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: Jacques James Scribnock

Heard: August 13, 2014, in Toronto, Ontario
Decision and Reasons: August 19, 2014

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Vlasios Kardaras	Industry Representative
Vas Pachapurkar	Industry Representative

Appearances:

Francis Roy	)	For the Mutual Fund Dealers Association of Canada
	)	
Jacque James Scribnock	)	Not in attendance personally or by counsel
	)	

1. The Hearing on the Merits (the "Hearing") in this matter was held on August 13, 2014, at the conclusion of which we reserved our decision. This is our decision and the reasons for the decision.

Background

2. From October 1995 to September 2008, Jacque James Scribnock ("Scribnock"` or "the Respondent") was registered as a mutual fund salesperson in Ontario and Quebec with Aegon Dealer Services of Canada, a Member of the Mutual Fund Dealers Association ("MFDA").

3. In September 2008 Aegon amalgamated with Investia Financial Services Inc. ("Investia"), also a Member of the MFDA, and the combined entity continued in business as Investia. The Respondent's registration was transferred to Investia in the course of the amalgamation. At all material times, the Respondent resided in Kinburn, Ontario, located near Ottawa, Ontario.

4. On March 1, 2011, Investia terminated the Respondent's relationship with the Member as a result of events unrelated to the subject matter of this proceeding. The Respondent is no longer registered in the securities industry in any capacity.

5. The MFDA brought disciplinary proceedings against the Respondent in a Notice of Hearing, dated February 21, 2014. The Notice alleged the following violations of the By-laws, Rules or Policies of the MFDA:

> **Allegation #1**: Between March 26, 2009 and March 1, 2011, the Respondent misappropriated at least $859,723.45 from four clients, thereby failing to deal fairly, honestly and in good faith with the clients and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.
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> **Allegation #2**: The Respondent failed to cooperate with an investigation of his activities by MFDA Staff by:

a) failing to respond truthfully to questions posed by MFDA Staff and withholding relevant information from MFDA Staff during an interview on December 2, 2011; and
b) commencing August 24, 2012, failing to attend an interview to provide a statement and produce documents and records as request by MFDA Staff during the course of an investigation;

contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

6. Staff of the MFDA ("Staff") commenced an investigation of the Respondent in or about August 2011, following a client complaint that Investia had received, alleging that the Respondent had made unsuitable leveraging recommendations, engaged in outside business activities with the client and processed unauthorized trades in the client's accounts. In the course of this investigation Staff became aware of allegations that the Respondent had misappropriated clients' funds.

7. Staff interviewed the Respondent on December 2, 2011 in connection with the complaint about unsuitable leveraged investments. He was asked about and denied having any outside business activities apart from those he had disclosed to Investia. In fact, as will be discussed below, the Respondent had a substantial number of outside activities that were not reported to Investia, activities that are the subject of allegation #1.

8. Staff subsequently made numerous information requests to the Respondent and to his various lawyers. These requests have gone unanswered. On April 2, 2014 the Panel set August 13, 2014 as the date for the Hearing. A Reply to the allegations has not been received by Staff. Neither the Respondent nor his counsel appeared at the Hearing.

Request for an Adjournment

9. In the spring of 2013, the Respondent was charged by the Ottawa Police Service with a number of counts under the Criminal Code, some of which involve the same conduct involved in this Hearing. The criminal charges have not been resolved and are still pending.

10. On July 31, 2014, the Respondent's criminal lawyer sent an e-mail to Staff asking that the present Hearing be adjourned. Staff informed the Respondent's lawyer that it would not consent to an adjournment.

