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: Alfredo Pino

Heard: December 11, 2018 in Toronto, Ontario
Decision and Reasons (Penalty): February 8, 2019

DECISION AND REASONS
(Penalty)

Hearing Panel of the Central Regional Council:

Paul M. Moore, QC	Chair
Vlasios Kardaras	Industry Representative
Robert C. White	Industry Representative

Appearances:

H. C. Clement Wai	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Alfredo Pino	)	Respondent, in person and by telephone, in part

Decision and Reasons on the Merits

1. Our decision on the merits in this case was issued on November 26, 2018. It is reported as *Re: Alfredo Pino (Misconduct),* MFDA File No. 201691 and may be viewed here.

2. In our decision on the merits we held that Staff had proved the following three allegations against the Respondent:

> #1: Misappropriation. The Respondent's client, BC, paid approximately $280,000 to the Respondent. The Respondent deposited the monies in the bank account of Trova, a private company owned and controlled by him. Approximately $267,000 of the monies were never repaid. The funds were misappropriated by him. This conduct was failing to deal fairly, honestly and in good faith with client BC, contrary to MFDA Rule 2.1.1;
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> #2: Outside Business Activities. The Respondent did not disclose his activities with three Trova companies to, nor receive the approval of, his Member, Investors Group. This conduct was contrary to MFDA Rules 1.2.1(c) (now Rule 1.3) and 2.1.1; and
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> #3: Failure to Cooperate and Misleading the MFDA. The Respondent failed to cooperate with and misled the MFDA during its investigation. This conduct was contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Decision on Penalty

3. We order the following sanctions against the Respondent:

a) The Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any Member of the Mutual Fund Dealers Association of Canada, pursuant to s. 24.1.1(e) of MFDA By-law No. 1.

b) The Respondent shall pay to the Mutual Fund Dealers Association of Canada a fine of $400,000, pursuant to s. 24.1.1 (b) of MFDA By-law No. 1.

c) The Respondent shall pay to the Mutual Fund Dealers Association of Canada costs of $25,000 attributable to conducting the investigation of the Respondent's conduct and the hearing of this matter, pursuant to s. 24.2 of MFDA By-law No. 1.

Reasons

Submission of Staff

4. Previous to the hearing Staff provided the panel and the Respondent with its written submission on penalties and a book of authorities which included several precedent cases.

5. Staff recommended a permanent prohibition, a fine of around $400,000 and costs of $25,000 to $35,000.

6. Staff outlined the various factors that hearing panels have considered when determining appropriate sanctions, including the seriousness of the contravention, whether a respondent recognizes the seriousness of the contravention, the harm suffered by clients as a result of the misconduct, the benefits received by a respondent from his misconduct, the need to deter not only the respondent but also others in the capital markets from pursuing similar misconduct, and previous decisions made in similar circumstances.

7. Staff argued that the sanctions it suggested were appropriate for several reasons.

8. Staff observed that misappropriation of client funds is among the most serious types of misconduct. It involves a significant breach of trust, causes serious harm to the clients affected and undermines the reputation and integrity of the securities industry.

9. Staff submitted that the Respondent's conduct was egregious. He took advantage of a vulnerable senior citizen, a widowed person with no previous investment experience, few savings, and little understanding of what she was doing when the Respondent persuaded her to trust him with her money. Although BC eventually was reimbursed by the Respondent's Member, she had the trauma of a legal battle with the Respondent and faced the uncertainty of the possible loss of a significant portion of her wealth.

10. Staff argued that conducting outside business activity without the approval or knowledge of the Member is serious misconduct. The Member loses its ability to determine whether there are any issues relating to conflicts of interest, client servicing, standards of conduct, the nature of the activity, risk management, and the ability to supervise.

11. As a result of the Respondent's failure to co-operate, Staff has spent more regulatory resources and time to determine the full extent of the Respondent's misconduct.

12. Staff observed that the Respondent benefited financially from the misconduct at least to the extent of $263,000. Although the Member has reimbursed BC, the Respondent has not repaid BC or his Member.

13. Staff submitted that the Respondent has caused the adjournment of this matter at least four times. There have been five adjournment requests by the Respondent. Four of the motions have proceeded shortly before the scheduled commencement of the hearing or on the date of the hearing. This has prejudiced Staff's case as it has had to reschedule BC's participation at the hearing.

14. Staff observed that the Respondent has manipulated the regulatory process by making repeated adjournment motions based on his health while at the same time he has been conducting business facilitating the investments of clients in cryptocurrency and gold.

15. Staff reported that the Respondent has gone through two different counsel (May 2015 to December 2015 for one and December 2015 to October 19, 2018 for the other), although they were at the same firm. His most recent counsel continues to act for him in the civil litigation with his Member.

16. Staff observed that the respondent breached the panel's order that he inform Staff of any change in his condition.

17. All this in the preceding four paragraphs should be taken into account when making an award as to costs.

18. Staff argued that its suggested sanctions are consistent with decisions made by MFDA panels and other regulatory bodies in similar circumstances.

