



**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: Gabriele Gentile**

Heard: April 19, 2012 in Halifax, Nova Scotia  
Decision and Reasons: May 8, 2012

**DECISION AND REASONS (MOTION)**

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.  
Ann Etter  
Darrell Bing

Chair  
Industry Representative  
Industry Representative

Appearances:

David Halasz	)	For the Mutual Fund Dealers Association of
	)	Canada
Brian K. Awad	)	For the Respondent
	)	

A. HISTORY OF PROCEEDINGS

1. On December 21, 2011, the Mutual Fund Dealers Association of Canada (“MFDA”) issued a Notice of Hearing against Gabriele Gentile (“the Respondent”).

2. This Notice of Hearing alleged the following violations of the By-laws, Rules or Policies of the MFDA:

**Allegation #1:** Between March 2007 and October 2008, the Respondent, in his capacity as Branch Manager, received information on five occasions that Bruce Schriver, a licensed insurance agent of an affiliate of the Member who conducted business from the branch location supervised by the Respondent, had borrowed monies from clients and other individuals which he had not repaid, which information the Respondent failed to report to the Member’s head office compliance staff, as a result of which the Member was not made aware of the circumstances and was unable to conduct a reasonable supervisory investigation and take such other supervisory measures as may have been warranted in the circumstances, contrary to MFDA Rules 2.5.3(b) and 2.1.1(c) and MFDA Policy No. 3.

3. By Notice of Motion, dated January 23, 2012, the Respondent moved for the following relief:

- (a) a dismissal of the Notice of Hearing in the within matter, issued by the MFDA on December 21, 2011; and
- (b) such amended, additional or other relief as counsel may request and the Panel may deem just and appropriate to grant.

4. In the Notice of Motion, the Respondent relied on the following grounds:

- (a) Allegation #1 in the Notice of Hearing is based on the proposition that the Respondent, as Branch Manager of the Member, was required to report to the Member’s head office certain conduct of BS, an individual identified in the Notice of Hearing.
- (b) BS was not an Approved Person, Employee or Agent of the Member.
- (c) MFDA Rule 2.5.3(b) (now 2.5.5(d)), MFDA Rule 2.1.1(c), and MFDA Policy No. 3 did not require a Branch Manager to report to the Member’s head office in regard to

conduct or possible conduct of a third party who was not an Approved Person, Employee or Agent of the Member.

(d) Allegation #1 is not well founded, is not sustainable, and does not raise a genuine issue requiring a hearing of the merits of the allegation.

(e) Such other grounds as counsel may cite and the Panel may deem just and appropriate to consider.

5. The First Appearance in this matter took place before a Hearing Panel of the Atlantic Regional Council of the MFDA on February 2, 2012.

6. After hearing submissions from counsel for both the Respondent and the MFDA Staff with respect to the scheduling of the Motion, the following Order was made:

i. The Respondent shall serve and file by March 2, 2012, all moving materials, including any evidence, submissions and authorities.

ii. MFDA Staff shall serve and file by March 30, 2012, all responding materials, including any evidence, submissions and authorities.

iii. The next hearing in this matter shall occur by teleconference on Thursday, April 5, 2012, commencing at 10:00 a.m. (Atlantic) in order to discuss any procedural issues, including whether the Respondent's motion shall be heard in writing or as an oral hearing.

iv. Should the Respondent's motion proceed by way of an oral hearing, it shall be heard on April 19, 2012 at 10:00 a.m. (Atlantic) at a venue to be announced in Halifax, Nova Scotia.

7. Extensive written materials were served and filed by the parties in accordance with the provisions of paragraphs 1 and 2 of the February 2, 2012 Order.

8. In accordance with paragraph 3 of the February 2, 2012 Order, a further hearing occurred by way of teleconference on April 5, 2012.

9. After hearing submissions of counsel for the parties, the following Order was made:

- i. The Respondent shall serve and file reply motion materials and a book of authorities by April 10, 2012; and
- ii. The Respondent's motion shall proceed by way of an oral hearing on April 19, 2012, commencing at 10:00 a.m. (Atlantic) at a venue to be announced in Halifax, Nova Scotia.

10. Reply materials and a Book of Authorities were served and filed in accordance with paragraph 1 of the April 5, 2012 Order.

11. On April 5, 2012, the MFDA issued a News Release providing details as to the venue of the Motion.

12. On April 19, 2012, both parties made lengthy oral submissions with respect to the Motion. At the completion of the submissions, the Hearing Panel reserved its decision and advised that it would release its Decision and Reasons in due course. The following constitutes our Decision and Reasons on the Respondent's Motion.

#### B. PROCEDURE ON MOTION

13. The MFDA Rules of Procedure ("ROP") do not specify or limit the types of preliminary motions that parties to a disciplinary hearing may bring before a Hearing Panel.

14. ROP 6 provides detailed guidance as to the mechanics of bringing a preliminary motion, including the contents of the Notice of Motion, the Motion Record and the Responding Record.

15. ROP 6.10 indicates the avenues which are open to the Hearing Panel when a motion is heard prior to the hearing of the proceeding on its merits. It provides as follows:

##### ***6.10 Disposition of Motions***

- (1) When a Motion is heard by a Panel prior to the hearing of the proceeding on its merits, the Panel may:
  - (a) grant the relief requested;

- (b) dismiss or adjourn the motion, in whole or in part and with or without terms;  
or
- (c) adjourn the motion to be disposed of by the Panel presiding over the hearing of the proceeding on its merits.

