



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: Chris M. McAuley

Heard: March 23, 2011 in Toronto, Ontario
Reasons for Decision: April 11, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.
Paul M. Moore, Q.C.
Robert C. White

Chair
Industry Representative
Industry Representative

Appearances:

Charles Toth)	For the Mutual Fund Dealers Association of
)	Canada
Howard C. Rubel)	For the Respondent
)	

1. The Notice of Hearing, dated June 15, 2010, made the following allegations:

Allegation #1: In or about 2007, the Respondent submitted false and misleading documentation to a lending institution for the purpose of obtaining investment loans for clients and for himself, thereby failing to observe the high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

Allegation #2: In or about February 2008, the Respondent misappropriated approximately \$47,838.11 from client NW, thereby failing to deal fairly, honestly and in good faith with client NW, contrary to MFDA Rule 2.1.1.

Allegation #3: Between about February and March 2008, the Respondent misled the Member during the course of its investigation of his conduct, thereby failing to observe the high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

Allegation #4: Between about March and May 2009, the Respondent failed to attend for an interview during the course of an investigation of his conduct by the MFDA, contrary to s. 22.1 of MFDA By-law No. 1.

2. Enforcement counsel and the Respondent signed an Agreed Statement of Facts. By this agreement, the Respondent admits the facts found in Part IV, paragraphs 6 to 38 of the Agreed Statement of Facts.

3. Paragraph 44 of the Agreed Statement of Facts describes the “Misconduct Admitted” in these words.

44. The Respondent admits the following contraventions of the By-laws, Rules and Policies of the MFDA:

- (a) in or about 2007, the Respondent submitted false and misleading documentation to a lending institution for the purpose of obtaining investment loans for clients and for himself, thereby failing to observe

the high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1;

(b) in or about February 2008, the Respondent misappropriated approximately \$47,838.11 from client NW, thereby failing to deal fairly, honestly and in good faith with client NW, contrary to MFDA Rule 2.1.1;

(c) between about February and March 2008, the Respondent misled the Member during the course of its investigation of his conduct, thereby failing to observe the high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1; and

(d) between about March and May 2009, the Respondent failed to attend for an interview during the course of an investigation of his conduct by the MFDA, contrary to s. 22.1 of MFDA By-law No. 1.

4. After the submissions had been made as to the contraventions, the Panel found that the misconduct had been established, on a balance of probabilities. Counsel were then invited to discuss the agreed upon penalties found in paragraph 5 of the Agreed Statement of Facts:

(a) a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity over which the MFDA has jurisdiction, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

(b) a fine in the amount of \$35,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

(c) costs in the amount of \$5,000 pursuant to s. 24.2 of MFDA By-law No. 1.

5. In cases before a Panel involving a settlement agreement, the settlement is based on section 24.4 of the MFDA By-law No. 1. In those cases, the hearing panel is required to either

accept or reject the penalties proposed in the Settlement Agreement. In the present matter, the Hearing Panel may impose any of the penalties prescribed in section 24.1.1 of MFDA By-law No. 1 that the Hearing Panel deems appropriate. In other words, it is incumbent upon the Panel to decide if the penalties sought by MFDA and agreed to by the Respondent are appropriate under all of the circumstances. In this matter, the Respondent does not oppose the penalties sought by MFDA Staff. He has agreed that this is a joint submission on penalty by both MFDA Staff and the Respondent. There is ample authority for the principle that a hearing panel should not interfere with a joint recommendation of MFDA Staff and the Respondent unless the recommendation is seen to be manifestly unfit. In the matter of *R. v. R.W.E.*, [2007] O.J. No. 2515 (Ont. C.A.), at paragraph 22, the Court of Appeal states as follows:

It is trite law that a sentencing judge is not bound to accept a joint submission. It is well-settled, however, that a judge should not reject a joint submission unless it is contrary to the public interest and the sentence would bring the administration of justice into disrepute: *R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); *R. v. Dorsey* (1999), 123 O.A.C. 342 (C.A.).

6. In order to determine if the agreed upon penalties are appropriate, there are a number of specific factors that must be considered, including the seriousness of the allegations, past conduct, recognition of the seriousness of the improper activity by the Respondent, harm suffered by the investor, benefits received by the Respondent, risk to investors and the capital markets, damage to the integrity of the capital markets, the need to deter others from like conduct and the consequences of inappropriate activity.

7. In addition, it is appropriate to consider the MFDA Penalty Guidelines. The Guidelines are not mandatory but are simply for the assistance of the Panel.

