File No: 200504

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: JAWAD RATHORE

Heard: May 31, 2005

Panel: The Honourable Lloyd W. Houlden, Q.C. (Chair)
Mr. Darcy M. Lake
Mr. Kenneth Mann

Counsel: Mr. Robert DelFrate
for the Mutual Fund Dealers Association of Canada

Ms. Linda Fuerst
for Mr. Jawad Rathore

DECISION AND REASONS

This matter was fixed for hearing on May 31, 2005. At the opening of the proceedings, the panel was informed that the parties had arrived at an Agreed Statement of Facts. The Agreed Statement of Facts reads as follows:

I. INTRODUCTION

1. By Notice of Hearing dated February 10, 2005, the Mutual Fund Dealers Association of Canada (the "MFDA") announced that it commenced a disciplinary proceeding against Jawad Rathore (the "Respondent") pursuant to ss. 20 and 24 of MFDA By-law No. 1.

2. The Notice of Hearing set out the following allegations:

Allegation #1: Between August 2002 and November 2002, the Respondent engaged in gainful occupation outside the business of the Member without so advising the Member and obtaining the approval of the Member, contrary to MFDA Rule 1.2.1.(d)(iii).

Allegation #2: Commencing on or about February 14, 2003, the Respondent failed to produce for inspection and provide copies of documents requested by the MFDA in the course of an investigation, contrary to s. 22.1 of By-Law No. 1.

II. IN PUBLIC / IN CAMERA

3. The Respondent and Staff of the MFDA ("Staff") agree that this matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

III. ADMISSIONS

4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out and the documents referred to in Part IV herein. The Respondent admits that the facts contained herein constitute misconduct as alleged in Allegations #1 and #2 for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

IV. AGREED FACTS

5. Staff and the Respondent agree to make submissions on the appropriate penalty to be imposed on the Respondent based only on the agreed facts set out below and on no other facts.

Registration History

6. From August 14, 2002 to November 7, 2002, the Respondent was registered in Ontario as a mutual fund salesperson for Independent Planning Group Inc. ("IPG"), a Member of the MFDA. IPG has been a Member of the MFDA since February 8, 2002. The Respondent carried

on business as a mutual fund salesperson under the trade name Rathore & Associates Asset Management Ltd ("R&A").

7. On November 6, 2002, the Respondent was terminated for cause by IPG as a result of the events described herein. The Respondent is not currently registered in the securities industry in any capacity.

8. Prior to being registered as a mutual fund salesperson for IPG, the Respondent was registered in Ontario as a mutual fund salesperson with FundTrade Financial Corp. and PSFL Investments, dating back to November 1999. FundTrade received no client complaints concerning the Respondent's handling of client accounts.

9. The Respondent has no prior discipline history.

Phoenix Pension Services

10. On July 12, 2002, one month prior to joining IPG, the Respondent incorporated Phoenix Pension Services Inc. ("Phoenix"). The Respondent is the sole director of Phoenix. Phoenix's registered address is the same address from which R&A operates. On Phoenix's website, the Respondent is currently listed as a Senior Account Manager but was previously listed as its President (no one is currently identified as the President).

11. Phoenix holds itself out as "credit risk management consultants who assist consumers facing a variety of financial challenges." The Phoenix website currently states that Phoenix is a "Member of the R&A Group of Companies."

12. One of the services offered by Phoenix to its clients is assisting them to process applications to access funds from their Locked in Retirement Accounts ("LIRA"). A LIRA is similar to a Registered Retirement Savings Plan ("RRSP"), however the funds held in a LIRA may only be withdrawn in limited circumstances, one of which is that the LIRA account holder is suffering from "financial hardship". All withdrawals from a LIRA must first be approved by

the Financial Services Commission of Ontario ("FSCO"), following an application made by the account holder.

13. Pursuant to the *Pension Benefits Act*, the grounds for making an application to FSCO to withdraw money from a LIRA based on financial hardship are: (i) low income; (ii) to avoid eviction from a principal residence; (iii) to avoid eviction from a rented residence; (iv) to pay first and last's month rent on a rented residence; (v) to pay for medical expenses; and (vi) to pay for residential renovations to accommodate a disability.