16. ROP 1.3 and 1.5 provide guidance as to how the ROP should be interpreted, as well as outlining the general powers of a Hearing Panel, as follows:

***1.3 General Principles***

- (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.
- (2) Where matters are not provided for in these Rules, the practice may be determined by analogy to them.

***1.5 General Powers of a Panel***

- (1) A Panel may:
  - (a) exercise any of its powers under these Rules on its own initiative or at the request of a party;
  - (b) waive or vary any of these Rules at any time, on such terms as it considers appropriate;
  - (c) issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.

17. At the beginning of the Oral Argument, we advised the parties that, in our view, the Motion was properly before us for consideration.

**C. POSITION OF THE PARTIES ON THE MOTION**

18. The Respondent defined the issue which he was raising on the Motion as follows:

“Is it open to the Panel to find that the Moving Party, “in his capacity as Branch Manager,” acted contrary to MFDA Rule 2.5.3(b), MFDA Rule 2.1.1(c) or MFDA Policy No. 3 by failing to report to the Member’s head office information concerning B.S., an individual who was not an Approved Person, Employee or Agent of the Member?”

19. In his Reply Submissions, the Respondent stated that “the key issue to be addressed by the panel on the motion is the scope (and limits) of a branch manager’s obligation to report to

head office”, which he defined as the Duty to Escalate.

20. The position of Staff is that the Respondent was “at all material times a branch manager subject to the MFDA’s jurisdiction and in his capacity as a branch manager had supervisory responsibilities.”

21. Staff further stated that:

“At issue in this proceeding (as opposed to this motion), is whether those supervisory responsibilities included, as Staff alleges, an obligation to escalate the reports the Respondent received from clients and others concerning Schriver’s borrowing activity. The determination of that question falls squarely within the Hearing Panel’s mandate to interpret and apply the applicable MFDA rules and requirements to the actions of an Approved Person based on the evidence adduced by the parties at the hearing. (See ss. 24.1.1(i) and (ii) of MFDA By-law No. 1). The Respondent has therefore not established that either the Respondent himself or the issue to be determined in this proceeding falls outside the Hearing Panel’s jurisdiction.”

22. It is clear to this Panel that the MFDA had jurisdiction over the Respondent who, it was agreed for the purposes of this Motion, “had been registered as a mutual fund salesperson and Branch Manager with Desjardins Financial Services Investments Inc. (“Desjardins”) since July 15, 1989.”

23. The real point of departure between the parties on the Motion was whether the Hearing Panel, at this preliminary stage of the proceedings, was in a position to determine the issue raised by the Respondent in his Notice of Motion.

24. The position of the Respondent was that “all essential facts are before the panel” and “it is entirely appropriate that a panel decide the issue raised on the motion on a preliminary basis.”

25. The position of Staff was that:

“It is premature to determine the issue raised in this proceeding at this preliminary stage. The primary goal of securities regulation is protection of the investing public and in furtherance of that goal, the Hearing Panel has a broad discretion to make determinations in the public interest. There is a heightened obligation on the Hearing Panel to ensure that important contested matters of this nature brought before it are determined in an open and transparent manner on the basis of a full evidentiary hearing. The appropriate time for the Respondent to argue the questions that he is raising on this motion is not at the beginning

of the hearing but at its conclusion, at which time the Hearing Panel can determine these questions on the basis of a full evidentiary record and with the benefit of the parties' submissions in respect of that evidence and the applicable regulatory considerations."

D. RELEVANT "FACTS" AND TEST TO BE APPLIED ON MOTION

26. The Respondent submitted that his Motion was analogous to a "motion to strike" in a civil litigation context and proposed that the Hearing Panel should assume, for the purposes of the adjudication of the Motion, and without making findings that are binding in the main proceeding, that the facts alleged in the Notice of Hearing are true.

27. Without in any way abandoning its position on the premature nature of the Motion, Staff made extensive submissions as to the test to be met by the Respondent on a Motion to Strike. The Respondent did not take issue with the nature of this test

28. In *Hunt v. Carey* [1990] S.C.J. No. 93, at paragraph 33, the Supreme Court of Canada articulated the test to be applied for striking out a claim at the pleadings stage as follows:

"Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C.O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a)." [Emphasis added]"

Re: *Hunt v. Carey* [1990] S.C.J. No. 93 (SCC) at para. 33.

29. In *Hunt v. Carey*, the Supreme Court also dealt with the issue of what is the appropriate forum to resolve disputed or unresolved questions of law as follows:

"Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law

were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century."

Re: *Hunt v. Carey, supra* at paras. 17 and 18.

30. The Supreme Court of Canada in its recent Decision of *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42, at paragraph 17, reiterated that "A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action."

31. We agree with the submission of Staff that our analysis on this Motion should be informed by the fact that it is brought in the context of a securities regulator with an investor protection mandate which is empowered to make determinations in the public interest. See, for example, section 24.1.1(j) of MFDA By-law No. 1 which provides, in part, as follows:

## **"24. DISCIPLINE POWERS**

### **24.1 Power of Hearing Panels to Discipline**

#### *24.1.1 Approved Persons*

A Hearing Panel of the applicable Regional Council shall have 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: (then follows a list of possible penalties) if, in the opinion of the Hearing Panel the person:

\* \* \*

- (j) has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest."

## **E. APPLICABLE MFDA RULES AND POLICY**

32. The Notice of Hearing alleges that the Respondent acted contrary to the following MFDA Rules and Policy:

A. “2.1.1 **Standard of Conduct.** 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.”

B. “2.5.3 **Branch Manager**

(b) **Responsibilities.** It is the responsibility of a branch manager to:

(i) ensure that the business conducted on behalf of the Member by an Approved Person and other employees and agents at the branch is in compliance with applicable securities legislation and the By-laws and Rules;

(ii) supervise the opening of new accounts and trading activity at the branch office.”

