

Reasons for Decision (Penalty)

File No. 201842



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: Duke Mongare Ongechi

Heard: June 10, 2020 by electronic hearing in Toronto, Ontario
Decision (Penalty): June 10, 2020
Reasons for Decision (Penalty): October 6, 2020

**REASONS FOR DECISION
(Penalty)**

Hearing Panel of the Central Regional Council:

John Lorn McDougall QC
Selwyn B. Kossuth
Tim Pryor

Chair
Industry Representative
Industry Representative

Appearances:

Lyla Simon

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Senior Enforcement Counsel for the Mutual
Fund Dealers Association of Canada

Duke Mongare Ongechi

Respondent

I. INTRODUCTION (PENALTY)

1. This proceeding was commenced by Notice of Hearing dated October 16, 2018 issued by the Mutual Fund Dealers Association of Canada (“MFDA”) against Duke Ongechi (“Respondent” or “Mr. Ongechi”).

2. The Notice of Hearing made the following allegations of violations of the By-laws, Rules or Policies of the MFDA (“Allegations”):

Allegation #1: Between about 2014 and 2015 the Respondent referred or assisted at least five clients to invest in or loan monies to a retail clothing business, thereby engaging in:

- i. an undisclosed and unapproved outside activity, contrary to MFDA Rules 1.2.1(c) (now Rule 1.3) and 2.1.1; and/or
- ii. a referral arrangement which was not permitted, contrary to MFDA Rules 2.4.2 and 2.1.1, and sections 13.7 and 13.8 of National Instrument 31-103.

Allegation #2: In or about September 2015, the Respondent signed a promissory note in which he agreed to pay \$19,755 to a client pertaining to the client’s investment in or loan to a retail clothing company, and provided personal cheques to the client to pay the amounts owed pursuant to the terms of the promissory note, thereby:

- i. engaging in personal financial dealings with a client which created a conflict or potential conflict of interest that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1; and/or
- ii. entering into a settlement agreement with a client without the Member’s knowledge or prior written consent, contrary to MFDA Rules 2.1.4 and 2.1.1, and MFDA Policy No. 3.

Allegation #3: Between December 2015 and March 2016, the Respondent failed to report to the Member, within two business days or at all, that the Respondent had been named as a defendant in two civil claims commenced by clients, and that there was a garnishment order rendered against the Respondent pursuant to a civil claim commenced by a client, contrary to MFDA Rules 1.4(b) and 2.1.1, and section 4 of MFDA Policy No. 6.

Allegation #4: Commencing in October 2016, the Respondent provided false or misleading statements to:

- i. the Member during the course of its investigation into his conduct, thereby interfering with the Member's ability to supervise and investigate the Respondent's conduct, contrary to MFDA Rule 2.1.1; and
- ii. MFDA Staff during the course of its investigation into the Respondent's conduct, thereby interfering with MFDA Staff's ability to conduct its investigation, contrary to MFDA Rule 2.1.1 and section 22.1 of MFDA By-law No. 1.

3. On January 18, 2019 the Respondent served a Reply in which he:

- admitted the facts alleged and conclusions drawn by Staff in all paragraphs of the Notice of Hearing, without exception;
- did not deny, take exception to, or qualify any of the facts alleged or conclusions drawn;
- did not state that he had no knowledge regarding the allegations and conclusions drawn; and
- did not assert any additional facts or conclusions, nor include reference to any supporting documents, that he intended to rely on at the Hearing.

4. On July 17, 2019, the misconduct phase of the hearing on the merits ("Misconduct Hearing") took place in Toronto before this Hearing Panel.

5. In written submissions entitled Written Submissions of Staff of the MFDA (Re. Penalty) ("Submissions re Penalty"), Staff accurately summarized the proceeding of the Misconduct Hearing as follows:

At the Hearing:

- counsel for Staff made an opening statement;
- the MFDA investigator, Sheila Daneshvaziri ("Ms. Daneshvaziri"), gave viva voce evidence regarding the MFDA investigation, and further details arising from the

information in, and documents made exhibits to, her affidavit that had been served and filed in advance of the Hearing;

- Staff closed its case;
- the Respondent made an opening statement, including the claim that he had made repayments to the clients in question in the amount of approximately \$81,456;
- the Respondent confirmed that in his Reply, he had admitted all the allegations and facts in the Notice of Hearing, and confirmed that the contents of the Reply remained his position; and
- After receiving the evidence and hearing submissions from the parties, the Hearing Panel reserved its decision regarding misconduct.