8. The Penalty Guidelines recommend the following:

- (a) misappropriation: minimum fine of \$25,000; permanent prohibition in almost all cases; and fine should include the amount of any financial benefit to the Respondent;

- (b) standard of conduct: minimum fine of \$5,000; write or rewrite an appropriate industry course; suspension; and permanent prohibition in egregious cases;
 - (c) failure to cooperate: minimum fine of \$50,000; and permanent prohibition in egregious cases.
9. In addition to the matters summarized above, we have considered the following matters:
- (a) The Respondent's conduct was serious, deceitful and deliberate.
 - (b) The Respondent prepared false and misleading information to obtain loans. He misappropriated \$47,838.11 from a client.
 - (c) The Respondent misled the Member during the course of its investigation.
 - (d) The Respondent failed to attend for an interview during the course of the MFDA investigation.
10. With reference to client harm, the Panel acknowledges that the client was repaid in full together with interest of approximately 10% over a period of seven months. The Respondent also paid to an associated company of Quadrus its costs incurred in resolving the client's complaint against the Respondent.

Risk to Investors

11. The conduct of the Respondent shows that he would be a risk to investors and the capital markets and, accordingly, the permanent prohibition recommended by MFDA Staff will eliminate this risk to the extent permitted under the MFDA jurisdiction. It is further noted that the Respondent has resigned his position as a registered mutual fund salesperson in Ontario.
12. The Respondent has no previous record of disciplinary proceedings before the MFDA. In addition, he was terminated by Quadrus as a result of the events described under the allegations.

By admitting his misconduct, the Respondent has accepted his responsibility for that misconduct and has avoided the necessity of a full hearing.

13. We are of the view that the fine of \$35,000 and costs of \$5,000 are significant. While we recognize that the fine of \$35,000 is less than the total amounts identified in the Penalty Guidelines, it could be said that the minimum fine of \$25,000 for misappropriation is reflected in the agreed upon total amount. The minimum fine for a breach of the standard of conduct of \$5,000 is reflected in the agreed upon total amount. The Guidelines amount of \$50,000 for failure to cooperate is reflected as a \$5,000 fine in the agreed upon total amount.

14. The Guidelines direction deals with a case where the Guidelines amount is not appropriate, in these words:

Depending on the facts and circumstances of a case, MFDA Staff and Hearings Panels may determine that no purpose is served by imposing a penalty within the range stated in the Guidelines; i.e., that a penalty below the stated range, or no penalty at all, is appropriate

15. This direction is useful in consideration of the failure to cooperate. This is not a case of refusal to cooperate. The Respondent responded by providing a written, truthful summary to the MFDA of his activities. After that step, his counsel who had concerns about ongoing criminal charges against the Respondent suggested two alternative solutions: First, delay the interview with the MFDA until the criminal proceedings were concluded. Second, any information given to the MFDA would be privileged. The MFDA refused to accept either alternative but it did receive the necessary financial documents to be used in his investigation. In essence, this is a unique case in that the Respondent did not ignore the request for an interview. His response did not meet the criteria of the MFDA but clearly did provide information and offer a method to resolve the issue of cooperation. The Panel is satisfied that the entire course of conduct regarding the issue of cooperation could be described as reasonable, although not correct. Essentially, there was no legal basis to refuse but the Respondent did more than most in responding to the request for an interview from MFDA Staff.

16. Counsel advised the Panel that the Respondent is presently 36 years of age and a married man with two children. He is the sole support for his family. The reason for his default and

inappropriate conduct arose from the fact that his father was dying of cancer in 2007. His relationship with his father had been very close and all responsibility for his care fell upon him. He emotionally was unable to conduct his work because of his close relationship with his father and his income fell dramatically. His line of credit was also reduced to a small amount and he maxed out all his credit cards to assist with the care of his father. He had had no difficulties before the onslaught of his father's cancer. His improper behaviour was explained to Quadrus within two weeks of having been discovered. He has arranged for the repayment of the money to one client. She received what she expected. He has also paid Great West Life for their financial losses. He agrees to the prohibition and is now attempting to provide support for his wife and children and to pay outstanding debts.

17. The penalties proposed in the Agreed Statement of Facts we find to be consistent with previous decisions made under similar circumstances where penalties equivalent to or less than the penalty proposed here were imposed.

18. We agree with the comment found on paragraph 53 of Staff's submission, which states:

... [T]he proposed penalties are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case.

19. We are, therefore, prepared to sign the Order that was presented to us at the hearing for all of the above reasons.

DATED this 11th day of April, 2011.

"John Webber"

The Hon. John B. Webber, Q.C.,
Chair

"Paul Moore"

Paul M. Moore, Q.C.,
Industry Representative

"Robert White"

Robert C. White,
Industry Representative