11. Even though neither the Respondent nor his counsel took part in the present Hearing, the panel raised the issue with MFDA Counsel, who presented us with a number of Investment Industry Regulatory Organization ("IIROC") cases on the issue of adjournments. (*Re Schoer* 2011 IIROC 21 and *Re Malley* 2014 IIROC 10.) These two decisions also refer to comparable cases involving requests to adjourn proceedings before various securities commissions. (See, for example, *British Columbia Securities Commission v. Branch* [1995] 2 SCR 3, *Arbour Energy Inc.* (2009) ABASC 366, and *Robinson v. Ontario Securities Commission* [1993] O.J. 3042 (Ont. Div. Ct.). Apparently there have been no reported MFDA cases on this issue.

12. It is clear from the above decisions that the Panel has a discretion whether to adjourn because of a pending criminal case, but it is also clear that this discretion should be exercised only "in extraordinary or exceptional cases." This language comes from the 1973 case of *Stickney v. Trusz* ([1973] O.J. 2279 at para 9) an Ontario High Court decision of Zuber J., involving a motion to stay a civil proceeding until after the criminal case has been tried, a decision which was affirmed by the Ontario Court of Appeal and for which leave to appeal to the Supreme Court of Canada was refused. The IIROC Panel in *Re Malley*, supra, took it to an even higher level, adding the word "very," stating at paragraph 24 that "a stay is only granted in very extraordinary and exceptional circumstances."

13. The Panel agrees with MFDA Counsel that in the circumstances of the present case, a stay or adjournment should not be granted. This is not an extraordinary or exceptional case. A regulatory body like the MFDA has a strong interest in proceeding expeditiously in regulating persons connected with the industry. Confidence in capital markets depends, to a considerable extent, on confidence in how those in the industry are regulated. Individuals who have been harmed by improper conduct have a particularly strong interest in seeing that disciplinary action is taken reasonably promptly. We are also influenced by the fact that the Respondent has not cooperated with the investigation.

14. This is not a case where the criminal proceedings are being heard at almost the same time. There is no certainty as to when the criminal trial will be heard and concluded, including various possible appeals. It could be years before the criminal proceedings are over. Moreover, the standard of proof in a regulatory proceeding is a balance of probabilities standard, not the criminal law standard of proof beyond a reasonable doubt, and so an acquittal in the criminal case will not necessarily affect the regulatory Hearing.

15. Further, because the Respondent did not appear at the Hearing, it was not necessary for us to consider whether his testimony needed to be dealt with in any special way, such as being heard *in camera*. The evidence that the Respondent gave at the interview on December 2, 2011 did not incriminate the Respondent with respect to criminal proceedings, except by falsely denying that he had any undisclosed outside activities. In any event, a trial judge in later criminal proceedings can take appropriate steps to protect any rights that accused might have in the criminal law context.

Stone Securities

16. The MFDA investigation revealed that an Ontario corporation, Stone Securities Corporation ("Stone Securities") had been incorporated by the Respondent as the sole shareholder, director, and officer in March 2009.

17. The Respondent did not disclose the existence of Stone Securities, or any outside business activity related to Stone Securities, to Investia, contrary to MFDA requirements (MFDA Rule 1.2.1) and Investia's policies and procedures. As stated above, he also did not – when asked directly about his outside activities – reveal the existence of Stone Securities in the interview that MFDA Staff conducted on December 2, 2011.

18. After incorporating Stone Securities, the Respondent approached clients AC, NR and BG, and GW and recommended that they purchase investment products offered by Stone Securities or invest in Stone Securities. The Respondent led his clients to believe that Stone Securities was

affiliated with, related to, or was the same company as Stone & Co. Limited ("Stone & Co."), a legitimate investment fund company carrying on business in Ontario that offered various types of investments for sale, including conventional mutual funds. In fact, there was no relationship between Stone Securities and Stone & Co.

19. In the course of soliciting investments in Stone Securities from the clients, the Respondent represented to the clients, among other things, that:

i) Stone Securities was an investment product offered by Investia;
ii) Stone Securities was an affiliate of Manulife Financial ("Manulife") and offered a guaranteed insurance product which provided a return of 5% per year;
iii) Stone Securities was run and managed by an investment fund manager at Stone & Co.; and/or
iv) Stone Securities offered treasury bills to investors with rates of return between 3% and 5% per year.