Cases Referred to by Staff

19. *In the Matter of Luigi Francesco Ciardullo*, MFDA File No. 201226 [2012] is a decision of a panel of the Central Regional Council of the MFDA. It was an uncontested hearing. The misconduct included misappropriation of $380,000 from 13 clients of which $250,000 was not

repaid by the respondent. False statements were made to Staff and the respondent failed to co-operate. The sanctions were a permanent prohibition, a $500,000 fine, and costs of $7,500.

20. *In the Matter of Robin Andersen*, MFDA File No. 200508 [2005] is a decision of a panel of the Central Regional Council of the MFDA. The misconduct included misappropriation of $113,527 from clients. There were further substantial amounts that were not covered by the allegations against the respondent. The conduct was planned and deliberate. Some of the clients were unsophisticated and vulnerable. The respondent's Member paid more than $400,000 to the clients. There was an agreed statement of facts. The sanctions were a permanent prohibition and a $200,000 fine.

21. *In the Matter of Keith Lorne Davis,* MFDA File No. 201615 [2016] is a decision of the Prairie Regional Council of the MFDA. The respondent borrowed and failed to repay $80,000 to a client. He had undisclosed and unapproved outside business activities. He misled his member and had 17 pre-signed blank forms. The sanctions were a permanent prohibition, a $90,000 fine for the borrowing, a $50,000 fine for the failure to co-operate, a $10,000 fine for the pre-signed forms, and $10,000 for costs.

22. *Headley (Re),* MFDA File No. 200509 [2005] is a decision of the Central Regional Council of the MFDA. The misconduct included misappropriation of $155,000 from two clients. The respondent eventually reimbursed the clients in full. The respondent failed to provide Staff with documentation and information. Evidence showed that the respondent provided false explanations to Staff. The sanctions included a $50,000 fine and $7,500 costs.

23. Staff argued that MFDA hearing panels have consistently ordered fines in an amount to ensure that a respondent does not benefit from the misconduct.

Costs

24. Staff provided a detailed bill of costs. It excluded time and charges for correspondence between counsel, 2 trips to Ottawa, including hotel charges, analysis and preparation of investigation report, internal meetings of Staff to obtain instructions, preparation of disclosure, preparation of motion records and orders, preparation of evidence, legal research and preparation of legal submissions re merits, and most of Staff's hearing and witness preparation. It also excluded

disbursements attributable to transcripts preparation, photocopying and binder preparation, travel expenses, postage and courier charges and hearing panel and venue expenses as well as transcript preparation, photocopies, other travel expenses.

Respondent's Submission

25. The Respondent did not attend the hearing in person nor indicate that he would like to attend the hearing by telephone until 9:30 a.m. of the morning of the hearing when he contacted Staff and requested to be able to phone into the hearing. He was connected by telephone at the commencement of the hearing.

26. The Respondent argued that the reasons for his many adjournments were his poor health from his car accident. He also argued that his house had been completely destroyed by fire and that his car accident on top of this had made it difficult for him to function as one might otherwise expect. Thus the costs incurred by Staff because of the adjournments should not be borne by him.

27. He argued that in his case only one client was involved, not several as in the cases cited by Staff.

28. He observed, and Staff confirmed, that the Member had contacted all of his clients and there were no complaints or additional incidents of misconduct.

29. He observed that he had no prior disciplinary proceedings against him.

30. He argued that he was confident that he would win the civil case against him by his Member who has an assignment of BC's claims against him. He argued that we should take this civil action into our consideration of an appropriate sanction in our case.

31. He advised that he was the owner of two fitness franchise facilities and that they were his principal source of his income.

32. He argued that a fine of $400,000 was too much and that he should receive credit against any fine if he won his civil suit with his Member.

MFDA Sanction Guidelines

33. We reviewed the MFDA Sanction Guidelines issued on November 15, 2018. These new guidelines replace previous ones issued in 2007. They are basically similar except they move to a principled base approach and do not specify particular fines for various incidents of misconduct.

34. The guidelines are intended to promote consistency, fairness and transparency. They are not mandatory.

35. The guidelines set out key factors to be considered in imposing sanctions, including the seriousness of the misconduct and whether it was unintentional or negligent, or intentional, manipulative, deceptive or fraudulent; whether a respondent attempted to mislead investors, his Member, or the regulator; whether the investors were vulnerable; whether a respondent recognizes the seriousness of the misconduct; whether there were attempts to improperly frustrate, delay or undermine the investigation or hearing, such as concealing information or intentionally providing inaccurate or misleading information; the financial benefit obtained or attempted to be obtained from the misconduct; the harm to investors, including subjective factors, such as the impact of the misconduct on investors (emotionally, physically or mentally); and previous decisions in similar circumstances.

36. The guidelines point out that while prior decisions in similar situations are instructive, the amount of a fine or other sanction should depend on the facts of each case, including the need for specific and general deterrence.

37. The guidelines point out that for multiple violations, the total or cumulative sanction should appropriately reflect the totality of the misconduct. The overall sanction should not be excessive or disproportionate to the gravity of the total misconduct.