6. On August 26, 2019, the MFDA issued a News Release advising that the Hearing Panel had made findings of misconduct by the Respondent. The News Release also advised that written reasons for the Decision would be forthcoming in due course. The Reasons for Decision (Misconduct) (the “Reasons”) were released on December 13, 2019.

7. The Hearing Panel’s conclusions are set out in the Conclusion section of the Reasons and are as follows;

III. CONCLUSION

41. In summary, for the foregoing reasons, we found that Allegation #1(i), Allegation #2, Allegation #3 (with respect only to one civil claim), and Allegation #4 had each been established.

42. We also found that, as there is no basis on the record before us for disbelieving the Respondent’s evidence that he earned nothing from facilitating the loans to Ambrosia, he therefore did not have a referral arrangement within the meaning of MFDA Rule 2.4.2 as was alleged in Allegation #1(ii).

43. Finally, we also found, on a balance of probabilities, the Respondent voluntarily repaid each of the Clients the amount of their respective loans.

II. THE POSITIONS OF THE PARTIES

8. In its Submissions re Penalty, Staff asked that the Hearing Panel impose the following sanctions on the Respondent:

- at least a three year prohibition from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1 (“By-law No. 1”);
- fine in the amount of at least \$30,000, pursuant to s. 24.1.1(b) of By-law No. 1; and
- costs in the amount of at least \$9,100 pursuant to s. 24.2 of By-law No. 1.

9. For his part, the Respondent made three oral submissions with respect to the appropriate sanctions. He first dealt with the cases relied on by Staff in support of Staff’s submissions with respect to the appropriate sanction. He argued that each was so factually dissimilar to the present case as to be of no use to this Panel in fashioning the appropriate sanctions. He particularly stressed that the \$30,000 fine sought by Staff was far too high compared to the results in the cases relied upon by Staff.

10. The Respondent’s second submission related to the request for costs of at least \$9,100. He submitted that the allegations were repetitive as follows:

“...in my opinion there really only should have been two allegations or...allegations, there should have been two allegations, not the five allegations that have been put there, because some of these were repetitive.”

Transcript June 10, 2020 at p. 53

However, the Respondent did not suggest an alternate amount for costs.

11. Mr. Ongechi’s final submission was as follows:

And the final submission I’m going to make is, one, since this happened in 2016 I’ve not worked – I have been out of what I would call gainful employment in my work I should be doing based on my training, so I haven’t worked, say, for four years. That’s one.

Number two, I pretty much lost all that I have built it up, whether it was residual income, whether it was investments or whatever, I would have normally otherwise been earning

since 2006 (sic) up to now. I have not been able to get any job. I have not, like you said, licensed work anywhere.

So pretty much, if anything, I think I've already paid enough dues since then up to now because I'm not really able to get any gainful employment because this keeps on hanging as a cloud over me and (inaudible) like you said, I've always made it a point because, yes, to show up or to be present whenever you – there was a hearing or an investigation or anything like that.

And then the second point is, yes, I did pay the people that I directed to fund money to Ambrosia. Again, like I said before, I did not borrow it. None of that money came to my account; it went directly to Ambrosia. And I did pay that – the investors back their money.

And then the other thing, like I stayed – from then up to now I haven't really been working in the industry and I've lost all the business. So whatever I'd built up to that time up to now. So even if I went back it would pretty much be starting again from square one.

Transcript June 10, 2020 pages 54 – 56

12. Regrettably, the Respondent again did not choose to provide the Hearing Panel with his view as to what an appropriate fine might be. In lieu of that, his submission was simply that, because of these events he had no work and lacked the financial resources to pay the fine sought, which was “at least \$30,000”.

13. However, as Ms. Simon pointed out in her Reply, Staff had no evidence of the Respondent's inability to pay the fine. The MFDA Sanction Guidelines of November 15, 2018 (“Sanction Guidelines”) require Respondents to provide evidence of their financial condition to support a submission of inability to pay a fine. Again, the Respondent did not provide such evidence although he was made aware of the requirement by Staff.