14. Phoenix prepares and submits to FSCO the applications with supporting documents for clients seeking to withdraw funds from a LIRA based on financial hardship. Phoenix also handles the process of withdrawing the funds from a LIRA once FSCO has granted an application. This involves submitting the necessary redemption forms to the financial institution administering the LIRA and then receiving and distributing the proceeds of the redemption. Phoenix also provides other related services, including but not limited to negotiating with creditors and providing credit counseling advice.

Dual Occupation

15. On or about July 30, 2002, the Respondent entered into an agreement with IPG to be an Approved Person sponsored by IPG. His registration as a mutual fund salesperson was transferred to IPG, effective August 14, 2002. The IPG Associate Agreement signed by the Respondent on July 30, 2002 included a clause entitled "Other Activities", which provides as follows:

> The Associate *shall not conduct securities related business* with any person other than through the Company in accordance with the terms of this Agreement and *shall not conduct any other business other than that specified in Schedule #1* hereto without the consent of the Company having first been obtained [emphasis added].

16. Schedule # 1 to the IPG Associate Agreement states:

> The Associate hereby completed this schedule and discloses to the Company all of his/her business activities and agrees to revise such disclosure as and when necessary:

17. The Respondent did not disclose his involvement in Phoenix (or in any other activity) to IPG on Schedule #1 to the IPG Associate Agreement signed by the Respondent on July 30, 2002.

18. The Respondent admits that his involvement with Phoenix was a dual occupation as described in MFDA Rule 1.2.1(d) and that he failed to disclose this dual occupation to IPG on Schedule #1 or in any other manner and failed to obtain approval from IPG for his outside business activity. At no time while the Respondent was associated with IPG did he advise IPG, either verbally or in writing, of his ownership of and involvement with Phoenix. However, both the Respondent's association with Phoenix and the nature of its business were displayed on the Phoenix website.

19. By letter dated September 27, 2004 to the MFDA, Anne Valenti, Compliance Officer at IPG confirmed that IPG did not become aware of the Respondent's involvement with Phoenix until late 2002 as a result of a client complaint filed against the Respondent, described below.

20. Reports prepared by Multiple Retirement Services Inc. ("MRS") showing the sale of mutual funds by clients and their withdrawal of funds from LIRAs were available to IPG electronically at the time. However, these reports did not reference Phoenix in any manner, did not reveal that the redemptions were made pursuant to a hardship application and did not reveal how the redemption proceeds were disbursed.

IPG's Investigation of Phoenix

21. In or around October 2002, MRS informed IPG of an unusually high incidence of redemptions pursuant to financial hardship applications being submitted by R&A on behalf of its clients. MRS also advised IPG that Mr. Earl Healey, a mutual fund client of IPG serviced by the Respondent, had attended MRS's offices and complained about amounts that had been withdrawn from his LIRA through the financial hardship applications prepared and submitted by the Respondent.

22. As a result, IPG conducted a branch audit of R&A and subsequently retained the forensic accounting firm of Kroll Lindquist Avey Co. ("Kroll") to investigate Mr. Healey's complaint and the activities at R&A and Phoenix. The Respondent provided documents to Kroll from Healey's client files and was interviewed by Kroll. Kroll also requested that the Respondent provide access to certain banking records so that they could confirm transaction details and determine if any other client monies had been deposited to the bank accounts. Although the Respondent initially promised to provide the account records, he did not. As a result, the Kroll report was based solely on the documents and information that were made available to them at the time.

23. Following their investigation, Kroll prepared a report.

24. The Respondent was not provided with a copy of Kroll's report and had no opportunity to respond to Kroll's conclusions at the time.

25. The Kroll report revealed the following:

a. R&A and/or Phoenix processed two financial hardship applications for Mr. Earl Healey.

