• Fine: Minimum of $50,000. • Permanent prohibition.	1) Whether the contravention was intentional or inadvertent. 2) Whether there was complete or only partial non-compliance. 3) The impact that the non-compliance had on the investigation. 4) Whether the Respondent can demonstrate that the refusal to cooperate was based on reasonable reliance on competent legal advice.

12. As can be seen, the cumulative fines proposed in this case exceed the minimum recommended in the Penalty Guidelines.

13. Staff submitted that given the facts in this case (as per the Decision and Reasons (Misconduct)) the penalties sought in this case are appropriate for the following reasons.

The Seriousness of the Misconduct and Harm

14. Staff submits that the misconduct engaged in by the Respondent herein is very serious. We agree. The Respondent, by conscious acts, deceived the affected clients. Further, he knowingly contravened the policies and procedures of the Member, as well as the rules of the MFDA. Staff submitted, and we agree, the Respondent's misconduct was conscious, deliberate, and was undertaken over a number of years.

15. Further, the Respondent, throughout his dealings during the time under consideration, led his clients to believe that the Member sanctioned his guarantees with respect to their investments, or at a minimum that the Member was aware of the guarantees. Clearly this was false, and was used to reassure and give comfort to the clients. In fact, the Respondent, through deliberate acts, concealed his misconduct from the Member, and thus the Member could not detect or supervise his activities and/or alert the clients to a potential or actual conflict. This deception, of the Member, was necessary in order for the Respondent to carry out his nefarious activities.

16. Staff submitted, and we agree, that the Respondent engaged in increasingly egregious misconduct in an effort to cover up his previous misconduct. At no point did the Respondent disclose his actions to the Member; instead he continued to mislead and deceive his clients and the Member.

17. In this case allegation no. 6, which was proven, was: "Commencing July 19, 2013, the Respondent has failed or refused to provide documents and information to, and to attend an

interview requested by the MFDA during the course of an investigation, contrary to Section 22.1 of MFDA By-law No. 1, and MFDA Rule 2.1.1. In Re Martin[3], the Panel stated:

> 31. It is viewed as serious misconduct when an Approved Person does not cooperate with an MFDA investigation and/or fails to comply with a request made by Staff pursuant to Section 22.1 of By-law No. 1. This is because it sabotages the ability of the MFDA to perform its regulatory function of fully investigating a matter and determining all of the relevant facts, including the full extent and implications of the underlying events. The failure to provide information requested in an investigation undermines the integrity of the self-regulatory system and the effectiveness of its operation.
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> 32. The Ontario Divisional Court in Artinian v. College of Physicians and Surgeons of Ontario (1990) 73 O.R. (2nd) 704[4] stated that fundamentally, every professional has an obligation to cooperate with his self-governing body. That decision applies as much to persons in the investment industry as it does to physicians."

18. In Re Vitch[5], the Panel stated:

> 54 Failure to cooperate with an investigation, even where, as here, the failure is not total, is a matter which goes to the very heart of MFDA's ability to attempt to protect investors, maintain capital market efficiency and ensure public confidence in the system. Over twenty years ago, the Ontario Divisional Court, in Artinian v. College of Physicians and Surgeons of Ontario (1990), 73 O.R. (2d) 704, said:
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> > …every professional has an obligation to cooperate with his/her self-governing body.
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> 55 There can be no exceptions to that obligation. The fulfillment of that obligation is particularly important to the MFDA because it has no statutory power to search and seize or to compel the production of documents. Without the cooperation of Members and Approved Persons, the MFDA's ability to

[3] Hearing Panel of the Central Regional Counsel, MFDA File No. 201142, Reasons for Decision dated June 24, 2014

[4] *Artinian v. College of Physicians and Surgeons of Ontario* (1990) 73 O.R. (2nd) 704

[5] Hearing Panel of the Central Regional Counsel, MFDA File No. 201103, Reasons for Decision dated September 22, 2011

> investigate and discipline its Members and Approved Persons is gravely fettered. While penalty guidelines are not binding on a Hearing Panel, they can indicate how seriously the industry views certain types of misconduct. The guidelines suggests a minimum fine of $50,000 for failure to cooperate and envisions the possibility of permanent prohibition of an Approved Person.
> 56 This Hearing Panel cannot overstate the importance of cooperation with an investigation. We think that it is necessary that Members and Approved Persons understand that any failure to cooperate with an investigation will likely attract severe sanctions.

