



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: Edward Jonathan Okopny

Heard: August 9, 2016 in Toronto, Ontario
Decision and Reasons (Penalty): August 31, 2016

**DECISION AND REASONS
(Penalty)**

Hearing Panel of the Central Regional Council:

W. A. Derry Millar	Chair
Guenther Kleberg	Industry Representative
Colleen Waring	Industry Representative

Appearances:

Paul Blasiak)	Counsel for the Mutual Fund Dealers Association
)	of Canada
)	
Edward Jonathan Okopny)	In Person
)	
)	
)	

I. INTRODUCTION

1. In our Decision and Reasons (Misconduct) (“Decision”) on the merits of this matter dated April 21, 2016, we found that Edward Jonathan Okopny (“Respondent”) violated the By-laws, Rules or Policies of the Mutual Fund Dealers Association of Canada (“MFDA”) as set out below:

Allegation #2: Between December 6, 2011 and March 29, 2012, the Respondent engaged in personal financial dealings with client MM by borrowing and failing to fully repay \$40,000 from client MM, thereby giving rise to a conflict or potential conflict of interest between the Respondent and client MM, which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of client MM, contrary to MFDA Rules 2.1.1 and 2.1.4.

Allegation #3: Between about June 2008 and March 29, 2012, the Respondent engaged in dual occupations, which were not disclosed to or approved by the Member, contrary to MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d))¹ and 2.1.1.

Allegation #4: Commencing in March 2013, the Respondent failed to provide documents and information requested by Staff and failed to attend an interview with Staff for the purpose of investigating the Respondent’s conduct, contrary to section 22.1 of MFDA By-law No. 1.

2. We have received written and oral submissions from Staff and the Respondent as to the appropriate penalty for the violations found by us in our Decision.

¹ On December 3, 2010, MFDA Rule 1.2.1(d) was renumbered as MFDA Rule 1.2.1(c).

II. STAFF SUBMISSIONS

3. Staff proposed the following penalties and costs be imposed by the Hearing Panel:

- (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 pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- (b) a total fine in the amount of at least \$115,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1, consisting of the following:
 - (i) a fine in the amount of at least \$40,000 in respect of the Respondent's personal financial dealings with client MM;
 - (ii) a fine in the amount of \$25,000 in respect of the Respondent's undisclosed and unapproved dual occupations;
 - (iii) a fine in the amount of \$50,000 in respect of the Respondent's failure to cooperate with Staff's investigation; and
- (c) costs in the amount of \$7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

4. Staff submit that:

- (a) The disciplinary powers of a Hearing Panel are described in section 24.1.1 of MFDA By-law No. 1 which grants a Hearing Panel the power to impose on an Approved Person, among other things, the following penalties:
 - (i) 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; and
 - (ii) a prohibition of the authority of the person to conduct securities related business in any capacity for any period of time.

- (b) Section 24.2 of MFDA By-law No. 1 provides that a Hearing Panel may, in its discretion, require that an Approved Person pay the whole or part of the costs of the proceeding and Staff's investigation relating to the proceeding.

5. Staff submit that the following principles should govern the Hearing Panel's exercise of its discretion:

- (a) The primary goal of securities regulation is the protection of the investor.²
- (b) The role of an MFDA Hearing Panel is similar to that of a provincial securities commission in so far as it protects the public interest by removing, permanently or for a period of time, from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets.³
- (c) Sanctions imposed in the securities regulatory context should be protective and preventative, intended to be exercised to prevent likely future harm to the capital markets.⁴
- (d) General deterrence is an appropriate consideration in making orders that are both protective and preventative. A penalty must re-affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry.⁵
- (e) In exercising its discretion to impose a penalty, the Hearing Panel should take into account the following considerations:
 - (i) the protection of the investing public;
 - (ii) the integrity of the capital markets;
 - (iii) specific and general deterrence;

² *Pezim v. British Columbia (Superintendent of Brokers)* [1994], S.C.J. 58, *Iacobucci, J. at paragraphs 59 and 68.*