C. MFDA POLICY NO. 3 – HANDLING CLIENT COMPLAINTS

“Introduction

This Policy establishes minimum industry standards for handling client complaints. A “complaint” shall be deemed to mean any written statement of a client or any person acting on behalf of a client alleging a grievance involving the conduct, business or affairs of the Member or any registered salesperson, partner, director or officer of the Member.

Although the definition of “complaint” refers to only written complaints, there may be instances where a Member receives a verbal complaint from a client which will warrant the same treatment as a written complaint. Such situations depend upon the nature and severity of the client’s allegations and require the professional judgement of the Member’s supervisory staff handling the complaint.”

33. It is the position of Staff on this Motion that the interpretation of the MFDA’s Rules and Policies “should be done using a broad and purposive analysis, consistent with the general approach of administrative tribunals to the interpretation and application of their governing provisions, and the approach of securities regulatory tribunals in particular.”

34. Staff referred us to the recent British Columbia Securities Commission decision in *Tony Tung-Yuan Lin* where the Commission stated: “Rule 2.1.1 is intentionally broad so that the MFDA can discipline members for misconduct not specifically prohibited yet is clearly contrary to the public interest.” (see: *Tony Tung-Yuan Lin* 2011 BCSECCOM 197 (B.C.S.C) at para. 33)

35. It is the position of the Respondent that professional discipline is a very serious matter and, consequently, “any provision that is “open to interpretation” should be given a narrow interpretation.”

36. Staff countered that while it recognized that professional discipline poses potentially serious consequences to respondents, Courts have recognized, in the context of self-regulatory bodies whose mandate is to engender public confidence in the profession and serve the public, that the governing provisions must be given a broad rather than a narrow interpretation and one which serves the interests of the public, not the profession. In this regard, it quoted a passage from Mr. Justice McQuaid of the Prince Edward Island Supreme Court as follows:

“Since one of the objects of the Law Society Act is to engender public confidence in what is otherwise a closed profession the role of which is, essentially, the service to the public, albeit for a fee, the Act, and any regulations made thereunder, must be given a broad, rather than narrow, interpretation. The public, rather than the profession, must be given the benefit of the interpretation.”

*Re: Johnston v. Law Society of Prince Edward Island* [1985] P.E.I.J. No. 79 (P.E.I.S.C.) at para. 8

#### F. THE “FACTS” ASSUMED FOR PURPOSES OF MOTION

37. The Notice of Hearing, a copy of which is attached as Appendix “A” to our Decision and Reasons, contains 31 paragraphs of alleged facts (see paragraphs 1-30 and 32), along with a paragraph outlining what, in Staff’s view, the Respondent should have done with the information in his possession.

38. It is important to note that none of these paragraphs have been proved by way of either *viva-voce* or documentary evidence. This Hearing Panel has heard no *viva-voce* evidence. This Hearing Panel has neither received nor considered any documentary evidence.

39. No proffered evidence has been honed by the crucible of cross-examination.

40. It is the Respondent, not Staff, who is requesting that we assume the facts in the Notice of Hearing are true for the purposes of this Motion. His position is that, based on these assumed

facts and on a proper interpretation of the relevant legislation, it is “plain and obvious” that the Allegation cannot succeed, that the proceeding by the MFDA is “certain to fail because it contains a radical defect” or that the prosecution “has no reasonable prospect of success.”

41. Staff detailed certain “facts” which, it submitted, must be accepted as proven for the purposes of this Motion. The Respondent did not take issue with these submissions. These “facts” include:

- (a) An individual, Schriver, who at all material times was a licensed insurance agent who operated out of the Branch but was not an Approved Person of Desjardins, was borrowing monies from Desjardins clients and other individuals and not repaying them.
- (b) The Respondent was the designated Branch Manager responsible for supervising activity at the Branch in accordance with all applicable MFDA requirements.
- (c) Between March 2007 and August 2008, the Respondent received information on five separate occasions that alerted him or ought to have alerted him to the fact that Schriver was borrowing monies from clients of Desjardins and other individuals and not repaying them. The Notice of Hearing set out particulars of each of the five occasions. The amounts lent to Schriver were significant, ranging from \$34,000.00 to \$50,000.00.
- (d) The Respondent did not take any steps to investigate the claims of the clients and other individuals, or to resolve the contradictions in the information he was receiving, apart from speaking with Schriver on three separate occasions. On the first two of those occasions, Schriver denied borrowing the monies. On a third occasion, Schriver admitted to borrowing monies from LL, a non-client.
- (e) In October 2008, when client RA’s lawyer wrote a demand letter to the Respondent seeking repayment of the monies he had lent Schriver from Desjardins, the Respondent forwarded the letter to Desjardins’ head office. This was Desjardins’ first indication that Schriver was borrowing monies from clients and other individuals and not repaying them.
- (f) The Respondent should have, but failed to, escalate the information he received on each of the five occasions to the Member’s head office compliance staff. As a result, the Member was unaware of the information and was unable to conduct a reasonable

supervisory investigation in response to the information, all or parts of which investigation the Member could have elected to delegate to the Respondent to perform in his capacity as the Branch Manager.

