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: Bruce Ian Mawer

Heard: February 10, 2014 in Edmonton, Alberta
Decision and Reasons (Misconduct): April 3, 2014

DECISION AND REASONS
(Misconduct)

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller, Q.C.	Chair
Howard Mix	Industry Representative
Richard Sydenham	Industry Representative

Appearances:

Faye Emmanuel	)	Enforcement Counsel, Mutual Fund Dealers Association of Canada
Bruce Ian Mawer	)	In attendance in person: not represented by Counsel

I. INTRODUCTION

1. By Notice of Hearing dated October 25, 2013 (the "NOH"), entered as Exhibit # 1 at the hearing, the Mutual Fund Dealers Association of Canada (the "MFDA") made two allegations against Bruce Ian Mawer, (the "Respondent"). He was registered in Alberta as a mutual fund salesperson with Worldsource Financial Management Inc. (the "Member"). The allegations read as follows:

> **Allegation #1:** Between 2006 and 2007, the Respondent engaged in personal financial dealings with four clients of the Member by soliciting and accepting monies from them in the total amount of $103,000, which monies he pooled with monies obtained from four insurance-only clients, his partner SS and his own monies, for the purposes of purchasing investment properties, contrary to MFDA Rules 2.1.4 and 2.1.1.
>
> **Allegation #2:** Between 2006 and 2007, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by soliciting and accepting monies in the total amount of $240,000 from four clients of the Member and four insurance only clients, which monies he pooled together with monies obtained from his partner SS and his own monies, for the purposes of purchasing investment properties, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

2. The hearing was convened before this Hearing Panel on February 10, 2014 in the presence of Enforcement Counsel, and the Respondent, who was self-represented.

II. FACTS

3. Enforcement Counsel submitted that the relevant facts were contained in Exhibit #1, the written replies the Respondent submitted prior to the hearing, namely, a reply dated December 2, 2013, marked as Exhibit #2, a reply dated December 31, 2013 marked as Exhibit #3, a reply dated February 8, 2014 marked as Exhibit #4, and the Affidavit of Allison Howse, senior investigator of MFDA, ("Howse") dated February 5, 2014 marked as Exhibit #5. Enforcement

Counsel further submitted that relevant facts were also contained in the oral evidence of Howse and of the Respondent at the hearing on February 10, 2014.

4. However, while the Respondent did not seek to cross-examine Howse on her oral testimony, by his own evidence at the hearing, he contradicted her oral and affidavit evidence. Moreover, there were some contradictions between the contents of his reply in Exhibit #3, where paragraphs 14, 15, 16 and 30 of the NOH were denied, and his reply of Exhibit #4, where those paragraphs were admitted. As well, the Respondent's oral testimony on February 10, 2014 aligned with his responses in Exhibit # 4. It was accordingly necessary for this Panel to make some findings of fact in respect of the internal contradictions within the Respondent's evidence and also in respect of contradictions between his evidence and that of Howse.

5. The following facts were admitted or not disputed by the Respondent:

Registration History

(a) From June 4, 2004 until October 27, 2008, he carried on business in Edmonton, Alberta.

(b) Previously, he was registered in Alberta as a mutual fund salesperson with WFG Securities of Canada Inc. from August 2001 to 2004.

(c) He is currently not registered in the securities industry in any capacity.

(d) He holds an active license with the Alberta Insurance Council to sell accident and sickness and full life insurance.

Investment Properties, Pooled Funds and the Brochure

(e) In 2007, the Respondent was one of the purchasers of seven investment properties, 3 in Alberta and 4 in British Columbia (the "Investment Properties").

(f) The monies used to purchase the Investment Properties came from:

i. certain clients of Worldsource including NP and DP, RF and AF;
ii. certain persons who were the Respondent's insurance clients including LS, MS, RS, and DF;
iii. NN and SS; and
iv. the Respondent.

(g) the above monies received were combined by the Respondent and SS and pooled together ("Pooled Funds") to purchase the Investment Properties to generate profits for the investors.

(h) the Investment Properties are, or have been, foreclosed upon and the Respondent did not recover any of the Pooled Funds.

(i) he was in possession of about 15 brochures (the "Brochure") pertaining to the Investment Properties, which contained, among other things, blueprints of the Investment Properties, which he distributed to those investors listed in subparagraphs (f)(i) (ii) and (iii) above.

Contribution and Solicitation of Funds

(j) four clients of the Member contributed $103,000 to the Pooled Funds and that he commingled such funds with his own.

