



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: George William Popovich

Heard: May 13, 2015 in Windsor, Ontario
Reasons for Decision (Penalty): May 27, 2015

**REASONS FOR DECISION
(Penalty)**

Hearing Panel of the Central Regional Council:

Mark J. Sandler
Guenther Kleberg
Glenda Towle

Chair
Industry Representative
Industry Representative

Appearances:

Shelly Feld)	For the Mutual Fund Dealers Association of
)	Canada
)	
Roland Schwalm)	For the Respondent
)	
)	

Introduction

1. In its Amended Notice of Hearing, the Mutual Fund Dealers Association of Canada (“MFDA”) alleges that George William Popovich (“the Respondent”) committed the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between August 2004 and February 2009, the Respondent failed to use due diligence to learn the essential facts relative to clients SM, MH, WC and PC, GL, and SL and accurately record the essential facts on the clients’ New Account Application Forms (“NAAFs”), contrary to MFDA Rules 2.2.1(a) and 2.1.1.

Allegation #2: Between August 2004 and February 2009, the Respondent:

- a) recommended and facilitated the implementation of a leveraged investment strategy in the accounts of clients SM, MH, and WC and PC; and
- b) recommended and sold a “return of capital” mutual fund (“ROC Fund”) to clients GL and SL;

without ensuring that the leveraged investment strategy and the ROC Fund was suitable for the clients, in keeping with the clients’ investment objectives and within the bounds of good business practice, contrary to MFDA Rules 2.2.1 and 2.1.1.

Allegation #3: Between August 2004 and February 2009, the Respondent misrepresented or failed to adequately explain the risks, benefits, material assumptions and features of:

- a) the leveraged investment strategy that he recommended and implemented in the accounts of clients SM, MH, and WC and PC; and
- b) the ROC Fund that he recommended and sold to clients SM, MH, WC and PC, GL, and SL;

thereby failing to present the leveraged investment strategy and [the] ROC Fund to the clients in a fair and balanced manner, contrary to MFDA Rules 2.2.1 and 2.1.1.

2. In particular, when dealing with clients SM, MH, WC & PC and GL & SL or their authorized representatives (collectively “the Clients”), the Respondent disregarded the advanced age, limited investment sophistication, low risk tolerance and potentially limited investment time horizon of the Clients. The Respondent also failed to adequately take into account the limited income and net worth of clients to whom he recommended leveraged investment strategies that had the potential to seriously impair the long term financial circumstances of those clients.

3. In some cases, the Respondent misrepresented essential facts relative to his clients on Know-Your-Client (“KYC”) information forms that he completed on their behalf.

4. The Respondent recommended that the Clients invest substantial amounts of money in a ROC Fund without adequately explaining the operational features of the ROC Fund in a manner that the Clients could clearly understand. Most significantly, he failed to ensure that the Clients understood that a substantial proportion (and sometimes all) of the payments that the Clients received from the ROC Fund constituted the return of their principal investment and was not profit. As a result, the Clients were deluded about the extent to which the money that they invested (whether borrowed or saved) was at risk.

5. The Respondent also disregarded concerns about his conduct that were raised with him by his branch manager and failed to follow the policies and procedures of the Member to ensure that the investment and leveraging recommendations that he made were suitable. Subsequently, the Respondent refused to accept responsibility for any of his misconduct and blamed his branch manager, his assistants, the Member and family members of his clients (who he claimed influenced their decisions) for his contraventions.

6. Each of the Clients suffered substantial financial losses as a consequence of the Respondent's conduct and the Respondent failed to ensure that the Clients were aware of the extent to which the value of their investment portfolios had declined.

7. The Respondent contravened his suitability obligations to the Clients and the standard of conduct that all Approved Persons are required to uphold and displayed a flagrant and longstanding disregard for the consequences that his advice had on unsophisticated clients who relied on him to responsibly and diligently guide them with respect to their investment decisions and to safeguard their financial interests.