³ *In The Matter of Robert Roy Parkinson* [2005], MFDA File No. 200501, decision dated April 29, 2005 ("*Parkinson*"), citing with approval *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] S.C.J. 38, ("*Asbestos Minority Shareholders*") per *Iacobucci, J. at paragraphs 42 and 43.*

⁴ *Re: Arnold Tonnies*, [2005], MFDA File No. 200503, *decision dated June 27, 2005, at p. 21 - 22,* citing with approval *Asbestos Minority Shareholders* at paragraph 43, *supra.*

⁵ *Tonnies, supra at p. 22* citing *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 *at paragraph 61*

- (iv) the protection of the MFDA's membership; and
 - (v) the protection of the integrity of the MFDA's enforcement processes.⁶
- (f) Other factors that Hearing Panels frequently consider when determining an appropriate penalty include the following:
- (i) the seriousness of the allegations proved against the Respondent;
 - (ii) the Respondent's past conduct, including prior sanctions;
 - (iii) the Respondent's experience in capital markets;
 - (iv) the level of the Respondent's activity in the capital markets;
 - (v) whether the Respondent recognizes the seriousness of the improper activity;
 - (vi) the harm suffered by investors as a result of the Respondent's activities;
 - (vii) the benefits received by the Respondent as a result of the improper activity; and
 - (viii) previous decisions made in similar circumstances.

6. Staff provided us with the relevant extracts from the MFDA Penalty Guidelines and submitted that the MFDA Penalty Guidelines recommend the following:

- (a) Personal financial dealings: minimum fine of \$10,000; writing or re-writing an appropriate industry course; period of increased supervision; suspension; permanent prohibition in egregious cases.
- (b) Outside business activity: minimum fine of \$10,000; writing or re-writing an appropriate industry course; period of increased supervision; suspension; permanent prohibition in egregious cases.
- (c) Failure to cooperate: minimum fine of \$50,000; permanent prohibition.
- (d) Standard of conduct: minimum fine of \$5,000; writing or re-writing an appropriate industry course; suspension; permanent prohibition in egregious cases.

⁶ *Tonnies, supra* at p. 22.

7. The Penalty Guidelines are simply guidelines and are not mandatory. As stated in the Guidelines:

Depending on the facts and circumstances of the case the, MFDA Staff and Hearing 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. Conversely, MFDA Staff and Hearing Panels may determine that egregious misconduct, the need for increased deterrence the, or certain policy considerations require the imposition of penalties above or otherwise outside of a stated range. Lastly, the facts and circumstances of the particular case may warrant that penalties of a different type than those stated in the Guidelines are appropriate.

MFDA Staff and Hearing Panels must always exercise judgment and discretion and consider appropriate aggravating and mitigating factors in determining appropriate penalties in every case. MFDA Staff and Hearing Panels must identify the basis for the penalties imposed.

Borrowing from Client MM

8. Staff submit that:

- (a) Borrowing from clients is very serious misconduct.⁷
- (b) In borrowing \$40,000 from client MM, the Respondent disregarded his responsibilities and fundamental obligations as an Approved Person and obtained a personal benefit for which he was not entitled by virtue of his obligations under MFDA Rules 2.1.4 and 2.1.1.

9. The Respondent's misconduct is aggravated by the following factors:

- (a) Client MM redeemed mutual funds in order to facilitate the loan and incurred deferred sales charges of approximately \$1,314 as a result of the redemptions.

⁷ *Nunweiler (Re)*, [2012] Hearing Panel of the Pacific Regional Council, MFDA File No. 201030, Panel Decision dated May 28, 2012, at para. 51.