Mutual Fund Dealers Association of Canada Sanction Guidelines –
November 15, 2018

III. REASONS FOR DECISION (PENALTY)

14. It is now beyond question that the primary goal of securities regulation is the protection of investors, including ensuring efficient capital markets and public confidence in the industry. That statement of purpose, first articulated in the *Pezim* case in the Supreme Court of Canada, has been

adopted in a great many subsequent MFDA cases. One of these, which was heavily relied upon by Staff in this case, is *Larson (Re)*.

Pezim v. British Columbia Securities Commission et al., (1994), 46 B.C.A.C. 1 (SCC)

Larson (Re) 2009 LNCMFDA 30, Decision of the MFDA Prairie Regional Council dated October 14, 2009.

15. MFDA hearing panels have iterated that in exercising its discretion to impose a penalty, a hearing panel should consider the following factors:

- i. The protection of the investing public;
- ii. The integrity of the securities market;
- iii. Specific and general deterrence;
- iv. Protection of the governing body's membership; and
- v. Protection of the integrity of the governing body's enforcement processes.

Larson *ibid* at para. 73.

16. MFDA hearing panels have also set out a number of additional factors that ought to be considered by a hearing panel when determining an appropriate penalty:

- i. The seriousness of the allegations proved against the respondent;
- ii. The respondent's past conduct, including prior sanctions;
- iii. The respondent's experience and level of activity in the capital markets;
- iv. Whether the respondent recognizes the seriousness of the improper activity;
- v. The harm suffered by investors as a result of the respondent's activities;
- vi. The benefits received by the respondent as a result of the improper activity;
- vii. The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
- viii. The damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;

- ix. The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- x. The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- xi. Previous decisions made in similar circumstances.

Larson *ibid* at para. 73.

17. This Hearing Panel agrees with the submissions made by Staff, relying on the *Larson (Re)* case, that:

The general deterrence objective is said to be a main objective when determining the appropriate penalty to impose, including sending a message to the industry regarding the impugned misconduct, as it tends to promote the prevention of future harm to the capital markets, thus also advancing the goal of enhancing the investor protection.

Larson *ibid* at para. 74

18. Of particular concern for a hearing panel is to provide deterrence to conduct which endangers the proper functioning of the regulatory regime. That is what occurred in this case. Staff was correct in submitting that the misconduct engaged in by the Respondent was very serious because it threatened the regulatory structure and should therefore attract a significant penalty. We agree.

Submissions re Penalty at para 22.

19. MFDA Rule 1.3 provides the requirements for an Approved Person to engage in an outside activity.

1.3 OUTSIDE ACTIVITY

1.3.1 Definition

For the purpose of the By-laws, Rules and Policies, “outside activity” means any activity conducted by an Approved Person outside of the Member:

- a) for which direct or indirect payment, compensation, consideration or other benefit is received or expected;
- b) involving any officer or director position and any other equivalent positions; or
- c) involving any position of influence.

1.3.2 Requirements for Outside Activity

An Approved Person may have, and continue in, an outside activity provided that:

- a) *Not prohibited.* The Corporation and the securities regulatory authority in the jurisdiction in which the Approved Person carries on, or proposes to carry on, the outside activity do not prohibit the Approved Person from engaging in such outside activity;
- b) *Notification.* The Approved Person discloses the outside activity to the Member;
- c) *Approval.* The Approved Person obtains written Member approval of the outside activity prior to engaging in such outside activity;
- d) *Conduct unbecoming.* The outside activity of the Approved Person must not be such as to bring the Corporation, its Members or the mutual fund industry into disrepute; and
- e) *Disclosure.* To the extent that the outside activity could be confused with member business, clear written disclosure is provided to clients that any activities related to the outside activity are not the business of the Member and are not the responsibility of the Member.

20. The regulatory framework regarding outside activities or referral arrangements is “a pillar of securities regulation and is designed to protect clients.” Regulatory requirements ensure that Members exercise oversight, due diligence, and risk appraisals regarding the activities that their Approved Persons may engage in, so that clients’ interests are protected.

Monforton (Re), 2017 LNCMFDA 23, Decision of the MFDA
Central Regional Council dated January 19, 2017 at para. 12.

Monforton ibid at para 9.

21. It is clear to us that had the Respondent done what he was obliged to do, that is to advise the Member of the loans to Ambrosia, the Respondent would never have received approval. It also seems obvious that the Member was not told because the Respondent knew full well the investment in Ambrosia would not have been allowed to proceed. It is a very serious breach to bypass the

Member and it goes to the heart of the MFDA regulatory regime. The Member has to know what business is being conducted by its dealing representatives such as the Respondent in order to perform its supervisory responsibilities.