42. We are accepting these as “facts” for the purposes of this Motion with the exception of the statement in paragraph “f” of what the Respondent “should have” done. We are accepting that he “failed” to escalate the information. The issue before us, at this stage of the proceeding, is: is it plain and obvious that he had no obligation to escalate any information?

43. We note in paragraph 10 of the Notice of Hearing that in or about March of 2007, the Respondent “started to monitor activity in the accounts of Schriver’s insurance clients.” Did he do this in his capacity as a Branch Manager of Desjardins or did he hold some other capacity on the insurance side of the business? How long did this monitoring activity go on and what were the results of same? At the moment, we have no answers to these questions. All we know, for the purposes of this Motion, is that something caused the Respondent to be concerned enough that he undertook certain monitoring activities.

44. In paragraphs 12 and 13 of the Notice of Hearing, there is a “factual” statement that, in December of 2007, the Respondent was informed by an Approved Person at Desjardins that certain individuals had lent monies to Schriver and had not been repaid. One of these individuals had redeemed funds from a mutual fund account held at the Member and also from a segregated fund account. The amount involved was \$90,000.00. Did the Respondent know about these redemptions and, if he did, did he have any obligation as a Branch Manager to further investigate despite the apparent reluctance of the client to discuss matters with him.

45. We note that the Respondent became a Branch Manager in July of 1989 and that the alleged events commenced in March of 2007. Over that 18 year period, we would assume that Desjardins would have communicated to the Respondent, in some fashion, as to what were the duties and obligations of a Branch Manager. We have none of this evidence. That type of evidence would assist the Hearing Panel in fairly assessing the conduct of the Respondent.

46. We therefore disagree with the assertion of the Respondent that “all of the essential facts are before the panel.”

G. DUTIES OF A BRANCH MANAGER

47. In paragraph 31 of the Notice of Hearing, Staff alleges that “a reasonable supervisory” investigation by the Respondent, in his capacity as a Branch Manager, should have included, at a minimum, the following things:

- (a) documenting the information received from clients and other individuals who came forward about Schriver’s borrowing activities;
- (b) confirming in writing with clients and other individuals the information they provided about Schriver’s activities;
- (c) confirming in writing with Schriver his response to the clients’ claims that he had borrowed monies from the clients and failed to repay them;
- (d) attempting to obtain documentary and other corroboration of the information provided by Schriver, the clients and other individuals concerning Schriver’s activities;
- (e) speaking with other Approved Persons, employees and agents of the Member at the Branch to determine if they were aware of Schriver’s borrowing activities;
- (f) determining whether Schriver was using Member information or taking advantage of his access to the Branch to identify clients from whom to borrow money or to facilitate his borrowing activities;
- (g) conducting a review of the client files at the Branch belonging to the clients who had come forward claiming that Schriver had borrowed monies from them to see if the client files contained any relevant documents or records;
- (h) determining whether the borrowing was being presented to the clients as an investment opportunity and, if so, whether the Approved Persons responsible for servicing the clients’ accounts were aware of, facilitating, or possibly had an interest in, the borrowing activity;
- (i) reviewing redemption activity in client accounts at the Branch to identify instances where significant redemption proceeds were not reinvested at Desjardins, and where such redemptions were identified, confirming with the clients the reasons for the redemptions; and
- (j) taking appropriate steps to ascertain whether any other clients at the branch had lent

monies to Schriver, including contacting clients by phone or letter if necessary.

48. We do not know, at this stage of the proceedings, if the Respondent had an obligation to do any, some or all of the enumerated tasks. However, it is not “plain and obvious” to us, on the assumed facts, that no such obligation could have existed. Evidence and submissions at the Hearing will enable a full and impartial analysis of the nature and extent of the obligation and whether the Respondent, on the basis of the admissible evidence, complied with that obligation.

49. On the Motion, there was a fundamental difference between the parties as to the duties and obligations of a Branch Manager. The position of Staff is that:

“The Branch Manager performs a critical function in a Member’s overall compliance and supervisory structure. In addition to performing regular duties of supervision and review, Branch Managers are required to act on information that comes to their attention which raises concerns that regulatory obligations are being contravened or the interests of clients adversely affected. A Branch Manager’s supervisory responsibilities include, among other things, supervising Member business conducted at the branch by both Approved Persons and non-Approved Persons, maintaining client confidentiality, ensuring continuous service to clients, overall reviewing of Approved Person conduct, ensuring appropriate signage at branch and sub-branch locations, supervising for unauthorized outside business activities or securities related business being engaged in by Approved Persons, supervising for “stealth advising” conducted by non-registrants at or through the branch, handling client complaints, providing training to both new and experienced Approved Persons, liaising with Member compliance staff, and generally ensuring all activities at the branch are conducted in accordance with Member policies and procedures, MFDA Rules, Policies, By-laws and other applicable securities regulations. Branch Managers are therefore entrusted with a significant amount of supervisory responsibility for ensuring that client’s interests are protected and activities at the branch comply with all applicable MFDA requirements. Branch Managers essentially serve as the Member’s eyes and ears on the ground. They are in the best position to observe the day-to-day conduct of those operating within the branch. They are often the only individual with supervisory responsibilities at the branch. Branch Managers therefore usually have primary responsibility for escalating to the Member situations identified at the branch level that involve actual or potential harm to clients.”

50. It is the position of Staff that the nature and scope of the supervisory responsibilities of a Branch Manager is informed by the general standard of conduct provisions contained in MFDA Rule 2.1.1.

51. The position of the Respondent is that it is not open to the Hearing Panel to find that Rule 2.1.1(c) prohibits conduct that “falls outside of the sphere of conduct that is addressed by the

more-specific elements of the collected MFDA rules and policies.”