38. The guidelines point out that in the most egregious cases hearing panels may consider the maximum fines permitted under s. 24 of By-law No. 1. Section 24 of By-law No. 1 provides that a sanction may include a fine not exceeding the greater of $5,000,000 and an amount equal to three times the profit obtained as a result of committing the violation. In our case the maximum fine under the by-law could be around $789,000.

Observation by Staff

39. When questioned by us as to why Staff had not recommended a fine closer to the maximum amount permitted under s. 24 of By-law No. 1, Staff made several observations.

40. Staff observed that in our case there was just one client that was abused. In the precedent cases there were multiple clients.

41. MFDA sanction decisions are now enforceable through the courts, unlike the situation when the precedent cases were decided. Thus our decision will likely be enforced. The fine needs to be sufficiently high to deter the Respondent and others, but should not be so high as to seem to be excessive.

42. Furthermore, the higher the fine, the more difficult it may be to find assets of the Respondent to satisfy the amount.

43. Staff observed that the Respondent is facing legal action from his Member for recovery of amounts it paid to BC. The Respondent may have to pay his Member if the Member prevails. In that event the available assets of the Respondent will have to be accessed by the MFDA and the Member. The higher our fine is, the less assets there may be left for the Member.

44. Regarding costs, Staff observed that the usual amount of a costs award sought by Staff for an uncontested hearing for similar cases would be around $10,000.

45. In our case, the Respondent was uncooperative, misled Staff, and manipulated the system. He unreasonably sought adjournments and most of those sought were not sought on a timely basis. While some of the earlier adjournments may have been justified by the health of the Respondent, he was untruthful and manipulative in seeking several of the adjournments. As a result, Staff observed, its costs were well in excess of what they would have been otherwise.

46. Staff suggested that a costs award of $25,000 to $35,000 would be reasonable and fair for this case, and should be a sufficient deterrent to others who may be inclined to manipulate the system or unreasonably try to delay proceedings against them in similar cases.

Our Analysis

47. BC was a vulnerable client. She had no prior investment experience. She did not understand what the loan agreement was. She told the Respondent that she did not know why he described her as having moderate investment knowledge. This description found its way into the Know-Your-Client form that apparently she signed, although she did not remember signing it. She was a widow. The Respondent took advantage of her. The facts are shocking.

48. The Respondent maintained in his Reply that he explained everything to BC, that she was a sophisticated investor and that she knew what she was doing. We determined that this was untrue. We determined that his statements purporting to connect the loan agreement with the monies he misappropriated from her were unbelievable.

49. The Respondent's conduct in allegation #1 was egregious.

50. The Respondent's conduct under allegation #2 was serious.

51. The Respondent's conduct under allegation #3 was egregious. The failures to cooperate were multiple and occurred over a long period of time. He misled. He provided untrue information.

52. In our view the Respondent's conduct has demonstrated that he is ungovernable and should not be permitted to participate in the capital markets.

53. A permanent prohibition is necessary to protect the public and to prevent the Respondent from doing future harm as a registrant with the MFDA and to deter others in the industry from committing similar violations of the rules.

54. The fine will ensure that the Respondent does not benefit from his wrongdoing and that there is a painful consequence where misappropriation occurs. Something more than just giving back the amount taken will be a consequence. In our case, the $400,000 fine (which serves as a sanction for the misconduct under all three allegations, not just under the first pursuant to which he received the financial benefit) is approximately 1.5 times the benefit retained by the Respondent.

55. We did not apply the three times multiple permitted under By-law No.1 for several reasons.

56. While the conduct was egregious, there was only one client involved. There was no evidence that other clients suffered from misconduct by the Respondent.

57. The Respondent did not have a prior disciplinary history. If he had, that would have been an aggravating factor.

58. There is an ongoing civil case against the Respondent concerning the same facts as the misappropriation in our case. We are mindful that the assets of the Respondent to satisfy our sanctions and any judgement against him in the civil case may be limited.

59. The sanctions are significant. They are sufficient to send the appropriate message as a specific deterrent to the Respondent and a general deterrent to others in the industry.

60. The sanctions will achieve the MFDA's mandate of investor protection, will improve overall compliance by mutual fund participants, and will foster public confidence in the securities industry.

61. Regarding costs, in our view much of the excluded time and expenses not included in the bill of costs could have been properly claimed as costs by Staff. We determined that the bill of costs was conservative and reasonable. We also determined that Staff's suggestion of a costs award of between $25,000 and $35,000 was reasonable and appropriate in the circumstances.

62. We set the costs award at the lower end suggested by Staff. This was in recognition that the Respondent's car accident and resulting poor health was a factor justifying in part some of the delay in this matter.

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63. Mr. Kardaras who sat as a panelist throughout this matter was unable at the very last minute to attend the penalty hearing. The decision on sanctions was made by the Chair and Mr. White and subsequently concurred in by Mr. Kardaras.

DATED this 8th day of February, 2019.

"Paul M. Moore"
Paul M. Moore, QC
Chair

"Vlasios Kardaras"
Vlasios Kardaras
Industry Representative

"Robert C. White"
Robert C. White
Industry Representative

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