(k) Howse testified that the Respondent denied in his interview of January 2013 that NP and DP redeemed mutual funds to invest in the Investment Properties. However, at the hearing the Respondent admitted that they had done so.

(l) he repaid $8000 to NP and DP as a return on their investment in late 2006 which funds were then returned to the Respondent in early 2007 to reinvest.

(m) he gave RF the Brochure.

(n) he admitted his signature on a loan agreement with RF and AF around January 15, 2007 for the sum of $55,000 with a minimum of 25% interest to be paid on the loan.

(o) a total of $55,000 from RF and AP was contributed by the Respondent to the Pooled Funds.

(p) he likely gave RS the Brochure.

(q) RS was an insurance client of the Respondent and provided $10,000 that was contributed to the Pooled Funds. According to the interview of January 31, 2013, the Respondent said the funds might have been transmitted directly to the Respondent by cheque.

(r) DF was an insurance only client of the Respondent. She provided $10,000 to the Respondent to invest in the Investment Properties that was contributed to the Pooled Funds.

(s) the Respondent gave NN the Brochure and NN provided him with $50,000 that was contributed to the Pooled Funds.

(t) LS and MS were insurance clients of, and had a personal relationship with the Respondent.

(u) SS, the son of LS and MS, was the Respondent's friend and business partner.

(v) in August 2007, LS arranged to direct over $67,000 to the Respondent to invest in one of the Investment Properties located in Kimberley, B.C.

(w) he used the said funds to place a deposit on the said property.

(x) the total of the funds provided by the mutual fund and insurance clients of the member and those of NN is $240,000.

(y) he has not repaid any of these amounts.

Records Keeping and Risks of the Investment

(z) he could not produce any records of the Pooled Funds or the Investment Properties. He stated in the investigation interview of January 31, 2013 that he did not maintain any such records, but in Exhibit # 4 he said records had been maintained but the file of such records was removed from his filing cabinet. At the hearing, he testified that he recalled after the investigation interview that he had a file with records of how much each individual invested into the pool funds, which file was kept at his home, but that he did not know what became of the file. He recalled the file listed the amounts but held no information to show what money went where.

(aa) he could not recall what advice he gave to the investors about the Investment Properties or if he had referred the investors for independent advice. He testified that all the investors knew the risks, and that he told RS, RF and AF that it was a real estate investment that "go(es) up and down". He recalled telling DF sometime in 2006 that they go up and down and that there was no guarantee.

Policies and Procedures of the Member

(bb) he admitted in Exhibit #4 that the Member's policies and procedures required its Approved Persons to seek and obtain approval from the Member prior to engaging in any business activities outside of the Member. At the hearing, he did not dispute that Worldsource required that outside business activities must be permissible under the MFDA rules and applicable securities legislation.

(cc) As to the contention in paragraph 47 of the NOH that in April 2006 the Member distributed a Compliance Notice reminding its Approved Persons that they must obtain approval from the Member prior to engaging in business activities outside the Member, he stated in Exhibit #4 that the branch manager was aware of his rental properties. He then said at the hearing that Exhibit #2 was typed in error and should have read that he

did not know he had to disclose a personal investment like this. However, immediately after the alleged erroneous statement in Exhibit #2, it was stated that he had numerous discussions about the Investment Properties at the time with his branch manager.

(dd) he signed an Agreement with Worldsource agreeing to act in the best interests of his clients and to comply with MFDA Rules and the policies of the Member.

(ee) In Exhibit #4 he admitted that prior to the events in question, he had signed a Disclosure Form dated November 15, 2004 indicating "no" to the question whether he was engaged in business activities other than mutual funds, that he had signed a Disclosure Form dated August 10, 2006 indicating only that he was engaged in "Life Insurance Sales" in response to the question whether he was engaged in business activities other than mutual funds and in November 2007 he indicated on his registration renewal information form that the only outside business activity he was involved in was Life Insurance Sales.

(ff) in his investigation interview of January 31, 2014 he said that the Member was aware of his involvement with the Investment Properties as he had discussed the same with his branch manager.

(gg) The Disclosure Forms were entered into evidence as exhibits to the Affidavit of Howse. Each such Disclosure Form also contained a statement that "By signing below, I confirm that I have received, read and understood the WFM Compliance Policies and Procedures Manual" and that (he) would comply with the MFDA Rules and the Member's policies and procedures. While the Respondent did not dispute these facts at the hearing, he testified that before signing the Disclosure Forms, he did not read them closely.