- (b) Apart from a repayment of \$6,400 (which included an interest payment of \$2,400), the Respondent failed to repay client MM the balance of the loan.
- (c) There is no evidence that the Respondent explained to client MM the conflict of interest that arose when he borrowed money from her, or disclosed the existence of the conflict of interest to the Member.
- (d) At the time of the loan client MM was 82 years old and was in severe pain as a result of having suffered a hand injury. It is highly unlikely that client MM would have been able to appreciate the conflict of interest, provide informed consent, or afford to incur losses associated with an unsecured loan to the Respondent.

Undisclosed and Unapproved Dual Occupations

10. Staff submit that:

- (a) An Approved Person's failure to disclose and obtain approval of his or her outside business activities is serious misconduct as it deprives the Member of a proper opportunity to: supervise the Approved Person, prevent the Approved Person from contravening regulatory requirements, and protect itself from the risk of litigation.⁸
- (b) The Respondent's failure to disclose his business activities on behalf of Globacorp Developments International ("Globacorp") and Globadigm Group ("Globadigm") made it impossible for the Member to make any determination as to what risk it was exposed to, and whether or not clients may have been at risk.
- (c) Between about June 2008 and March 2012, the Respondent held directorial positions with Globacorp and Globadigm, entities that were in the business of "land development" in Panama. The Respondent's specific duties included the marketing of Globacorp/Globadigm to real estate brokers and also representing Globacorp in business dealings with Keller Williams Realty Inc. (a real estate franchise based in the United States). This is the exact kind of outside business

⁸ *Mawer (Re)*, [2014] Hearing Panel of the Prairie Regional Council, MFDA File No. 201331, Panel Decision (Misconduct) dated April 3, 2014, at para. 32

activity a Member would want to know its Approved Persons were involved with as the Member could have been exposed to litigation alleging that the Respondent's activities were within the scope of his employment with the Member.

- (d) In addition, during a compliance audit conducted by the Member in November 2009, the Respondent misled the Member when he falsely answered "no" when asked if he was involved in "ANY outside business activities?" [Emphasis in original]. This is a significant aggravating factor in determining penalty.

Failure to Cooperate

11. Staff submit that:

- (a) Failure to cooperate with an MFDA investigation is amongst the most serious forms of misconduct because it subverts the MFDA's ability to perform its regulatory function.⁹
- (b) In the present case, the Respondent did not even partially cooperate with Staff. Staff sent five letters and three voice messages to the Respondent requesting that he submit information and documents and/or attend an interview, and at no time did the Respondent comply with Staff's requests.
- (c) Due to the Respondent's failure to cooperate with Staff's investigation, Staff was unable to investigate the full nature and extent of, among other things, the Respondent's activities with respect to the monies he borrowed from client MM, including whether he pressured or coerced client MM to withdraw the funds, and the Respondent's activities with respect to his dual occupations.

12. Staff submit that:

- (a) There was a direct financial benefit to the Respondent from his misconduct. The Respondent obtained a loan in the amount of \$40,000 from client MM and used

⁹ *Zhang (Re)*, [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201309, Panel Decision dated October 30, 2013, at para. 10 and *Theroux (Re)*, [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201307, Panel Decision dated April 1, 2014, at para. 9.

the monies to pay his personal debts. Apart from a \$6,400 repayment (which included an interest payment of \$2,400), the Respondent failed to repay client MM the balance of the loan.

- (b) The Respondent's misconduct caused direct harm to client MM as client MM was deprived of access to her funds for a substantial period of time (from December 2011 to June 2013).
- (c) Had the Member not paid the Notice of Garnishment that was issued in respect of the monies owed by the Respondent to client MM, client MM would have suffered a substantial financial loss.
- (d) Due to the Respondent's failure to cooperate with Staff's investigation, the Respondent has demonstrated that he is ungovernable and would therefore pose a risk to investors and the capital markets were he to continue to operate in the capital markets. A permanent prohibition is necessary in order to protect investors.
- (e) The proposed penalties will send a message to other Approved Persons that engaging in personal financial dealings with clients (particularly vulnerable or elderly clients), failing to disclose and obtain approval for outside business activities, and failing to cooperate with one's regulatory body will not be tolerated in the mutual fund industry.
- (f) Further, the proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster confidence in the mutual fund industry.
- (g) The proposed penalties are consistent with the MFDA Penalty Guidelines.