52. The Respondent submits that the Hearing Panel is required to give a narrow interpretation to the applicable rules and policies. Consequently, it is not open to the Hearing Panel to find that these rules and policies “required” the Respondent to supervise the activities of a person (such as Schriver) who was not an Approved Person, Employee or Agent of the Member.

53. In our view, it is clear that Staff is not alleging that the Respondent “failed to supervise” Schriver. The allegation is that the Respondent, in his capacity as Branch Manager, failed to escalate to the Member’s Compliance Staff information acquired concerning potential financial harm to clients and other individuals occasioned by the activity of an unregistered individual (i.e. Schriver) who was operating within the branch.

54. Rule 2.5.3, which was in force during the period of time referred to in the Allegation, required the Branch Manager to “supervise the trading activities at the branch office.” If, as was the case here on the assumed facts, the Respondent became aware of matters which either did or could have had a deleterious effect on this activity, did he have an obligation to make further inquiries even though the impugned conduct was by a person in the position of Schriver? In our view, it is not “plain and obvious” that such an obligation could not exist.

55. Likewise, when, as here on the assumed facts, an Approved Person brings to the attention of the Branch Manager information relating to the alleged activities of a person in the position of Schriver, which might call into question whether the business conducted on behalf of the Member at the branch is in compliance with applicable securities legislation and the MFDA By-laws and Rules, including Rule 2.1.1(c), does the Branch Manager have an obligation to make further inquiries? In our view, it is not plain and obvious that such an obligation could not exist.

56. The nature and extent of these obligations and whether the Respondent complied with them are only matters which can be determined after a full hearing on the merits.

57. Thus, even on a strict interpretation of the Rules and Policies, as submitted by the Respondent, it is not plain and obvious to this Hearing Panel that this matter could not succeed. Whether this Allegation will, in fact, be established, is something which can only be determined

after a full hearing on the merits.

#### H. DECISION

58. In the result, the Motion is dismissed.

59. In its written submissions, Staff requested that the “motion be dismissed with costs to the MFDA, the terms of which shall be spoken to at the hearing of the matter on its merits.”

60. We note that ROP 6.10(b) provides, in part, that the Hearing Panel may “dismiss the motion . . . with or without terms.” Does the use of the word “terms” in that subsection encompass “costs”?

61. We note further that section 24.2 of By-law No. 1 specifically refers to the granting of “costs of the proceedings” in certain defined circumstances. Can this section be fairly interpreted to include the “costs” of the Motion?

62. We have made no determination as to whether costs of this Motion can or should be awarded in the circumstances of this case. If the parties cannot agree on the issue of costs, we will entertain written submissions and oral argument at an agreed upon or appropriate time during the course of or at the conclusion of the Hearing on the Merits on the following issues:

(a) Does this Hearing Panel have the power to grant costs on a Motion of this nature?

(b) If the Hearing Panel does have such a power, should it exercise this power to grant costs of this Motion?

(c) If costs are to be granted, what quantum should be imposed?

63. On January 23, 2012, the Respondent filed a Reply in purported compliance with Rule 8 of the ROP.

64. Paragraph 4 of that Reply sought Leave to file an Amended Reply in response to the substance of Allegation #1 if this Hearing Panel deemed, as it has, that the proceeding is to continue. Such Leave is hereby granted.

65. Rule 8 requires the Reply to be served and filed within 20 days of the effective date of the service of the Notice of Hearing. Under the circumstances, we grant Leave to the Respondent to serve and file his Amended Reply within 20 days of the effective date of service on him of these Decision and Reasons.

66. Rule 10 of the ROP provides for the disclosure of documents by both the MFDA and the Respondent. Rule 11 mandates that Witness Lists and Statements be provided by both parties. We are uncertain as to how much time the parties require to comply with these Rules. Likewise, we are uncertain as to how much time should be set aside by this Hearing Panel for the Hearing on the Merits and when the parties will be ready to proceed.

67. Consequently, we would request that the Hearings Co-ordinator arrange for a hearing by way of teleconference to discuss these and any other appropriate issues.

68. In conclusion, we would like to thank counsel for both parties for the very high calibre of their written and oral presentations.

**DATED** this 8<sup>th</sup> day of May, 2012.

“Thomas Lockwood”

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Thomas J. Lockwood, Q.C.,  
Chair

“Ann Etter”

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**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: Gabriele Gentile**

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**NOTICE OF HEARING**

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**NOTICE** is hereby given that a first appearance will take place by teleconference before a hearing panel (the "Hearing Panel") of the Atlantic Regional Council of the Mutual Fund Dealers Association of Canada (the "MFDA") on February 2, 2012 at 10:00 a.m. (Atlantic), concerning a disciplinary proceeding commenced by the MFDA against Gabriele Gentile (the "Respondent"). Members of the public who want to listen to the teleconference should contact Marco Wynnycky, MFDA Hearings Coordinator, at 416-945-5146 or [mwynnyckyj@mfdca.ca](mailto:mwynnyckyj@mfdca.ca) to obtain particulars. The Hearing on the Merits will take place in Halifax, Nova Scotia at a time and venue to be announced.