20. All of the Respondent's representations regarding Stone Securities and the investments and insurance products it purportedly offered for sale were false and were made by him with the intention of defrauding the clients. There is no evidence that Stone Securities carried on business of any kind or offered any investment or insurance products for sale.

21. Relying upon the Respondent's recommendations, the clients each provided the Respondent with a series of cheques in varying amounts payable to "Stone Securities" to purchase investments for their respective accounts. Some of the clients owned legitimate investment products offered by Stone & Co. and, as such, did not question making their cheques payable to "Stone Securities". The Respondent deposited the clients' cheques in a personal bank account, which he was not authorized or directed by the clients to do, thereby misappropriating the clients' monies. There is no evidence that the Respondent used the monies to purchase any investments for the clients and the Respondent has not returned or otherwise accounted for the monies.

22. In total, between March 26, 2009 and March 1, 2011, the Respondent misappropriated at least $859,723.45 from clients AC, NR and BG, and GW. The totals for each are as follows:

AC:	$196,426.45
NR and BG:	$72,049.00
GW:	$591,248.00

23. Stone Securities was not an investment product or outside business activity known to or approved by Investia. None of the clients' monies relating to their purported investments in Stone Securities were processed for the account or through the facilities of Investia.

24. The Respondent provided the clients with promissory notes, "declarations of trust," or similar documents in respect of their purported investments relating to Stone Securities. In response to communications and inquiries received from the clients, the Respondent provided false confirmations that their monies had been invested as he represented the monies would be, or were about to be invested as he had represented.

Some Examples of the Respondent's Conduct

25. The details of the transactions described above are set out in a thirty-page affidavit by Daniela Capozzolo, the investigator in the case. The affidavit is part of a two-volume set of thick binders with the evidence that the MFDA collected from various sources.

26. MFDA Counsel took us carefully through some of the individual transactions relating to Stone Securities. In each case the Panel was convinced by the paper trail in the various exhibits that the transaction took place as alleged by MFDA.

27. With respect to client AC, for example, the first transaction involving Stone Securities illustrates how the Respondent operated. Here is the description in Ms. Capozzolo's affidavit:

> "Re: April 29, 2009 transaction: AC wrote a cheque in the amount of $25,000 payable to Stone Securities (see Exhibit 22), which she provided to the Respondent. AC redeemed $26,580.40 of her mutual fund holdings in TD

> Dividend Income Fund on April 23, 2009 to invest in Stone Securities (see Exhibit 25). The Respondent then provided AC with a copy of the Declaration of Trust dated April 29, 2009 (see Exhibit 16-1). The Respondent deposited AC's April 29, 2009 cheque in the amount of $25,000 in Stone Securities' BMO bank account (transit #xxxx & account #xxxx-xxx)."

28. The Panel could see clearly how the funds came out of AC's mutual fund accounts and ended up in the Respondent's Stone Securities' banking account, an account which the Respondent had set up and which he completely controlled. In exchange, AC received a worthless and fictitious document titled "Declaration of Trust." There were seven other similar transactions for AC before March 1, 2011. In two of these transactions, legitimate Stone & Co. Mutual funds were redeemed (with a deferred sales charge deducted) and the remaining funds used to purchase worthless Stone Securities instruments.

29. There were four similar transactions involving clients NR and BG during the time that the Respondent was registered as a dealing representative and therefore was under the jurisdiction of the MFDA, that is, before the Respondent's relationship with Investia was terminated on March 1, 2011.

