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: Glen Lawrence Gomes

Heard: October 29, 2019 in Toronto, Ontario
Decision (Misconduct): October 29, 2019
Decision (Penalty) and Reasons: February 4, 2020

DECISION (PENALTY) AND REASONS

Hearing Panel of the Central Regional Council:

John Lorn McDougall, QC	Chair
Brigitte J. Geisler	Industry Representative
Edward Jackson	Industry Representative

Appearances:

David Barbaree	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
A. Benson Forrest	)	Counsel for the Respondent
Glen Gomes	)	Respondent, in person

I. INTRODUCTION

1. By Notice of Hearing dated March 4, 2019 ("NOH"), the Mutual Fund Dealers Association of Canada ("MFDA") commenced a disciplinary proceeding against Glen Lawrence Gomes ("Respondent").

2. The NOH made the following allegations of violations of the By-laws, Rules or Policies of the MFDA ("Allegations"):

> **Allegation #1:** Between October 2013 and May 2014, the Respondent engaged in securities related business that was not carried on for the account of the Member and through its facilities by recommending, selling, and/or facilitating the sale of mortgage investments products to at least 3 clients totaling approximately $434,700, contrary to the Member's policies and procedures and MFDA Rules 1.1.1, 2.1.1, 2.5.1 and 1.1.2.
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> **Allegation #2:** Between October 2013 and May 2014, the Respondent engaged in another gainful occupation, which was not disclosed to and approved by the Member, by recommending, selling, and/or facilitating the sale of mortgage investment products to at least 3 clients totaling approximately $434,700, contrary to the Member's policies and procedures, MFDA Rules 1.2.1(c) (now MFDA Rule 1.3), 2.1.1, 2.5.1 and 1.1.2.
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> **Allegation #3:** Between October 2013 and May 2014, the Respondent referred at least 3 clients to a company that sold mortgage investment products and received at least $34,344 in referral fees for doing so, thereby participating in a referral arrangement to which the Member was not a party and which did not otherwise comply with sections 13.7 to 13.10 of National Instrument 31-103, and MFDA Rules 2.1.1 and 2.4.2.
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> **Allegation #4:** Between January 13, 2013 and March 31, 2017, the Respondent obtained and possessed 4 pre-signed account forms in respect of 3 clients, contrary to MFDA Rule 2.1.1.
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> **Allegation #5:** On October 21, 2010, the Respondent altered 2 account forms in respect of a client without having the client initial the alterations, contrary to MFDA Rule 2.1.1.

3. The Respondent filed a Reply to the Allegations dated May 3, 2019 which, in relevant part, was as follows:

REPLY

1. Gomes denies having a referral arrangement with Tier 1 Transaction Advisory Services Inc. ("Tier 1").

ALLEGATION #1

25. Gomes denies that the activity described herein constituted the securities related business. Accordingly, Gomes denies allegation #1 of the NOH.

ALLEGATION #2

26. Gomes denies that the activity described above constituted an outside business activity for which disclosure and approval by Investia was required. Accordingly, Gomes denies allegation #2 of the NOH.

ALLEGATION #3

27. Gomes denies that he referred AA, DS and NR to Tier 1 and denies that he was participating in a referral arrangement to which Investia was not a party. Accordingly, Gomes denies allegation #3 of the NOH.

ALLEGATION #4

28. Gomes denies that he obtained and possessed four pre-signed account forms in respect of three clients in his files.

29. To the extent there were pre-signed account forms in any of his files, Gomes specifically denies any prior knowledge of same. Gomes was aware of the prohibition against pre-signed forms and, had he been aware of the presence of same, would have had them destroyed. At no time did Gomes use a pre-signed form to process business.

ALLEGATION #5

30. Gomes denies that he altered any account forms as alleged or otherwise.

4. The hearing on the merits of this matter was held on October 29, 2019 in Toronto. At the opening, Staff of the MFDA ("Staff") filed a document titled Agreed Statement of Fact ("ASF") which was marked as an exhibit in the proceeding. While the ASF does contain a number of facts to which the parties had agreed, it also deals with other matters of significance, particularly in the Agreed Facts Section IV paragraph 5 as follows:

> 5. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV and no other facts or documents. In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent. If the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

5. The power to require mutual agreement from the parties before providing a Hearing Panel with additional facts it has requested originates in the MFDA *Rules of Procedure*, Rule 15: Settlement Hearings. It is important to note that the present case was not a settlement hearing. Quite the contrary, while facts were agreed, the parties had a fundamental disagreement with respect to the appropriate sanctions. Thus a merits hearing was required to decide the matter.