22. In the process of determining what appropriate sanctions should be applied, the Hearing Panel must consider other factors which bear on that determination. Such other factors are listed in paragraph 16 above. The ones that are particularly germane in this case are set out as follows together with our comments:

- ii. Respondent's past conduct.

Mr. Ongechi had no previous record of transgression of any kind.

- iv. Whether the Respondent recognizes the seriousness of his misconduct.

The Respondent admitted to his misconduct including that his breaches were serious misconduct.

- v. The harm suffered by investors.

As the Panel found that there were no complaints and no credible evidence to the contrary, it accepted that the Respondent had repaid each of the investors and there was consequently no harm to the investors.

- v. The benefits received by the Respondent as a result of the improper activity.

The Hearing Panel found that the Respondent received no benefits. To the contrary, based on Mr. Ongechi's evidence at the Penalty Hearing, he suffered significantly personally as a result of his misconduct.

23. Staff provided the Hearing Panel with a matrix of cases to be considered by it on the basis they were factually similar to this case. However, on close examination, they were so dissimilar as to be largely unhelpful. This was demonstrated by the Respondent in his Reply submissions when he dealt with the facts of those cases and easily established significant dissimilarities.

24. There is however another, perhaps equally important, reason for not giving great weight to the cases proffered by Staff. They were virtually all settlement cases. Settlement cases have two drawbacks. The first is that these cases are the result of negotiation, not quasi-judicial determination of what is a fair and appropriate result. The second is that the settlement procedure

limits the Hearing Panel from knowing the facts underlying the case. Consequently, the result is that the precedential value of settlement cases is limited.

25. The Sanction Guidelines abandoned the prior practice of including suggested ranges of penalties for particular breaches of the MFDA By-laws, Rules and Policies. Instead, the Sanction Guidelines now offer the following advice to Hearing Panels and others seeking to determine what fair and reasonable sanctions should be:

The Sanction Guidelines are not mandatory. The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. The Sanction Guidelines are intended to provide a summary of the key factors upon which discretion may be exercised consistently and fairly in like circumstances, but are not binding on Hearing Panels. The list of key factors in the Sanction Guidelines is not exhaustive, and Hearing Panels may consider other aggravating and mitigating factors as appropriate.

Hearing Panels should always exercise judgment and discretion, and consider appropriate aggravating and mitigating factors in determining appropriate sanctions in every case. In addition, Hearing Panels should identify the basis for the sanctions imposed in the Reasons for Decision.

Sanction Guidelines at page 1.

26. The Hearing Panel used as its starting point the sanctions asked for by Staff, that is at least a three year prohibition from conducting securities related business while in the employ of or in association with, any MFDA Member, a fine of at least \$30,000 and costs of at least \$9,100 (Staff filed a draft bill of costs of \$9,100).

27. We felt that overall Staff's sanction requests were on the high side. The seriousness of the misconduct required a suspension, if only because of the overarching need to provide a general deterrence for others. However, we felt that a shorter period would be more appropriate, given the fact that the investors appear not to have been harmed, that the Respondent personally paid them the amounts of their loans to Ambrosia and that he cooperated with Staff in this proceeding. In the result, we concluded that a two year prohibition was appropriate.

28. Similarly, the Hearing Panel felt that the claim for a fine of at least \$30,000 was excessive, but we also felt that a significant fine was needed in this case. We particularly regarded the Respondent's active and repeated misrepresentations to the Member as warranting such a fine. In

the result, we agreed that a fine of \$20,000 adequately reflected the seriousness of the misconduct and was appropriate in all the circumstances.

29. Finally, despite Mr. Ongechi's submission that the costs claimed were too high, the Members of this Hearing Panel thought they were quite low and obviously did not amount to anything close to a full indemnity for the actual costs of this proceeding. We therefore allowed the costs claimed in the draft bill of costs, \$9,100.

30. The foregoing constitutes the Hearing Panel's Reasons for Decision on Penalty, of which the parties were advised on June 10, 2020.

DATED this 6th day of October, 2020.

"John Lorn McDougall"

John Lorn McDougall, QC
Chair

"Selwyn B. Kossuth"

Selwyn B. Kossuth
Industry Representative

"Tim Pryor"

Tim Pryor
Industry Representative

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