



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

**IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Douglas Malech

Heard: September 18, 2009 in Edmonton, Alberta
Reasons: November 17, 2009

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council

Hon. Roger Kerans, FCI Arb, CARB
Kathleen Jost
Rick Strong

Chair
Industry Representative
Industry Representative

Appearances

Charles Toth)
) For the Mutual Fund Dealers Association
) of Canada
)

Douglas D. Malech)
) Attended Personally
)
)

1. By Notice of Settlement Hearing, the Mutual Fund Dealers Association of Canada (“MFDA” or the “Association”), announced that it proposed to hold a hearing to consider whether, pursuant to section 24.4 of MFDA By-law No. 1, a Hearing Panel of the Prairie Regional Council should accept the Settlement Agreement entered into by MFDA Staff and Douglas Malech (the “Respondent”). This hearing was held in Edmonton, Alberta on September 18, 2009, at the conclusion of which the Panel accepted the Agreement subject to the submissions made at the hearing. What follows are the Panel’s reasons.

2. Here are the facts as agreed:

- a. The Respondent has admitted that, in or about November 2007, he failed to deal fairly, honestly and in good faith with client A.M. by misappropriating from her approximately \$10,000, contrary to MFDA Rule 2.1.1.
- b. The Respondent when challenged admitted his guilt and promptly paid the claim.
- c. The money had been paid to the Respondent by the victim with instructions to purchase a non-existing GIC, but instead deposited it to his personal account.
- d. At hearing, the Respondent admitted receipt of the Notice of Hearing and related documents, and accepted an abridgment of the notice period.
- e. The Respondent also acknowledged that he had signed the Settlement Agreement, and that he had consulted a lawyer before doing so.

3. In answer to questions from the Panel, the parties at hearing made these supplementary consensual submissions in explanation of the Settlement Agreement, which are also accepted by the Panel:

- a. The victim never demanded payment of the interest on the money stolen, although the Respondent had the money for seven months;
- b. The Respondent stated that he sent his former client a cheque for \$625.00 to cover interest lost but she has not cashed it;
- c. She did this “...somewhat out of the goodness of her heart...” and not as a result of anything said or done by the Respondent.

Decision

4. The judgement of the Hearing Panel is that the real issue in this case is the appropriateness of the fine. It cannot find any precedent for a fine this low, and this has caused the Panel some concern.

5. On the other hand, there are many mitigating circumstances here, as outlined by MFDA Enforcement Counsel. The Respondent has no prior record of any of this sort of behaviour. The Respondent has no other licences to sell commercial financial products. There was a single victim and a single incident. And there was a prompt and full confession to the employer and to the MFDA. Finally, the Respondent was ready and willing to settle the affair and co-operated with the MFDA to permit avoidance of unnecessary expense, and, most significantly, has made full restitution of the amount originally taken.

6. In view of this collection of strongly mitigating circumstances, we are prepared to accept the fine as reasonable. As to disposition, the Panel affirms the agreed penalty:

- a. the Respondent shall pay a fine in the amount of \$2,500 pursuant to s. 24.1.1 (b) of MFDA By-law No. 1; and
- b. the Respondent shall be permanently prohibited from conducting 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.

7. In coming to this conclusion, the Panel considered and applied the observations made *In the Matter of Investor Group Financial Services Inc.*, [2004] Hearing Panel of the Ontario Regional Council, MFDA File No. 200401, Hearing Panel Decision dated December 16, 2004 and *In the Matter of Joseph Zollo*, [2006] Hearing Panel of the Central Regional Council, MFDA File No. 200610, Hearing Panel Decision dated March 20, 2007. In determining whether the Settlement Agreement should be accepted, the Hearing Panel will consider a number of factors, including the following:

- a. The public interest and whether the penalty imposed will protect investors.

- b. Whether the Settlement Agreement is reasonable and proportionate, having regards to the conduct of the Respondent, as set out in the Agreement.
 - c. Whether the Settlement Agreement addresses the issues of both specific and general deterrence.
 - d. Whether the proposed settlement will prevent the type of conduct described in the Agreement from occurring again in the future.
 - e. Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets.
 - f. Whether the Settlement Agreement will foster confidence in the integrity of the MFDA.
 - g. Finally, whether the Settlement Agreement will foster confidence in the regulatory process itself.
8. The Panel is of the view that these goals are met by the agreed disposition in this case.

DATED this 17th day of November, 2009

“Roger Kerans”
Hon. Roger Kerans, FCIArb, CArb, Chair

“Kathleen Jost”
Kathleen Jost, Industry Representative

“Rick Strong”
Rick Strong, Industry Representative