6. Rule 15(3) of the MFDA Rules of Procedure is as follows:

> ***15.3 Additional Facts Only to be Disclosed on Consent***
>
> (1) The Hearing Panel may advise the parties of any additional facts which it considers necessary to assess the settlement but unless the parties consent, any facts which are not contained in the Settlement Agreement shall not be disclosed to the Hearing Panel.
>
> (2) If a Respondent is not present at the settlement hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.
>
> MFDA *Rules of Procedure*, Updated Version: July 16, 2010.

7. Rule 15(3) only applies to settlement hearings. There is a reason for this. In settlement hearings Staff and the Respondent are free to negotiate a settlement which in the result may not be one which the Hearing Panel would have ordered itself. However, in the interest of facilitating settlements, as long as the settlement is within "a zone of reasonable appropriateness" the Hearing Panel is obliged to "accept" the result. The Hearing Panel does not approve it, merely accepts the negotiated result on that basis.

> *Milewski (Re)*, 2015 LNCMFDA 7, Reasons for Decision of the MFDA Central Regional Council dated January 15, 2015

8. We asked counsel for authority for the use of this settlement procedure in a merits hearing. Despite being assured that such authority existed, none was forthcoming. In its absence, we concluded we were bound to apply the usual rules for merits hearings which do not provide for limitations on the information provided to a hearing panel such as in Rule 15(3).

9. Shortly put, we felt it was inappropriate to accept such a restriction when we were charged with deciding the proper sanctions, not simply accepting a negotiated settlement.

10. In the event, having made our position clear to counsel, we proceeded to hear the matter with only the ASF and the answers to our questions as evidence. Fortunately, after hearing the matter to the end, we concluded that we could find a result which we considered was just and fair in all the circumstances. In doing so we were relying on Staff to have told us of the existence of any other facts which would obviously affect our conclusion. No such information was forthcoming and so we proceeded to determine the matter of penalty.

II. AGREED FACTS

11. The portions of the ASF which are relevant to these Reasons for Decision are contained in Part IV Agreed Facts and are reproduced here:

> **Registration History**
>
> 7. Commencing in 1998, the Respondent was registered in Ontario as a mutual fund salesperson (now known as dealing representative).

8. From January 13, 2013 to March 31, 2017, the Respondent was registered in Ontario as a dealing representative with Investia Financial Services Inc. (the "Member"), a Member of the MFDA.

9. On March 31, 2017, the Member terminated the registration of the Respondent and he is not currently registered in the securities industry in any capacity.

10. At all material times, the Respondent conducted business in the Markham, Ontario area.

Securities Related Business Outside the Member

11. At all material times, the Member's policies and procedures required that its Approved Persons only offer investment products to its clients that it had approved for sale, and required all products be sold through the Member.

12. Between 2012 and 2015, the Respondent had an arrangement with Tier 1 Transaction Advisory Services Inc. ("Tier 1"), a real estate and development company that offered investments in syndicated mortgages.

13. Tier 1 had real estate development projects, including projects known as Vaughan Crossings and Memory Care Oakville.

14. Between October 2013 and May 2014, the Respondent facilitated the sale of syndicated mortgages totaling approximately $434,700 to 3 clients of the Member (collectively the "Syndicated Mortgages"), as described in the table below:

Date	**Client**	**Amount of Investment**	**Investment**	**Fee Received by the Respondent**
October 2013	AA	$189,000	Vaughan Crossings	$15,192
October 2013	DS	$126,300	Vaughan Crossings	$9,600
May 2014	NS	$119, 400	Memory Care Oakville	$9,552
Total		**$434,700**		**$34,344**

15. The Respondent engaged in acts in furtherance of a trade in relation to facilitating the sale of the Syndicated Mortgages to the clients, including:

a) introducing the clients to the opportunity to invest in the Syndicated Mortgages;
b) discussing the terms and features of investing in the Syndicated Mortgages;
c) providing the clients' contact information to representatives of Tier 1; and
d) attending meetings between the clients and representatives of Tier 1 concerning investing in the Syndicated Mortgages.