2. After a contested hearing, we found that each of the three allegations against the Respondent had been proven. On January 14, 2015, we released our Decision and Reasons. Those reasons are 212 paragraphs in length. It is unnecessary to reproduce in detail here what we said then. Our earlier reasons provide much of the factual support for our decision as to what penalty should be imposed on the Respondent.

3. On May 13, 2015, we heard submissions on penalty. That same day, we announced our decision as to penalty, accompanied by brief oral reasons. We indicated that written reasons would follow. These are our written reasons.

Relevant Considerations

4. The most important objective in arriving at an appropriate penalty is protection of the investing public. The penalty imposed must serve to prevent and discourage future misconduct by the Respondent (specific deterrence) as well as by others (general deterrence.) The penalty should serve to improve industry compliance with applicable By-laws, Rules and Policies. It should also promote respect for and confidence in the securities industry and its participants, the integrity of securities markets, and the regulatory system. At the same time, the penalty must be proportionate to the misconduct, and take into consideration any extenuating or mitigating circumstances, all within the overall context of ensuring that the public is protected.

5. In *Lamoureux (Re)*, [2002] A.S.C.D. No. 125, the Alberta Securities Commission identified a broad list of non-exhaustive factors that inform penalty decisions:

- The seriousness of the allegations proven;
- The Respondent's past conduct, including prior sanctions;
- Mitigating factors;
- The Respondent's experience in the capital markets, and the level of the Respondent's activity in the capital markets;
- Whether the Respondent recognizes the seriousness of the improper activity;
- The harm suffered by investors as a result of the Respondent's activities;
- The benefits received by the Respondent as a result of the improper activity;
- The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in those markets;
- The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- 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;
- The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and
- Previous decisions made in similar circumstances.

6. We have considered all of these factors, as well as the non-binding MFDA Penalty Guidelines, in arriving at an appropriate penalty. In the context of this case, general deterrence figures prominently, though not exclusively, in our determination.

Enforcement Counsel's Position

7. Enforcement Counsel proposed that we prohibit the Respondent from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA for a period of at least three years (a "three year suspension").

Enforcement Counsel submitted that if the Respondent seeks to become registered as an Approved Person following the suspension, he should be required to first successfully complete the Canadian Securities Course offered by the Canadian Securities Institute or another course acceptable to the MFDA; be subject to close supervision for at least 18 months after re-registration; and be permanently prohibited from recommending or facilitating the implementation of leveraged investment strategies by anyone. Enforcement Counsel also proposed a fine of at least \$150,000, and costs of at least \$50,000. He contended that the proposed penalties “would be sufficient to deter the Respondent and others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.”

8. In response to questions from the hearing panel, Enforcement Counsel pointed out that this proposal was deliberately worded to reflect the least severe penalties that could be imposed: hence, the use of the phrase, “at least.” He noted that this proposal was not made pursuant to a joint submission (which would normally attract a high level of deference unless unreasonable) and that the hearing panel was free to impose more severe penalties, including a permanent prohibition.

9. Counsel for the Respondent acknowledged that the jurisprudence compelled a suspension of some length, such as that proposed by Enforcement Counsel. He indicated that it was unlikely, in any event, that the Respondent would ever practise in the industry again, in light of his inactivity for six years, his age (71) and his personal and family circumstances. He submitted that the three year suspension was sufficient to meet the goals of specific and general deterrence. He also recommended a fine of \$60,000 and a reduced costs order, given the Respondent’s limited financial resources, the passage of time since the misconduct, the Respondent’s inactivity for six years, and his personal and family circumstances. He asked that we take into consideration the absence of any prior disciplinary record through a lengthy career.

Analysis

10. Given the positions of the parties, fairness required that we advise them in a timely way of our concern that a three year suspension failed to serve the objectives of specific and general deterrence. We provided both parties with a full opportunity to address this concern.