**DATED** this 21<sup>st</sup> day of December, 2011.

"Jason D. Bennett"

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Jason D. Bennett  
Corporate Secretary

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NOTICE is further given that the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

**Allegation #1:** Between March 2007 and October 2008, the Respondent, in his capacity as Branch Manager, received information on five occasions that Bruce Schriver, a licensed insurance agent of an affiliate of the Member who conducted business from the branch location supervised by the Respondent, had borrowed monies from clients and other individuals which he had not repaid, which information the Respondent failed to report to the Member's head office compliance staff, as a result of which the Member was not made aware of the circumstances and was unable to conduct a reasonable supervisory investigation and take such other supervisory measures as may have been warranted in the circumstances, contrary to MFDA Rules 2.5.3(b)<sup>1</sup> and 2.1.1(c) and MFDA Policy No. 3.

## **PARTICULARS**

NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:

### **Registration History**

1. The Respondent has been registered as a mutual fund salesperson and Branch Manager with Desjardins Financial Security Investments Inc. ("Desjardins") since July 15, 1989.
2. Desjardins is registered as a mutual fund dealer and exempt market dealer in the provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, and is also registered as a restricted dealer in the province of Quebec.

### **Allegation #1 – Failure to fulfill branch manager duties and obligations**

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<sup>1</sup> On December 3, 2010, MFDA Rule 2.5.3(b) was amended and renumbered to 2.5.5(d).

### ***Background***

3. At all material times, the Respondent was the designated branch manager (the “Branch Manager”) of a Desjardin branch located at Suite 312, 7001 Mumford Rd., Halifax, Nova Scotia (the “Branch”). In addition, the Respondent was licensed as a life insurance agent with Desjardins Financial Security Independent Network (“DFSIN”), which was an affiliate of the Member, Desjardins, and which maintained a branch within the same premises as the Branch. The Respondent shared the supervisory responsibilities over the life insurance agents located within the Branch with BB, who also had the title of managing director for the Branch.<sup>2</sup>

4. As the Branch Manager, the Respondent was responsible for supervising activity at the Branch to ensure compliance with MFDA requirements. This supervisory responsibility included, among other things, reporting supervisory and compliance concerns to Desjardins’ head office for review and investigation so that appropriate follow-up action could be taken where circumstances warranted.

5. Bruce Schriver (“Schriver”) was licensed as a life insurance agent who operated out of the Branch until July 5, 2009, when he was terminated. Prior to being registered as a life insurance agent operating out of the Branch, Schriver was registered in Nova Scotia as a mutual fund salesperson with MFDA Member Select Money Strategies Incorporated (“Select”) until June 2004, when he was terminated by Select for selling securities outside the accounts and facilities of Select.

6. The MFDA commenced two disciplinary proceedings against Schriver. The first proceeding was commenced on March 12, 2009 (MFDA Hearing File No. 200901), and the second proceeding was commenced on May 19, 2009 (MFDA Hearing File No. 200918). Both matters proceeded to a hearing on the merits on October 6, 2009, where Schriver admitted, among other things, that he borrowed monies from two clients, redeemed monies from a third client’s account, and never repaid the redemption proceeds to the third client. A Hearing Panel of the MFDA imposed a permanent prohibition against Schriver from conducting any securities

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<sup>2</sup> BB was an Approved Person of Desjardins who serviced client accounts and was a third alternate branch manager for the Branch. The position of managing director is not a category of registration under local securities legislation, nor is it a requirement under MFDA Rules. It appears that as the managing director, BB’s primary focus was on the administrative and commercial, as opposed to regulatory, aspects of running the Branch.

related business in any capacity while in the employ of or associated with any MFDA Member, and ordered the payment of a fine of \$200,000 and costs of \$10,000.<sup>3</sup>

***Information the Respondent received about Schriver's activities***

7. As described below, between March 2007 and August 2008, the Respondent received information on five occasions that alerted him or ought to have alerted him that Schriver was borrowing monies from clients of Desjardins and other individuals and not repaying them.<sup>4</sup>

First Occurrence – March 2007

8. In or around March 2007, the Respondent participated in a meeting held at the Branch during which the prohibition against Branch personnel (both mutual fund salespersons and insurance agents) borrowing money from clients was discussed. The prohibition was discussed at this time as there had previously been an occurrence where a mutual fund salesperson at the Branch was discovered to have borrowed money from clients and was terminated.

9. Shortly after this meeting, CB, a life insurance agent at the Branch reported to the Respondent that several individuals had contacted CB to advise that they had lent monies to Schriver and had not been repaid by him. The Respondent states that CB did not tell the Respondent the names of these individuals as they wanted to remain anonymous. CB advised the Respondent that the individuals did not wish to come forward to meet in person with the Respondent about Schriver's activities and did not want CB to disclose their dealings with Schriver until they advised CB that he could do so.

10. The Respondent states that he approached Schriver and asked him whether he had borrowed monies from clients, which Schriver denied. At or around this same time, the Respondent states that he started to monitor activity in the accounts of Schriver's insurance clients.

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<sup>3</sup> The Decision and Reasons *In the Matter of Schriver* is available on the MFDA's website [www.mfda.ca](http://www.mfda.ca).

<sup>4</sup> These clients and other individuals were different than the clients and individuals identified in the proceedings described in paragraph six above from which Schriver borrowed monies.

11. The Respondent did not escalate the matter to Desjardins head office, and did not take any further steps to investigate the matter, including determining the identities of the individuals who complained to CB and whether they were clients of the Member.

Second Occurrence – December 2007

12. In December 2007, RS, an Approved Person with Desjardins, informed both the Respondent and BB that RG, a client of Desjardins, had told RS that RG, and two other individuals, RA (also a Desjardin client), and KK (a non-client), had each lent monies to Schriver and had not been repaid.