16. As stated above, the Respondent received fees from Tier 1 totaling approximately $34,344 in respect of his activities described above at paragraph 14 and 15.

17. The Respondent did not disclose to the Member that he was facilitating the sale of the Syndicated Mortgages to clients.

18. The Syndicated Mortgages were not investments approved by the Member for sale to its clients by its Approved Persons, including the Respondent.

19. None of the purchases of the Syndicated Mortgages by clients described above in paragraph 14 were carried on for the account of the Member or through its facilities

20. The Respondent failed to disclose to, or obtain approval from, the Member to have any arrangement with Tier 1.

21. Prior to the completion of the Vaughan Crossings and Memory Care Oakville developments, clients AA, DS and NS stopped receiving distributions.

22. On October 31, 2016, pursuant to an application on behalf of the Superintendent of Financial Services, a trustee was appointed for the corporations that were previously performing mortgage administration functions on behalf of syndicated mortgage investors in Tier 1 real estate development projects, which included Vaughan Crossings and Memory Care Oakville.

23. In April 2017, pursuant to a motion brought by the court-appointed receiver, each investor in Vaughan Crossings, including clients AA and DS, were provided with a pro rata interest in a numbered company that purchased the Vaughan Crossings property. The objective of the numbered company is to apply to have the property zoned residential in order to increase market value and then sell the property to recover as much of the investors' investments as possible. The likelihood of investors, including clients AA and DS, recovering their full investment from the sale of the Vaughan Crossings property is not known to Staff.

24. On November 14, 2017, pursuant to a motion brought by the court-appointed receiver, the sale of the Memory Care Oakville property was approved.

25. Client AA commenced a lawsuit against the Respondent and the Member, relating to the Respondent's role in client AA purchasing the Syndicated Mortgages. The lawsuit is currently ongoing.

26. Client NS complained to the Member about her investment in the

Syndicated Mortgages. The Member paid client NS compensation and her complaint is now settled.

Pre-Signed Account Forms

27. At all material times, the Member's policies and procedures prohibited its Approved Persons from using pre-signed account forms.

28. Between January 13, 2013 and March 31, 2017, the Respondent obtained and possessed 4 pre-signed account forms in respect of 3 clients.

29. The pre-signed account forms consisted of a 100% Investment Loan Financial Information Appendix; a B2B T2033 Purchase Instructions form; a Member RRIF Form; and a Limited Trading Authorization form.

Additional Factors

32. The Respondent has not been the subject of previous disciplinary proceedings with the MFDA.

33. By agreeing to the Agreed Statement of Facts the costs associated with a full hearing on the merits has been avoided.

34. In November 2017, the Respondent filed for bankruptcy. At that time, the Respondent reported assets of $7,002, and outstanding liabilities of $684,900 including an unsecured debt of $635,000 owed to the Canada Revenue Agency. To date, the Respondent has not been discharged from bankruptcy.

35. The Respondent has provided evidence to Staff that his sources of income include the Canadian Pension Plan, Old Age Security, the Guaranteed Income Supplement, and trailing commissions he receives on insurance policies.[1] The Respondent has provided evidence to Staff that his annual income for 2018 was approximately $22,000. The Respondent states that his annual income for 2019 will be substantially similar to 2018.

36. The Respondent claims to be unable to pay any amount towards either a fine or costs.

37. As stated above in paragraphs 14 and 16, the Respondent received $34,344 in fees in respect of his role in facilitating the sale of the Syndicated Mortgages. There is no evidence that the Respondent received any financial benefit from

[1] The Respondent has been licensed in Ontario in the insurance industry since 1976.

obtaining the pre-signed or altering the account forms described above beyond the commissions or fees he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.