13. Although the Respondent has no past disciplinary history with the MFDA, Staff submit that this factor should be given very little weight in light of the serious misconduct at issue in this proceeding.

14. Staff submit that the proposed penalties are appropriate based on previous decisions made in similar circumstances. Staff provided the Hearing Panel with a chart of cases which support

the penalties being proposed by Staff. As specified in the chart, in cases where an Approved Person fails to cooperate with an MFDA investigation, Hearing Panels have routinely imposed a permanent prohibition and a fine of at least \$50,000.

15. Staff also requests that an order for costs be made against the Respondent in the amount of \$7,500. This amount will permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and prosecution of this matter. This amount is consistent with the amounts awarded by MFDA Hearing Panels in the decisions listed above.

16. Staff submits that the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring a high standard of conduct by Members and Approved Persons.

III. RESPONDENT'S SUBMISSIONS

17. The Respondent submits that:

- (a) He certainly understands the seriousness of the findings against him and the errors that he has made. Most importantly, at no time was his conduct as a result of malice or for personal gain.
- (b) As to the redemptions made with client MM:
 - (i) it was truly a daughter and son-in-law in need of financial help
 - (ii) The commitment in writing to repay, was to make sure that client MM, no matter what, would not end up suffering financially.
 - (iii) The borrowed funds were entirely used for debt and expenses related to her grandson's health challenges.
 - (iv) In addition, in October 2013, client MM was repaid in full plus interest for all borrowed funds.

- (c) As to the finding of undisclosed dual occupations:
- (i) He at no point ever considered his travel to Panama and subsequent conversations with Keller Williams in the United States in 2010, as a second occupation.
 - (ii) He believed that he was gaining knowledge in land development that might expand his horizons in the future.
 - (iii) In addition, there was never any contract between the Respondent and any other entity, including Globacorp, regarding a position or remuneration of any kind.
 - (iv) All trips made to Panama, were completely funded by the Respondent and at no point did he receive any consideration from Globacorp or John S. Cornacchia.
 - (v) He never felt that what he was doing in travelling to Panama, was ever a second occupation.
- (d) As to findings of failure to cooperate:
- (i) He did not intend to disregard the communications of the MFDA, but unfortunately he was overwhelmed and consumed with his son's continued health challenges and with his additional familial challenges.
 - (ii) Once he was no longer with State Farm and the repayment of the debt to client MM was complete, he also believed that the MFDA inquiry would end as well.
- (e) With respect to penalty:
- (i) He respects the findings of the MFDA Hearing Panel and asks for leniency regarding any fine amount.
 - (ii) Prior to the incident with client MM, he not only had a complaint free record with the MFDA, but through the 2008 and 2009 fiscal years he only

had one client make a redemption, during a time with a record number of redemptions in the industry. He believes that this is an example of the exemplary care he showed his Mutual Fund clients.

- (iii) At no point did he ever feel he was compromising the care of his clients. As well, no client outside of family members, was ever aware of his travel to Panama or any perceived second occupation.
- (iv) He requests that any penalties be strictly related to the prohibition of his authority in relation to any conduct with the MFDA in the future.
- (v) Not only is he not in a position to pay any financial fines at this time, any financial penalty would simply diminish his ability and capacity to deal with the continued and lifelong financial requirements of his son's health challenges.
- (vi) There was never any intention on his part, to cause harm or personally gain from any of his MFDA clients and he most certainly never acted in malice.

IV. ANALYSIS AND DECISION

18. We agree with the principles that govern the determination of the appropriate penalty in matters of this kind as outlined by Staff and set out in paragraph 5 above.