III. APPLICABLE LAW

6. This Hearing Panel noted the absence of the benefit of oral testimony from any of the investors whose funds were the subject of this hearing or of the branch manager who purportedly received the Brochure or verbal disclosure of the investment enterprise. It is aware however that Rule 1.6 of the MFDA Rules of Procedure specifically permits hearsay evidence, which it considers to be relevant to the matters before it, and is not bound by legal rules of evidence.

7. This Hearing Panel is also well aware of the comments of the MFDA Hearing Panel in *Re Tonnies* File No. 200503 June 27, 2005 at p. 7 when it considered the affidavit of a Staff investigator that included notes of a conversation with the Member's national compliance officer as follows:

> "Although such evidence may be admitted by us pursuant to the Rules, it is important for the Panel to exercise caution when relying upon hearsay evidence on matters that are integral to the allegations before us. Even though in this case none of the evidence was challenged by Mr. Tonnies, as he did not appear either personally or through counsel, the Panel still must be satisfied that the evidence supports the allegations of misconduct made against him."

8. This Hearing Panel is also aware that the standard of proof in MFDA and other regulatory proceedings in the securities industry is the civil standard of a balance of probabilities. As stated by the Supreme Court of Canada in *F.H.* v. *McDougall* 2008 SCC 53 at para 49:

> "…in civil cases, there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, a trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

IV. HEARING PANEL FINDINGS OF FACT

9. Certain of the facts presented in evidence were in dispute between the parties in respect of the following issues:

a) Whether the Respondent solicited any of the funds received from the investors.
b) Whether NN was an investor.
c) Whether the Respondent had kept any records of the investments.
d) Whether the Respondent knew he must obtain approval from the Member prior to engaging in any outside business activities.
e) Whether the Respondent disclosed to the Member his engagement in the Investment Properties and Pooled Funds with insurance and mutual fund clients.

10. This Hearing Panel had the opportunity to assess the credibility of the investigator Howse during her evidence in chief. Her evidence was consistent with the evidence in her affidavit. She was not cross-examined on her testimony.

11. This Hearing Panel also had the opportunity to assess the credibility of the Respondent during his evidence in chief and under cross-examination. We found his evidence on the above issues (a) (c) (d) and (e) in dispute to be vague, inconsistent, or both.

12. In particular, on the issue of solicitation of the investors, this Hearing Panel noted that Howse testified that NP advised that the Respondent asked NP and DP to invest in the Investment Properties. The Respondent in Exhibits #2, #3 and #4 denied that he solicited Funds from anyone. However, during his investigation interview when asked if he had recommended to the clients to invest in the properties, the Respondent's answer was that he did not remember. In his testimony at the hearing, he said he could not recall the details of the conversation in which NP and DP's investment in the Investment Properties was discussed but admitted that possibly, NP could have inferred that the Respondent approached her with the investment opportunity.

13. The Respondent in his testimony said he could not recall the details of the conversation in which RF and AF's investment in the Investment Properties was discussed. He said under cross-examination that "if he approached RF and AF", it may have been in 2005 or 2006. He could not recall the specifics of the conversation in which RS's investment in the Investment Properties was discussed.

14. The Respondent testified he could not recall the details of the conversation in which DF's investment in the Investment Properties was discussed. He could not recall the details of the conversation in which NN's investment in the Investment Properties was discussed or whether that conversation occurred at the home of NN or a coffee shop.

15. The Respondent testified he knew nothing of the involvement of LS and MS until after the purchase was made, although he had a good relationship with LS between 1999-2008, visited his home 7-8 times per year, had business conversations with him in 2006 and 2007 about the funds but had no recall how their funds of $70,000 became invested, although he knew they were associated with the purchase of Investment Properties.

16. This Hearing Panel observed that the Respondent's initial reply on the solicitation issue

was an unqualified denial. However, when interviewed and when giving his testimony his response changed to one of no recall and then at the hearing his evidence appeared to waver again to the stage of allowing for the possibility that a solicitation may have occurred in some instances. This Hearing Panel found it unlikely that with investment dealings of this magnitude he would not have a clear recollection of the discussion with even one such investor especially when he admitted having provided the Brochure to most such investors. This Hearing Panel considered that his insufficient memory, when contrasted with that of the memory of certain actual investors who specifically recalled that he made the solicitation, made it unlikely that his version of events was accurate.

17. This Hearing Panel carefully reviewed the evidence on both sides on the issue of whether NN was in fact an insurance client. This fact was asserted in the NOH. However, the Respondent consistently denied this particular in Exhibits #3 and #4. This allegation was not pressed by Enforcement Counsel at the interview nor put to the Respondent at the hearing. In the result, this Hearing Panel was not satisfied on the evidence that NN was an insurance client of the Respondent.