First Hardship Redemption

b. The first hardship application was approved by the Financial Services Commission of Ontario ("FSCO") on August 15, 2002 in the net amount of $19,550.00.

c. This amount was deposited in the personal bank account of Christine DeMasi, the Respondent's Executive Assistant. Mr. Healey had no bank account of his own at the time.

d. On August 22, 2002, Mr. Healey signed a release acknowledging that the following amounts, totaling $10,313.50, had been paid to, or on behalf of, Mr. Healey:

   i. $4,388.50 paid to Earl Healey via certified cheque;
   ii. $2,925.00 paid to Excell Collections (re: outstanding debt)
   iii. $3,000.00 received in cash

e. The balance of the funds paid to Phoenix totaled $9,236.50.

f. The release did not state the withdrawal amount approved by FSCO and redeemed from Mr. Healey's LIRA. The release did not quantify the amounts paid to the Respondent or to Phoenix. The release stated that the balance of the funds were to be "paid to Phoenix Pension Services for services rendered and costs incurred."

g. The release, printed on Phoenix letterhead, further states:

> "I hereby remise, release and forever discharge Jawad Rathore, Rathore & Associates Asset Management Ltd., Phoenix Pension Services and Independent Planning Group Inc. …"

h. In total, Mr. Healey received $10,313.50 of the $19,550.00 redeemed through the first hardship redemption. The remaining $9,236.50 was paid to Phoenix. Mr. Healey made no inquiries of the Respondent or Phoenix, nor did he make any complaint about the handling of the first hardship redemption application at any time during August and September 2002. It was not until October 2002 that Mr. Healey became aware of the full amount paid to Phoenix.

Second Hardship Redemption

i. The second hardship application was approved by FSCO approximately one month later, on September 20, 2002, in the net amount of $12,768.00.

j. Prior to the funds being withdrawn, the Respondent advanced $3,500 to Mr. Healey.

k. On September 27, 2002, Mr. Healey provided the Respondent with two blank signed cheques drawn on a newly opened bank account. The payee on one of the cheques was Phoenix. Mr. Healey does not recall the name of the payee on the other cheque.

l. On or about September 30, 2002, the redemption amount of $12,768.00 was deposited into the new bank account opened by Mr. Healey on the instructions of the Respondent.

m. On October 1, 2002, the Respondent cashed the two cheques for amounts totaling $10,725.00 ($4,500.00 and $6,225.00) that Mr. Healey had provided to the Respondent. A balance of approximately $2,043.00 was left in the account.

n. In total, Mr. Healey received approximately $5,543.00 of the $12,768.00 redeemed through the second hardship redemption. The remaining $7,225.00 was withdrawn from the bank account by the Respondent using the cheques provided to him by Mr. Healey.

o. On September 30, 2002, Mr. Healey discovered that $12,768.00 had been deposited into his newly opened bank account. Since the Respondent had told him that he should expect to receive approximately $3,000 from the second hardship redemption, Mr. Healey contacted the Respondent to inquire about the discrepancy. According to Mr. Healey, the Respondent explained that taxes still needed to be deducted by Phoenix. According to the Respondent, he explained that fees and reimbursements still needed to be deducted.

p. Later that same day, Mr. Healey discovered that two withdrawals had been made in the account following Mr. Healey's conversation with the Respondent. Mr. Healey again contacted the Respondent for an explanation. The Respondent told him that the withdrawals had been made to cover the additional amounts which the Respondent had referred to in the earlier conversation. Mr. Healey then contacted MRS for an explanation.

q. On October 1, 2002, Mr. Healey met with MRS and was informed that the two financial hardship withdrawals, net of all withholding taxes, had totaled $19,550 (on a gross amount of $28,088) and $12,768 (on a gross amount of $18,320), respectively.

r. On October 4, 2002, the Respondent left a voicemail message for Mr. Healey advising that an error had been made with respect to the redemptions. Mr. Healey did not return the call.

s. On October 7, 2002, the Respondent left a further message for Mr. Healey in which he indicated that there was a substantial amount due to him. The Respondent asked Mr. Healey to contact him. Once again, Mr. Healey did not.