13. In April 2009, RA advised MFDA Staff that he lent Schriver monies on two occasions: (1) \$40,000 in or around late 2006; and (2) approximately \$50,000 in August 2007, the proceeds of which RA redeemed from a mutual fund account held at the Member and from a segregated fund account.

14. The Respondent claims that RS told him that RG, RA, and KK did not wish to speak further with the Respondent about having lent Schriver monies.

15. On or about January 24, 2008, RS documented his discussions with the Respondent and BB about client RG. The Respondent, BB and RS signed a memorandum which documented their discussion as follows:

*On the day of December 9, 2007, I received a telephone call from client [RG], He indicated to me that he had entered into a loan arrangement with my associate [Schriver] where [Schriver] was the borrower. He informed me that [Schriver] had not paid him according to the schedule laid out by he and [Schriver] and was greatly concerned over this.*

*[RG] continued to state that [Schriver] had also borrowed money from two other individuals, [RA] and [KK]. These two individuals also had not received payment.*

*Once I had finished my conversation with [RG] I immediately informed my Managing Director, [BB] who then immediately put me in touch with the office compliance officer, [the Respondent].*

*At the request of the individuals involved I have closely monitored the situation and have not been instructed to approach the Insurance Industry regulators.*

<signed>  
[RS]

<signed>  
[BB]

<signed>  
[the Respondent]

16. The Respondent states that BB questioned Schriver about the information that RS received from client RG about clients RG and RA, as well as KK, and that Schriver denied to BB borrowing monies from these individuals.

17. The Respondent did not report the information he had received from Approved Person RS concerning clients RG and RA, as well as KK, to Desjardins' head office, nor did he take any further steps to investigate the matter. The Respondent also failed, or chose not to re-evaluate and escalate the information he had received from (insurance agent) CB in March 2007 in light of the information he had subsequently received from Approved Person RS concerning Schriver's borrowing activities.

18. The Respondent did not resolve the contradiction between Schriver's denials to him and to BB, on the one hand, and the further information he was receiving that Schriver had borrowed and failed to repay monies from several individuals, including at least two Desjardins clients at the Branch, on the other hand.

### Third Occurrence – Spring 2008

19. In spring 2008, MM, a non-client of Desjardins, contacted BB and informed BB that he had lent money to and not been repaid by Schriver. BB passed along the information to the Respondent.

20. The Respondent states that BB told him that MM did not want to lodge a complaint because he did not want Schriver to lose his job; rather MM had contacted BB in the hope pressure would be brought to bear on Schriver to repay the monies he owed to MM.

21. The Respondent did not report to Desjardins' head office the information he had received from BB that Schriver had borrowed monies from, and had not repaid, MM.

22. After receiving this latest information from BB about Schriver borrowing monies from an individual and failing to repay him, the Respondent states that he met with Schriver personally for a second time and asked him whether he had borrowed monies from MM. Schriver forcefully denied borrowing monies from MM. The Respondent states that he became highly suspicious of Schriver's denial and further states that he re-reviewed activity in Schriver's insurance clients' accounts for the previous eight to nine months.

23. The Respondent did not report his growing suspicions concerning Schriver to Desjardins, nor did he re-evaluate and escalate the information he had received to date concerning Schriver in light of the new information he had received concerning MM.

#### Fourth Occurrence – May 2008

24. In May 2008, IL, a non-client of Desjardins, met with the Respondent and informed him that IL had lent money to Schriver and had not been repaid. IL provided the Respondent with a letter of complaint that outlined the circumstances of the loan IL gave to Schriver. The Respondent claims that IL told him that he did not wish to escalate the matter, as IL hoped that Schriver would repay IL his money. IL advised the Respondent that he was bringing the matter to his attention in order to put pressure on Schriver to repay the monies owed to him.

25. After having met with IL, the Respondent claims he approached Schriver, who admitted that he had borrowed monies from IL and used the monies to pay legal expenses.

26. Despite having Schriver's admission that he had borrowed monies from IL in respect of a loan which IL now claimed was in default, the Respondent did not re-evaluate and escalate the information he had previously been made aware of concerning Schriver's borrowing activities and, in particular, the credibility of Schriver's three prior denials with respect to having engaged in borrowing activity.

27. The Respondent did not report the information he received from IL (or any of the

information that he had received to date, including the evidence he had received that at least two Desjardins clients had lent money to Schriver and not been repaid) to Desjardins' head office. The Respondent did not take any further steps to investigate the situation.

28. In March 2009, IL advised MFDA Staff that he lent Schriver monies on two occasions as follows: (1) \$43,000 in 2007; and (2) \$34,000 in or around February 2008.

#### Fifth Occurrence – August 2008

29. In August 2008, client RA, whose situation was first brought to the Respondent's attention by Approved Person RS as described in paragraph 12 above, contacted the Respondent directly and advised the Respondent that client RA had lent money to Schriver and not been repaid. The Respondent states that RA declined to meet with him in order to discuss the matter further, because RA wished to discuss the matter with his counsel. The Respondent did not report the information he received from client RA to Desjardins' head office or take any further steps to address the Schriver situation.

30. Approximately two months later in October 2008, RA's lawyer wrote a demand letter to the Respondent seeking repayment from Desjardins of the monies that Schriver had borrowed from RA and failed to repay. The Respondent forwarded the demand letter to Desjardins' head office, which was the first notice that Desjardins received that Schriver was borrowing monies from Desjardins clients and other individuals and failing to repay them.