18. This Hearing Panel found the evidence of the Respondent on the issue of whether he kept records to be unreliable in that on each of four occasions when he responded his responses were internally inconsistent. In his replies in Exhibits #3 and #4 he appeared to contend that he did keep records, but in his interview he stated that he did not keep records. In his reply in Exhibit #4 he claimed that the records were removed from his filing cabinet, but in his testimony at the hearing he claimed he did not know what became of the file. First, the responses were never fulsome or consistent. Second, having regard to his final response given in testimony and his demeanour observed when giving that evidence, this Hearing Panel found his evidence as a whole on this issue to be disingenuous and not credible.

19. As to the contention that he did not seek or obtain approval from the Member to solicit and accept monies from clients and other individuals, the Respondent first replied in Exhibit #2 that he knew he had to disclose such an investment and had numerous discussions about the said Investment Properties with his branch manager. However, he gave no response on this point in

either Exhibit # 3 or # 4.

20. The Respondent then testified at the hearing that he understood he was not allowed to have another job or buy his own investments. He then added that his branch manager at the Member was well aware of the Respondent's activities since he had received a Brochure from the Respondent and then expressed interest. The Respondent then asserted that the real estate activity did not constitute another (gainful) occupation but instead this enterprise was akin to merely buying a stock. He also asserted that he did not carefully read the policies of the Member or the contents of the Disclosure Statements he was required to make to the Member that expressly denied any such involvement.

21. This Hearing Panel rejected the evidence of the Respondent on the issue of whether he knew he was obliged to disclose his real estate activities to the Member. This Hearing Panel concluded it more likely than not that the Respondent was aware of, or chose to be wilfully blind to, the fact that he was obligated to disclose his activities to the Member and that he was aware of his failure to do so on the three occasions when he was asked for a written response from the Member to such a question.

22. At the hearing, the Respondent testified that he did not know the extent of what he had to disclose or that he had to disclose the use of clients' monies to acquire an investment. He then said he had numerous discussions with the branch manager of the Member and mentioned he was buying investment properties. He did not specifically recall, but thought he told the branch manager between 2009 and 2011 that he had close friends who were clients who were investing in real estate properties and also that he was using client funds to buy investment properties. He thought that branch manager had since retired, was forgetful and not really paying attention to such discussions.

23. Howse's evidence was that she received an email from the branch manager dated August 1, 2012 who stated he had no knowledge of the Respondent approaching individuals to invest in Investment Properties. She also received a letter from the Member dated August 20, 2012 which indicated neither the Member nor the Respondent's supervisor employed by the Member had any

knowledge of the Respondent's outside business activities. This Hearing Panel accepted the evidence of Howse on this point.

24. This Hearing Panel did not accept the Respondent's alternative position that if he was obligated in the circumstances to make a disclosure, then he did so by providing the Brochure to his branch manager and mentioning the nature of the investment. His evidence was internally inconsistent in saying at once that he told the branch manager of the enterprise on many occasions and then that the disclosure occurred either 3 or 5 years ago.

25. If the Respondent did mention the Investment Properties at all to his branch manager, this Hearing Panel considered it unlikely that any such purported disclosure was made in a sufficiently fulsome way to make it clear to the branch manager that the Respondent was making a disclosure of either Dual Occupations or Outside Business Interests as required by the Member's policies and procedures.

V. RULING

26. Enforcement Counsel submitted that the Respondent violated MFDA Rule 2.1.1 by soliciting and accepting funds of four clients of the Member, pooling their funds with his own and funds obtained from others and using the pooled funds to purchase investment properties without the knowledge of the Member. Further, he violated Rule 2.1.4 by failing to address this conflict of interest by the exercise of responsible business judgment influenced only by the best interests of the client and by failing to notify the Member of the conflict which disallowed the Member to ensure the conflict was addressed by the same responsible business judgment. This Hearing Panel is in agreement. As noted in *Lui (Re)* No. 201124, dated July 27, 2012 at para 44:

> "As was said in Re Puri, 2007 LNCMFDA 34, MFDA Hearing Panels have consistently held that where an approved person solicits and accepts money, and fails to pay it back or otherwise account for it, the approved person engages in conduct which is inconsistent with the standard of conduct set out in MFDA Rule 2.1.1."