11. We do not lightly impose a sanction that exceeds the three year suspension proposed by Enforcement Counsel and implicitly adopted by the Respondent. However, in our view, a three year suspension would be incompatible with our findings and would not fulfill the objectives described earlier. The findings we have made, viewed cumulatively, are so serious as to compel a permanent prohibition. Those findings include:

- The Respondent placed multiple clients in unsuitable investments;
- The Respondent failed abysmally in his disclosure obligations to his investor clients;
- The Respondent provided a seriously flawed description of the risks associated with his clients' investments;
- The clients would not have adopted the investment strategies in issue, had they been given an accurate description of those risks;
- The clients' financial well-being was significantly prejudiced by the Respondent's misconduct. The parties disagreed on how the clients' losses should be calculated. It is unnecessary to resolve that debate in order to make the above finding. Further, some of the clients were also profoundly affected emotionally;
- The Respondent stood to profit significantly by his misconduct. Again, the parties disagreed on precisely how to calculate that profit. Counsel for the Respondent also contended that his client may not have profited very much or at all given subsequent events. It is unnecessary to resolve that debate in order to conclude, as we do, that the Respondent expected to earn significant income from the subject investments, and that this formed at least part of the motivation for his misconduct;
- The Respondent was prepared to have a client unwittingly sign a false document to justify, after the fact, the leveraging strategy adopted;

- The Respondent misstated facts in the KYCs either deliberately or because he misapprehended how these forms were to be filled out;
- The Respondent orchestrated the non-attendance of Mr. Woodall, his supervisor, at two client meetings, and misled clients as to why Woodall was not present. He also made false representations to his clients as to Woodall's continuing involvement in and approval of what the Respondent was doing;
- The Respondent took steps, albeit imperfect, to prevent his supervisor from learning, in a timely way, about the leveraged investments the Respondent had facilitated. The Respondent denied that a client was leveraged, when she was. In our view, these findings are incompatible with a disposition that would have to rely upon the Respondent's undertaking that he not recommend or facilitate the implementation of leveraged investments;
- The Respondent violated the terms of his close or strict supervision. In our view, this finding is incompatible with a disposition that would have to rely upon the Respondent being placed on close or strict supervision if re-registered;
- The clients were vulnerable. They placed their trust in the Respondent's expertise, integrity and judgment. They were betrayed;
- The Respondent either did not explain the fee structures involved at all or advised that his clients don't pay fees. Either way, the clients were misinformed; and
- Even when there was a downturn in the economy, the Respondent failed to keep his clients informed of the true status of their investments so as to enable them to make informed decisions. Indeed, the Respondent gave false assurances to MH when this issue arose for her in October 2008.

12. We are mindful of the fact that the Respondent has no prior disciplinary record despite his lengthy involvement in the industry. We are also mindful of his personal and family circumstances, as well as the passage of time since his misconduct occurred. However, these facts are overwhelmed by the seriousness of his misconduct. Simply put, that misconduct, involving, as it does, a lack of integrity, false documentation, violation of close or strict supervision and deliberate efforts to hide what the Respondent was doing from his supervisor, is wholly incompatible with his return to the industry.

13. It is also significant that the Respondent has displayed no remorse or acceptance of responsibility. To be clear, he was entitled to contest the allegations, and to raise any defence available to him. The fact that he did so does not constitute an aggravating factor. However, he is not entitled to mitigation based on remorse or acceptance of responsibility.

14. We have reviewed the existing jurisprudence. In particular, we were provided with cases that also involved the placement of clients in unsuitable (often leveraged) investments, inadequate or misleading disclosure of the attendant risks and false documentation. In some cases, the respondents also failed to cooperate with the MFDA, an additional aggravating factor. It is fair to say that suspensions of fixed duration (from one to ten years), rather than permanent prohibitions, were much more frequently imposed in the jurisprudence provided to us. As well, the severity of the penalties imposed was often influenced by the size of the clients' losses and the extent to which the respondents received compensation relating to their misconduct. We acknowledge, and have taken into consideration, the fact that suspensions of fixed duration have been imposed in cases involving greater financial losses and greater compensation than applicable here.