#### ***Reasonable Supervisory Investigation***

31. The Respondent should have reported the information he had received on five occasions concerning Schriver's borrowing activities to Desjardins' head office compliance staff. Desjardins had a regulatory obligation to conduct a reasonable supervisory investigation in response to such information, all or parts of which investigation Desjardins could have elected to delegate to the Respondent to perform in his capacity as the Branch Manager. Such a reasonable supervisory investigation should have included, at a minimum, the following things:

- a) documenting the information received from the clients and other individuals who

came forward about Schriver's borrowing activities;

- b) confirming in writing with clients and other individuals the information they provided about Schriver's activities;
- c) confirming in writing with Schriver his response to the clients' claims that he had borrowed monies from the clients and failed to repay them;
- d) attempting to obtain documentary and other corroboration of the information provided by Schriver, the clients and other individuals concerning Schriver's activities;
- e) speaking to other Approved Persons, employees and agents of the Member at the Branch to determine if they were aware of Schriver's borrowing activities;
- f) determining whether Schriver was using Member information or taking advantage of his access to the Branch to identify clients from whom to borrow money or to facilitate his borrowing activities;
- g) conducting a review of the client files at the Branch belonging to the clients who had come forward claiming that Schriver had borrowed monies from them to see if the client files contained any relevant documents or records;
- h) determining whether the borrowing was being presented to the clients as an investment opportunity and, if so, whether the Approved Persons responsible for servicing the clients' accounts were aware of, facilitating, or possibly had an interest in, the borrowing activity;
- i) reviewing redemption activity in client accounts at the Branch to identify instances where significant redemption proceeds were not reinvested at Desjardins, and where such redemptions were identified, confirming with the clients the reasons for the redemptions; and
- j) taking appropriate steps to ascertain whether any other clients at the branch had lent monies to Schriver, including contacting clients by phone or letter if necessary.

32. As a result of the Respondent's failure to report the information he received on five occasions between March 2007 and August 2008 concerning Schriver's borrowing activities to Desjardins, Desjardins did not become aware of the borrowing activity until October 2008 and therefore was unable to conduct a reasonable supervisory investigation and take such other supervisory measures as may have been warranted in the circumstances prior to that date.

33. As a result of the conduct described above, between March 2007 and October 2008, the Respondent in his capacity as Branch Manager acted contrary to MFDA Rules 2.5.3(b) (now 2.5.5(d)) and 2.1.1(c) and MFDA Policy No. 3.

**NOTICE** is further given that the Respondent shall be entitled to appear and be heard and be represented by counsel or agent at the hearing and to make submissions, present evidence and call, examine and cross-examine witnesses.

**NOTICE** is further given that MFDA By-laws provide that if, in the opinion of the Hearing Panel, the Respondent:

- (a) has failed to carry out any agreement with the MFDA;
- (b) 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;
- (c) has failed to comply with the provisions of any By-law, Rule or Policy of the MFDA;
- (d) has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or
- (e) is otherwise not qualified whether by integrity, solvency, training or experience,

the Hearing Panel has the power to impose any one or more of the following penalties:

- a) a reprimand;
- b) a fine not exceeding the greater of:
  - 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.
- 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) 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;
- e) revocation of the authority of such person to conduct securities related business;

- f) prohibition of the authority of the person to conduct securities related business in any capacity for any period of time;
- g) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel.

**NOTICE** is further given that the Hearing Panel may, in its discretion, require that the Respondent pay the whole or any portion of the costs of the proceedings before the Hearing Panel and any investigation relating thereto.

**NOTICE** is further given that the Respondent must **serve a Reply** on Enforcement Counsel and **file a Reply** with the Corporate Secretary within twenty (20) days from the date of service of this Notice of Hearing.

A **Reply** shall be **served** upon Enforcement Counsel at:

Mutual Fund Dealers Association of Canada  
121 King Street West, Suite 1000  
Toronto, Ontario  
M5H 3T9  
Attention: David Halasz, Enforcement Counsel  
Facsimile: 416-361-9073  
Email: dhalasz@mfd.ca

A **Reply** shall be **filed** by:

- a) providing 4 copies of the **Reply** to the Corporate Secretary by personal delivery, mail or courier to:

Mutual Fund Dealers Association of Canada  
121 King Street West, Suite 1000  
Toronto, Ontario  
M5H 3T9  
Attention: Office of the Corporate Secretary; or

- b) transmitting 1 copy of the **Reply** to the Corporate Secretary by fax to fax number 416-361-9781, provided that the Reply does not exceed 16 pages, inclusive of the covering page, unless the Corporate Secretary permits otherwise; or
- c) transmitting 1 electronic copy of the **Reply** to the Corporate Secretary by e-mail at CorporateSecretary@mfd.ca.

A **Reply** may either:

- i.) specifically deny (with a summary of the facts alleged and intended to be relied upon by the Respondent, and the conclusions drawn by the Respondent based on the alleged facts) any or all of the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing; or
- ii.) admit the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing and plead circumstances in mitigation of any penalty to be assessed.

**NOTICE** is further given that the Hearing Panel may accept as having been proven any facts alleged or conclusions drawn by the MFDA in the Notice of Hearing that are not specifically denied in the **Reply**.

**NOTICE** is further given that if the Respondent fails:

- a) to **serve** and **file** a **Reply**; or
- b) attend at the hearing specified in the Notice of Hearing, notwithstanding that a **Reply** may have been served,

the Hearing Panel may proceed with the hearing of the matter on the date and the time and place set out in the Notice of Hearing (or on any subsequent date, at any time and place), without any further notice to and in the absence of the Respondent, and the Hearing Panel may accept the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing as having been proven and may impose any of the penalties described in the By-Laws.

**End.**

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