27. Enforcement Counsel submitted that such conduct is aggravated and falls below the

standard expected of an Approved Person pursuant to Rules 2.1.1. and 2.1.4 when as here, the client monies were obtained for investment with the Respondent, comingled with the Respondent's own funds, the investment was managed by the Respondent, for at least two clients, the mutual funds were redeemed to invest in the Investment Properties, and for at least two clients, the Respondent entered into a personal loan agreement and the funds were used to invest in the Investment Properties, the Respondent did not disclose his activities to the Member, the activities were contrary to the Member's policies and procedures and the client monies were not repaid. This Hearing Panel is in agreement and notes that similar findings were made on similar facts in *Lui (Re) (supra*) and *Tonnies (Re) (supra).*

28. Enforcement Counsel submitted that the Respondent was in violation of MFDA Rule 1.2.1(d) that requires as a condition of an Approved Person having and continuing in another gainful occupation, that the Member must be aware and approve of the Approved Person engaging in such other occupation. She further submitted that breach of the rule is a serious offence and a request to engage in outside activity by an Approved Person must be in a form and to an extent sufficient to enable the Member to assess whether the activity complies with the constituent elements of the rule and is otherwise an activity in which the Member is prepared to allow the Approved Person to engage.

29. Enforcement Counsel further submitted that the Respondent failed to disclose to, and obtain prior approval from Worldsource to engage in the purchase of investment properties with funds from clients and non-clients of the Member and as such, contravened MFDA Rule 1.2.1(d), 2.1.1. and the policies and procedures of Worldsource, which required the Respondent to provide, among other things, a written description of the activity, and that he receive written permission to engage in such activity, which the Respondent did not do.

30. Enforcement Counsel also submitted that in obtaining monies from clients and non clients for real estate investments with him was conduct contrary to the Member's policies and procedures and would not likely have been approved by the Member. Given that it was not or would not have been approved by the Member, Enforcement Counsel contends that his activity thereby constitutes a breach of the Approved Persons Standard of Conduct and the MFDA Rule

2.1.1.

31. As to the Respondent's evidence that he did not know he was required to make the disclosure of his real estate investment activities, Enforcement Counsel submits that ignorance of his obligation to disclose such activities is no excuse in the face of his obligation and written agreement that he would be familiar with and adhere to the same.

32. This Hearing Panel did not accept as credible, the evidence of the Respondent that he verbally disclosed the nature and extent of his activities to the Member, particularly as it was contradicted by at least two persons employed by the Member. Moreover, the Respondent did not provide the disclosure in any written form or receive written approval from the Member to engage in such activity. As was stated by the Hearing Panel in *Re Vitch*, No. 201103, dated September 22, 2011 at para 53:

> "The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious. There are many reasons why a Member must know what its employees are doing. We will mention only two of what seem to us to be the most important reasons. The first is that a failure to know about an employee's other commercial activities impinges upon the Member's ability to properly supervise its employee. The second reason is that the Member could be exposed to litigation alleging that the AP's activity was within the scope of his/her employment with the member."

33. This Hearing Panel found no reliable evidence to suggest that the Member was aware of or approved of the Respondent's real estate activities or waived the requirement for written disclosure and written approval for the same.

34. Enforcement Counsel further submitted that the term "gainful occupation" is broad enough to include an occupation that the Approved Person expects or hopes to derive some compensation, profit or other benefit from it.

35. The Hearing Panel did not accept the Respondent's contention that the activity was not "gainful employment" or that he did not expect or hope to make a profit from the activity. Indeed, this Hearing Panel noted that the Respondent admitted elsewhere in his evidence at that

hearing that the real estate investment was intended to produce a profit to all investors. This Hearing Panel noted that the Hearing Panel in *Bangyay (Re)* no. 201238 dated July 22, 2013 did state that:

> "At its very least the meaning which must be given to gainful occupation is that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it."

36. This Hearing Panel accordingly accepted submissions of Enforcement Counsel that the Respondent contravened MFDA Rule 1.2.1(d) and 2.1.1.

37. This Hearing Panel thus concluded that Allegation #1 has been proven to the required standard. Further, except for the fact that the Hearing Panel was not satisfied that the breach in Allegation #2 related to 4 but only three insurance clients, otherwise it was satisfied that Allegation #2 was proven to the required standard.

38. This Hearing Panel directs that a penalty hearing be scheduled.

DATED this 3rd day of April, 2014.

"Shelley L. Miller"

Shelley L. Miller, Q.C.
Chair

"Howard Mix"

Howard Mix
Industry Representative

"Richard Sydenham"

Richard Sydenham
Industry Representative

DM 374256 v2