Complaint Letter

t. Mr. Healey wrote a letter of complaint to the Respondent. The letter is dated October 7, 2002 and was received by the Respondent on October 8, 2002. Mr. Healey told the Respondent that after reviewing the documents in his possession, a total of $16,511.50 was still owing to him from Phoenix.

u. On October 8, 2002, the Respondent sent a fax to Mr. Healey confirming that he had left voice messages for him and advising that there had been an error in calculating the amount of funds due to him.

v. On October 15, 2002, the Respondent issued a money order to Mr. Healey for $16,511.50, the amount that Mr. Healey said was owing to him. The Respondent acknowledged receipt of Mr. Healey's letter dated October 7, 2002, and noted that the payment was to avoid the expense of retaining counsel to debate Mr. Healey's allegations against the Respondent set out in the letter of complaint.

w. In his discussions with Kroll, the Respondent stated that the shortfall in monies paid to Mr. Healey with respect to the second hardship redemption arose due to an error involving "double counting", but provided no further explanation of how the amounts due to Mr. Healey were miscalculated. The Respondent provided no explanation for the shortfall with respect to the first hardship application.

Additional Clients

x. In addition to Mr. Healey, Kroll identified two other IPG clients who had made financial hardship applications through the Respondent.

y. Kroll also identified fifteen (15) additional clients who made financial hardship redemptions while the Respondent was registered with FundTrade. Some of these clients subsequently became clients of IPG.

z. IPG contacted all 17 clients. None complained of any difficulties with the fees charged to them or received by the Respondent or Phoenix in relation to the services provided, however some did complain about the quality of service they received. The Respondent does not agree with the complaints about the quality of service.

Failure to Produce and Provide Documents

26. By registered letter dated December 18, 2002, the MFDA notified the Respondent that an investigation had begun surrounding the circumstances of the Respondent's termination by IPG.

27. By registered letter dated February 14, 2003 the MFDA requested that the Respondent provide copies of all banking statements for any and all accounts in which he may have had an interest during the period of February 1, 2002 to November 30, 2002. The letter specifies: "this includes, but is not limited to all business accounts, all personal accounts and any other bank accounts that may have been used to effect transferals of monies received from hardship withdrawals or redemptions." The letter requested that the material be provided no later than February 28, 2003. The letter also requested that he provide any correspondence between the Respondent and either IPG or FundTrade informing them of his relationship with Phoenix. The letter advised the Respondent of his obligation to comply with the request in accordance with s. 23.1 (now s. 22.1) of By-Law No. 1.

28. On March 3, 2003, at the request of the Respondent, the MFDA granted an extension of the deadline until March 11, 2003. By registered letter dated March 3, 2003, the MFDA confirmed the extension and advised the Respondent that his failure to provide the requested bank statements could result in disciplinary proceedings for failure to comply with a request pursuant to s. 23.1 (now s. 22.1) of By-Law No. 1.

29. On March 5, 2003, MRS, the carrying dealer for both FundTrade and IPG, provided the MFDA with the names of the 18 of the Respondent's clients who had made hardship redemptions, together with supporting documents, including account statements and FSCO approval documentation. None of these documents referenced Phoenix nor did they include any of the Respondent's banking records.

30. On March 13, 2003, the MFDA received a reply letter from the Respondent. The Respondent provided some of the requested information, but did not provide the requested bank statements. The Respondent did not deny that he was under any obligation to produce the requested documents. However, he did advise that he was not engaged "in selling or providing advice concerning the sale or purchase of mutual funds anymore" and did not "intend to engage in any activities which would require registration as a mutual fund salesperson in the future."

31. By registered letter dated March 18, 2003, the MFDA informed the Respondent that he remained under the MFDA's jurisdiction for a period of five years after his departure from IPG. He was also warned that since he did not provide the documents compelled by the MFDA under s. 23.1 (now 22.1) of By-Law No.1, the MFDA would be notifying the OSC of the Respondent's failure to comply and cooperate with its investigation.

32. The Respondent had no further contact with the MFDA until February 2004. By registered letter dated February 18, 2004, the MFDA further advised the Respondent that his failure to provide the requested bank statements could result in disciplinary proceedings for failure to comply with a request pursuant to s. 22.1 of By-Law No. 1, and provided the Respondent with another opportunity to comply with the request to provide the documents. The

MFDA also provided the Respondent with the opportunity to attend the MFDA's offices to provide a statement in regards to his termination by IPG.

33. On March 1, 2004, the MFDA received a telephone call from counsel for the Respondent ("Counsel") who acknowledged receipt of the February 18, 2004 letter. By letter dated April 22, 2004, the MFDA confirmed the March 1, 2004 conversation with Counsel and provided Counsel with copies of the February 14, 2003 and March 18, 2003 letters.