19. With respect to Allegation #2, borrowing from a client, we repeat what we said in our Decision dated April 21, 2016, “it makes no difference that MM was his mother-in-law as well as his client. For the purposes of his duties and responsibilities as an Approved Person, MM was his client.” In addition, we agree with the submissions of Staff that borrowing from clients is very serious misconduct. We agree with Staff that the Respondent’s misconduct is aggravated by the factors set out in paragraph 9. In particular, client MM at the time of the loan was 82 years old and was in severe pain as a result of having suffered a hand injury. We agree that it is “highly unlikely that client MM would have been able to appreciate the conflict of interest, provide informed consent, or afford to incur losses associated with an unsecured loan to the Respondent”.

20. With respect to Allegation #3, undisclosed and unapproved dual occupations, we do not believe that the Respondent fully appreciates the seriousness of his failure to disclose and obtain approval for his dual occupation. We agree with Staff that an Approved Person's failure to disclose and obtain approval of his or her outside business activity is serious misconduct as it deprives the Member of a proper opportunity to: supervise the Approved Person, prevent the Approved Person from contravening regulatory requirements, and protect itself from the risk of litigation. Notwithstanding what the Respondent may have felt about his activities in Panama, we have found that what he was doing was a dual occupation which was neither disclosed to nor approved by the Member.

21. With respect to Allegation #4, failure to cooperate, as we said in our Decision dated April 21, 2016, "the failure to cooperate hinders the MFDA's ability to investigate the conduct of registrants in the mutual fund industry and prevents the MFDA from fulfilling its regulatory mandate to protect the public." Notwithstanding the fact that the Respondent felt that he was "overwhelmed and consumed with my son's continued health challenges and with his additional familial challenges", he had an obligation to cooperate with the MFDA which he failed to do. The Respondent's submission that "once he was no longer with State Farm and the repayment of the debt to client MM was complete, he also believed that the MFDA inquiry would end as well" demonstrates a lack of knowledge of the MFDA's By-laws, Rules and Policies and his obligations as an Approved Person.

22. We agree with Staff's submissions set out in paragraph 12 including that the Respondent did obtain a benefit from the loan of \$40,000 from client MM which he used to pay his personal debts; client MM was deprived of access to her funds for a substantial period of time; there was a risk that had not the Member paid the Notice of Garnishment, client MM would have suffered a substantial loss; and his failure to cooperate demonstrates he is ungovernable and would therefore pose a risk to investors in the capital markets were he to continue to operate in the capital markets.

23. We also agree that notwithstanding the fact that the Respondent had no prior disciplinary history and requested leniency, the seriousness of the violations found by us mandate a substantial penalty. The penalty must be sufficient so that Approved Persons recognize the importance of:

- (a) Not borrowing from clients, whether family members or not;
- (b) Not disclosing and not obtaining approval for dual occupations; and
- (c) Failing to cooperate with a MFDA investigation.

24. While the Hearing Panel has sympathy for the Respondent and his former spouse with respect to the illness of their son, the Respondent's conduct must attract the appropriate penalty. We agree with the Staff's submissions on penalty.

25. With respect to costs, we are of the opinion that the Respondent should contribute to the costs of the investigation and hearing. In our view, the amount requested by Staff of \$7,500 is a fair and reasonable amount.

V. CONCLUSION

26. For the reasons set out above we find that the appropriate penalty in this case is:

- (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 total fine in the amount of \$115,000 consisting of the following:
 - (i) a fine in the amount of \$40,000 in respect of the Respondent's personal financial dealings with client MM;
 - (ii) a fine in the amount of \$25,000 in respect of the Respondent's undisclosed and unapproved dual occupations;

(iii) a fine in the amount of \$50,000 in respect of the Respondent's failure to cooperate with Staff's investigation; and

(c) The Respondent shall pay costs to the MFDA in the amount of \$7,500.

DATED this 31st day of August, 2016.

“W. A. Derry Millar”

W. A. Derry Millar
Chair

“Guenther W. K. Kleberg”

Guenther W. K. Kleberg
Industry Representative

“Colleen Waring”

Colleen Waring
Industry Representative

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