38. There is no evidence of client complaints in relation to the pre-signed or altered account forms described above.

III. ADMISSION OF LIABILITY

12. In Part III of the ASF the Respondent admitted to violating the By-laws, Rules and Policies of the MFDA as alleged in the NOH as follows:

3. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

13. In Part IV of the ASF the Respondent made the following admissions:

39. By engaging in the conduct described above, the Respondent admits that he:

a) between October 2013 and May 2014, engaged in securities related business that was not carried on for the account of the Member and through its facilities by facilitating the sale of mortgage investments products to 3 clients totaling approximately $434,700, contrary to the Member's policies and procedures and MFDA Rules 1.1.1, 2.1.1, 2.5.1 and 1.1.2;
b) between January 13, 2013 and March 31, 2017, obtained and possessed 4 pre-signed account forms in respect of 3 clients, contrary to MFDA Rule 2.1.1; and
c) on October 21, 2010, altered 2 account forms in respect of a client without having the client initial the alterations, contrary to MFDA Rule 2.1.1.

IV. THE DISPUTE ON PENALTY

14. In its written submissions, Staff took the following position with respect to penalty:

27. Staff proposes the following penalties against the Respondent:

a) a prohibition of at least 5 years on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-Law No. 1;
b) a fine in the amount of at least $75,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
c) costs pursuant to s. 24.2 of MFDA By-law No. 1. (Staff will submit a Bill of Costs at the hearing, which will reflect total costs incurred in this proceeding.)

15. Perhaps to explain the decision not to seek a permanent ban, the more usual penalty for a breach that goes to the heart of the MFDA regulatory structure, Staff submitted the following in closing submissions:

> Mr. Barbaree: And we've quoted from the case of Brauns, and it's in our submissions. I don't think you need to turn up the decision itself, but the hearing panel in that case held, "Any inability to pay the fine, while relevant, is trumped by the need to articulate the seriousness of the respondent's misconduct and to at least impose a fine that bears some relationship to the benefit obtained as a result of the misconduct and/or the loss to those affected."
>
> In my submission, that's precisely what should happen in this case as well. Mr. Gomes is – has financial circumstances that are explained in the agreed statement of facts, but that can't trump the importance of demonstrating to the industry the seriousness of this misconduct.
>
> …
>
> Yes, and, Mr. Chair, that's a fair point. I say two things in response. One, we're hamstrung here because the – what the panel can do is they can impose a fine, they can impose a prohibition period and they can impose costs, and that's the extent of what we can do.
>
> I'm not a bankruptcy lawyer, I don't know what chances of recovery the MFDA will have after this hearing panel makes an order and we don't have the full details of what's going on in those proceedings.

I think the important point for the panel is, again, to make it clear to the industry that this conduct won't be – won't be tolerated. It deserves a severe penalty, and then whether or not Mr. Gomes ultimately has to pay that money or a portion of that money I don't know, and I'm not sure it matters from a general deterrence perspective.

Transcript October 29/19 page 28 line 19 – page 29 line 8 and page 29 line 17 – page 30 line 8.

16. Counsel for the Respondent, in his closing submissions, took a different approach, as follows:

Mr. Forrest: My friend has talked about general deterrence and that's clearly an objective that has to be considered, but I would submit that in this case, in all the circumstances, some of which I'll discuss in a minute, a more appropriate approach to achieving general deterrence is to levy a longer suspension against Mr. Gomes and minimize the financial penalties that are imposed, if any, upon him.

…

It should be a lengthy, even a permanent ban, and a nominal, if any, financial penalty imposed.

In my submission, that is a serious penalty, recognized by the MFDA sanction guidelines as, really, the most serious kind of penalty that can be imposed. In terms of the concerns about general deterrence, that would address the concerns that my friend was discussing, which are legitimate concerns. I think the industry needs to know that these are serious matters that will be penalized heavily.

There's other factors that go into why, in my submission, there ought to be only a nominal financial penalty, if any. Firstly, of course, is the inability to pay that Mr. Gomes faces. I mean it's pretty obvious that he's in a serious financial situation, he's in bankruptcy, he owes the government a lot of money. He has nominal income, he's on basically social assistance, CPP, OAS, and guaranteed income supplement.

He's still receiving a small amount of trailers from his life book, small book of life business, so last year he reported $22,000 on his income tax return and he's going to basically have the same amount this year.

…

The Chair: So quantify what you submit the nominal number should be.

Mr. Forrest: If the panel felt that it needed to impose some financial penalty, I would think $5,000 or $10,000.

Transcript October 29/19 page 36 lines 12 – 19; page 37 line 10 – page 18 line 9; and page 38 line 23 – page 39 line 2.