34. By letter dated May 4, 2004, Counsel advised the MFDA that the Respondent was no longer an Approved Person, had not sold mutual funds since 2002, and had "no intention of engaging in any activities requiring registration as a mutual fund salesperson in future." Accordingly, there appeared "to be little reason for the Association to pursue this matter further, or for [the Respondent] to go to the expense of responding to questions about matters which arose back in 2002."

35. By letter dated May 6, 2004, the MFDA advised Counsel that the MFDA continued to require production of the requested bank statements and warned that enforcement proceedings for failure to comply with s. 22.1 of By-Law No. 1 were under consideration.

36. The Respondent still has not provided the MFDA with the requested information and, in particular, the requested bank statements.

37. The Respondent admits that his failure to provide all of the requested information constitutes a breach of s.22.1 of MFDA By-law No.1.

FINDINGS OF THE PANEL RE THE OFFENCES

Mr. DelFrate reviewed, for the panel, the Agreed Statement of Facts and asked us to make a finding that the misconduct had been proved and that Mr. Jawad Rathore was guilty of the offences charged. This was not opposed by counsel for Mr. Rathore. Accordingly, we found

that misconduct had been proved and that Mr. Jawad Rathore was guilty of the two offences charged against him.

PENALTIES

We then proceeded to hear argument from counsel as to the appropriate penalties to be imposed. Turning first to the charge of engaging in gainful occupation outside the business of the Member without so advising the Member and obtaining the approval of the Member, contrary to MFDA Rule 1.2.1.(d)(iii), we agree with counsel for MFDA that this is a serious offence. Where an Approved Person is engaged in an outside business activity, the Approved Person must disclose that activity to the Member so as to permit the Member to meet the requirements imposed by Rule 1.2.1(d). As counsel for MFDA pointed out, without disclosure of the dual occupation, the MFDA and the Member cannot ensure that securities legislation and internal procedures are being complied with, that the MFDA and its Members or the mutual fund industry are not being brought into disrepute, that clients are aware that the outside activity is not the business or responsibility of the Member and that any actual or potential conflicts of interest are dealt with appropriately.

For this offence, counsel for MFDA suggested the following penalties:

1. A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of, or associated with, any MFDA Member;
2. A fine of $25,000; and
3. Costs of the proceedings fixed at $15,000.

A permanent prohibition was not opposed by Ms. Fuerst and, accordingly, that will apply in both this offence and the second offence. Regarding the costs of the proceedings, we believe that costs should be fixed at $7,500 and, of course, this will also apply to both offences. In connection with the fine, we are of the opinion that $25,000 is excessive and we would, therefore, fix the fine at $10,000.

With reference to the second offence, a failure to produce for inspection and provide copies of documents requested by the MFDA in the course of its investigation, we agree with counsel for the MFDA that this is also a serious offence, and it is made more serious in this case by the fact that Mr. Rathore has not yet made full production of the documents requested by the MFDA.

Under s. 24.1.4(a) of MFDA By-Law No. 1, the obligation to comply with a request for information pursuant to an MFDA investigation continues notwithstanding that the Approved Person has ceased to be an Approved Person.

As is pointed out by the Supreme Court of Canada in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 35 in a somewhat similar context:

> Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry.

Counsel for the MFDA suggested a fine of $50,000 for this offence. Again, we feel that this amount is excessive and that a fine of $15,000 would be sufficient.

CONCLUSION ON PENALTIES

As we have said, the offences are serious and the protection of the public requires that the penalty should be substantial. At the same time, the penalty should be appropriate to the overall situation and not unduly harsh. We have endeavoured to arrive at the appropriate balance.

For both offences, there will be permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of, or associated with, any MFDA Member. For the first offence, there will be a fine of $10,000 and for the second offence a fine of $15,000. Costs fixed at $7,500.

Dated at Toronto, this 28th day of June 2005.

"The Honourable Lloyd W. Houlden, Q.C"
The Honourable Lloyd W. Houlden, Q.C.
Chair

"Darcy M. Lake"
Darcy M. Lake

"Kenneth Mann"
Kenneth Mann