Respondent Breuer's Disciplinary History, Experience, and Level of Activity in the Capital Markets

19. Clearly the Respondent was an experienced registrant, having carried on business as a mutual fund salesperson since 1993. Staff acknowledged that the Respondent had no prior disciplinary history. They submitted, and we agree, that his extensive industry experience, and the MFDA and Members requirements resulted in him being well aware of his regulatory obligations to both the MFDA, and to the Member. We have no doubt that the Respondent was well aware of his regulatory obligations, which is why he carried on his activities in a clandestine manner, and did not disclose them to the Member.

20. Staff submits that the Respondent's continued failure to cooperate indicates the Respondent does not recognize the seriousness of his misconduct. That is one inference that may be drawn, but it may also be that the Respondent fully appreciated that he had engaged in serious misconduct, in contravention of MFDA rules, and Member policies, and that his career was likely finished. However by not responding, or cooperating in the investigation, it is clear the Respondent has not expressed any remorse for his serious misconduct. Staff submitted that the Panel should infer that the Respondent has a complete lack of remorse and has failed to recognize the seriousness of his misconduct, and this should be treated as a significant aggravating factor.

The Benefits Received by the Respondent/Extent of Client Harm

21. On the evidence before us, the Respondent did not receive any financial benefits in terms of fees or commissions as a result of his misconduct. However, the clients who were affected by his misconduct did suffer substantial losses. ES realized a loss of $17,400.00 by July 8, 2010 and GL and ML lost $120,000.00 between June 2008 and December 2012, all of which were borrowed funds. It is particularly egregious in that the Respondent led the clients to believe that the principal of their respective investments would be guaranteed by either the Respondent or by the Member.

Deterrence

22. It is clear from prior court decisions and Hearing Panel decisions that it is appropriate for deterrence to be among the factors taken into account when determining penalty. In Re Cartaway Resources Corp.[6], the court stated:

> 52 Deterrent penalties work on two levels. They may target society generally, including potential wrong doers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: … In both cases deterrence is prospective in orientation and aims at preventing future conduct.
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> 62 It may well be that the regulation of market behaviour only works effectively when securities commissions impose ex post sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.

The same may be said of MFDA Hearing Panels.

[6] *Cartaway Resources Corp. (Re),* [2004] 1 S.C.R. 672

23. Staff submitted that the conduct of the Respondent disclosed in the evidence adduced in this case establishes that he is ungovernable, because clearly at all material times he was aware of his regulatory obligations and opted to act contrary to those obligations, and deceived both the Member and his clients, resulting in financial harm to those clients. Such conduct, in Staff's submission, clearly warranted a permanent ban. We agree.

24. Staff also submitted that the penalties it proposes will effect general deterrence in that they will send a message to other Approved Persons that personal financial dealings with clients of the Member, by way of "guaranteed principals", failure to disclose a potential or actual conflict of interest, surreptitiously repaying a client with their own funds, and failing to cooperate with MFDA investigations will not be tolerated in the mutual fund industry. We agree that it is appropriate in this case to impose a penalty that will have or that should have the effect of a general deterrent.

25. Staff also submitted that the proposed penalties were in keeping with the purpose of the MFDA "to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons. Furthermore, the proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry."

26. Staff also referred the Panel to previous decisions where Hearing Panels had imposed sanctions generally within the range of the penalties sought in the present case: Re Tonnies (supra.); Re Nunweiler[7]; Re Jones[8] and Re Campbell[9]. In each of those cases there was a permanent prohibition, a significant fine ($50,000 to $200,000) and an award of costs.

[7] *Nunweiler (Re)*, Hearing Panel of the Pacific Regional Council, MFDA File No. 201030, Reasons for Decision dated May 28, 2012.
[8] *Jones (Re),* Hearing Panel of the Central Regional Council, MFDA File No. 201008, dated February 7, 2011.
[9] *Campbell (Re),* Hearing Panel of the Pacific Regional Council, MFDA File No. 200805, Reasons for Decision dated June 26, 2008.

Conclusion

27. This Panel carefully considered all of the evidence adduced at the Hearing on the Merits, and the submissions of counsel and the authorities cited with respect to penalty. In our view the Respondent was guilty of very serious misconduct affecting not only his clients, but the reputation of the securities industry. In the result it was our opinion that it would be appropriate under all the circumstances of this case to impose the following penalty on the Respondent:

a) a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of, or in association with any MFDA Member, pursuant to Section 24.1(e) of MFDA By-law No. 1;
b) a fine of $150,000.00 pursuant to Section 24.1.1(b) of MFDA By-law No. 1; and
c) costs of $7,500.00 pursuant to Section 24.2 of MFDA By-law No. 1.

DATED this 30th day of January, 2015.

"Stephen D. Gill"

Stephen D. Gill
Chair

"Sharon Moskalyk"

Sharon Moskalyk
Industry Representative

"Cecilia Wong"

Cecilia Wong
Industry Representative

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