V. ANALYSIS AND REASONS

17. The contending submissions of the parties on penalty constitute somewhat of a reversal of the positions typically taken by counsel for Staff and the Respondent on the appropriate sanctions. In the present case, Staff is urging a heavy financial penalty and something less than a permanent ban from the industry. The Respondent, unusually, offers up a permanent ban and a *de minimus* fine as the appropriate sanctions.

18. The essence of Staff's submission seemed to be that the best sanction is the one that is seen to punish the Respondent the most because that is the one which will provide the most by way of general deterrence. In this case Staff opted for a heavy fine in lieu of a permanent ban because the Respondent's age makes the heavy fine more punitive and thus provides more deterrence.

19. We are not in agreement with Staff's approach on sanctions in this case. While sanctions imposed by a Hearing Panel, by their very nature, always have a punishment element attached to them, the Hearing Panel's role is to apply sanctions that will be regarded as just and fair but that provide the needed general deterrence to prevent future misbehaviour. Punishment *per se* is not within the MFDA's remit and Staff's approach seems to overly focus on it.

20. The MFDA Sanction Guidelines describes a permanent ban in the following way: "…the permanent prohibition of the authority of an Approved Person to conduct securities related

business in any capacity [is] generally regarded as the most severe sanction that Hearing Panels may impose". As such, a permanent ban, in most circumstances, provides the highest general deterrence for members of the industry from repeating the breaches of a Respondent.

> MFDA Sanction Guidelines, November 15, 2018, page 6

21. We do not think the question of whether a permanent ban or a time limited suspension is a matter that should be subject to trading between the parties. A permanent ban, being the most serious sanction available, is either appropriate on the facts or it is not. Here the Hearing Panel was of the view, because the misconduct goes to the heart of the MFDA regulatory regime, that a permanent ban was necessary and appropriate. We were strengthened in this conclusion by the result in *Cheung (Re)*, a case heavily relied upon by Staff, where a permanent ban was ordered by the Hearing Panel.

> *Cheung (Re),* MFDA File No. 201431, Pacific Region, May 26, 2016 (Penalty)

22. Turning then to the matter of fixing an appropriate fine. Fixing the amount is more of an art than a science as the Hearing Panel is obliged to consider a number of factors, most of which are listed in the Sanction Guidelines. Not all of these apply in every case. In the present instance the most important are:

a) the seriousness of the misconduct;
b) the Respondent's recognition of the seriousness of the misconduct;
c) the benefits received by the Respondent as a result of the misconduct;
d) the harm suffered from the misconduct;
e) Respondent's past conduct;
f) ability to pay;
g) extent of Respondent's cooperation with MFDA.

23. The ASF in paragraph 32 deals expressly with each of the foregoing subjects in a manner largely favourable to the Respondent, although the harm suffered by the clients was not quantified and we cannot be certain to what extent there has been, or will be, recovery of their investments. We have taken the Respondent's favourable conduct into account.

24. We also considered the admission of liability relating to Allegation #4, pre-signed account forms and Allegation #5, altered account forms. These are transgressions which, while serious, are lower on the scale than those in the first three Allegations. This is particularly the case in that there were no client losses and no client complaints. However they were considered in the deliberations on the appropriate fine.

25. We view Staff's request for a fine of "at least $75,000" as excessive when compared to other similar cases, including *Cheung (Re)*. On the other hand, the Respondent's suggestion does not take into account, as it should, the commissions of $34,344 improperly earned by the Respondent. With that figure as a starting point, the Hearing Panel concluded that, considering all the factors, a fine of $50,000 was appropriate and awarded it.

Cheung, *supra*

26. Finally, Staff claimed costs in the amount of $9,462.50 and filed a bill of costs in support of that claim. We consider the amount is entirely reasonable and awarded it.

VI. CONCLUSION

27. In summary, the Hearing Panel's disposition of the matter was:

a) A permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;

b) A fine in the amount of $50,000; and

c) Costs in the amount of $9,462.50.

DATED this 4th day of February, 2020.

"John Lorn McDougall"
John Lorn McDougall, QC
Chair

"Brigitte J. Geisler"
Brigitte J. Geisler
Industry Representative

"Edward Jackson"
Edward Jackson
Industry Representative

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