15. The MFDA Penalty Guidelines reflect that termination or permanent prohibition may represent an appropriate penalty for "egregious" misconduct. The IIROC Sanction Guidelines are more specific in articulating factors that might support a suspension as opposed to factors that might support a permanent prohibition. Though the IIROC Guidelines are not strictly applicable here, we find them helpful. Section 4.3 of the Guidelines reflects that a permanent ban is a severe economic penalty and should generally be reserved for cases where:

- The public itself has been abused;
- It is clear that a respondent's conduct is indicative of a resistance to governance;
- The misconduct has an element of criminal or quasi-criminal activity; or
- There is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.

16. Rather than asking, in a regulatory context, whether the misconduct has an element of criminal or quasi-criminal activity, we would prefer to ask whether a significant feature of the misconduct involves deliberate dishonesty or falsification of documents. (Of course, deliberate dishonesty and falsification of documents are hallmarks of criminal offences such as fraud, false pretences, and uttering a forged document).

17. In this case, members of the public were betrayed or abused as a result of the Respondent's misconduct. His efforts to prevent his supervisor from discovering what he was doing, coupled with his continuing misconduct while under close or strict supervision amount to powerful evidence of resistance to governance. Deliberate deceit and document falsification were significant features of the Respondent's misconduct. The facts provide ample reason to believe that the Respondent cannot be trusted to act appropriately in the future. We are equally satisfied, having regard to our findings viewed cumulatively, that this case is distinguishable from those in which suspensions of fixed duration were imposed. In any event, the misconduct here is properly characterized as egregious. The facts, again viewed cumulatively, do not permit a disposition that does not include permanent prohibition. Deterrence, as well as ongoing confidence in the securities industry, its participants, the markets and the regulatory system requires no less.

18. A fine is also warranted and supported by existing jurisprudence. It is true that the imposition of a permanent prohibition may well make it less likely that a fine will ever be paid. (A suspension of fixed duration can be coupled with both a fine and conditions that require payment of the fine before re-registration is permitted.) Nonetheless, the imposition of a fine signals our repudiation of the Respondent's conduct, and serves the objectives earlier described.

19. In our view, a fine of \$100,000 takes into consideration the totality of circumstances, including an admittedly imprecise calculation of the Respondent's anticipated compensation, his personal and family circumstances, some evidence (albeit limited) of financial difficulties, and the fact that we are permanently prohibiting him from ever practising in this industry.

20. We wish to add that it also would not have been unreasonable to impose a much higher fine. That has been done in other cases. However, in the particular circumstances of this case, a fine of \$100,000 meets the objectives associated with the imposition of penalty.

21. Enforcement Counsel sought costs of \$50,000, supported by a partial bill of costs. It is obvious from the bill of costs itself, and from counsel's submissions, that the proposed quantum of costs is significantly less than the true costs in this case. Costs should not be borne by the MFDA directly or by its Approved Persons or Members indirectly. In our view, the requested costs order is modest, reasonable and proportionate.

Order

22. Accordingly, we made the following Order:

- a) If at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA Rules of Procedure;
- b) From the date of this Order, the Respondent is permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- c) The Respondent shall pay a fine in the amount of \$100,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- d) The Respondent shall pay costs of this proceeding in the amount of \$50,000 pursuant to s. 24.2 of MFDA By-law No. 1.

23. We are grateful to all counsel for their assistance.

DATED this 27th day of May, 2015.

“Mark J. Sandler”

Mark J. Sandler
Chair

“Guenther Kleberg”

Guenther Kleberg
Industry Representative

“Glenda Towle”

Glenda Towle
Industry Representative

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