30. Similarly, there were thirteen transactions involving client GW during the Respondent's relationship with Investia.

Post-termination Misappropriations

31. The Respondent continued selling Stone Securities to the clients described above after his termination on March 1, 2011. AC gave the Respondent $40,000 in August 2011, NR and BG purchased four Stone Securities trust documents after termination, three of them in August 2011, each of the three for $57,000. On five occasions after termination GW purchased securities involving Stone Securities from the Respondent, each of the five being for $75,000. These were not included in Allegation #1 because – as Counsel for the MFDA informed us – the MFDA does not consider that it has jurisdiction over these transactions. They are, however, relevant to a proper understanding of the Respondent's conduct.

32. The Ottawa Police Service, however, includes these post-termination transactions in its indictment. The Police Service compiled a list of cheques written out to Stone Securities by the Respondent's clients. The total is $2.6 million. And the figure may be higher because of transactions that have not been brought to light because of the failure of the Respondent to cooperate.

Relationship between the Respondent and his Clients

33. As noted above, the Respondent did not participate in an interview concerning the Stone Securities transactions, did not enter a Reply to the Notice of Hearing, and did not appear at the Hearing. So we have very little knowledge of his relationship with his clients.

34. In his interview with MFDA Staff on December 2, 2011 he states that he has been a financial advisor since 1981 and that some of his clients have been with him for 30 years. He also outlines some of the regulatory difficulties he has had over the years, including being put on strict close supervision by Investia on November 12, 2010, several months before his relationship with Investia was terminated on March 1, 2011.

35. Throughout his career the Respondent has been a financial advisor, including being a life insurance agent, giving tax advice and preparing tax returns, and giving advice as a divorce financial analyst. After his termination with Investia, he continued as a financial advisor.

36. At the material time, client AC, who had been a client since 2003, was about 80 years old and was showing early indications of dementia. She was confused about her investments and deferred entirely to the Respondent's recommendations. Her daughter was the person who brought her dealings relating to Stone Securities to the attention of the Ontario Securities Commission, which passed the complaint on to the MFDA. Neither AC nor her daughter realized that Stone Securities was not connected with Stone and Co., whose mutual funds AC already held.

37. At the material time, clients NR and BG were about 60 years of age and retired. After being laid off in 2007, Mr. NR was unable to find work and went on long-term disability. They had been the Respondent's clients since 2000. NR described to MFDA Staff why he and his wife started purchasing Stone Securities:

> "We dealt with [the Respondent] from 2000 to 2009. He did everything right. When the market crashed in 2002 and '03, we virtually lost nothing, everything was wonderful. So every time that [the Respondent] came to us and said, 'I think you should do this,' and we did it, it worked. So by 2009, when our first tracings of anything fraudulent came about, we had absolute confidence in [the Respondent] He came to our house, sat at our dining room table, told us about his wife and his kids and he told us about his diet, while he built himself up for the 2013 Mr. Universe competition that he was going to enter. He was just a really nice guy. So we had absolutely no reason to question anything he did. He had us invested in a company called Stone & Co. for a number of years and we had returns coming back from Stone & Co. that were all very successful. So when he started coming to us and saying, 'Hey, I`ve got this wonderful investment called Stone' we just didn't question it. We never questioned anything he did. We've invested in Stone for years. What we didn`t notice, we used to write cheques to Stone & Co. and started to write cheques to Stone Securities."

38. Client GW had also known the Respondent for many years and placed a high degree of trust in him. She had inherited a large sum of money – about a million dollars – all of which she gave to the Respondent to invest in Stone Securities.

39. All of the above clients had sufficient trust in the Respondent that they continued to purchase securities from the Respondent's Stone Securities – even after they had been notified that he was no longer entitled to sell mutual funds through Investia.

Failure to Cooperate

40. As stated above, on December 2, 2011, the Respondent attended at an interview with MFDA Staff in relation to the reasons for his termination by Investia, which related primarily to making allegedly unsuitable leveraging recommendations to clients. During the course of this interview, the Respondent falsely stated to MFDA Staff that while he had been registered with Investia, he had disclosed all of his outside business activities to Investia and Investia had

approved of them. The Respondent did not disclose the existence of Stone Securities to MFDA Staff during the interview when questioned if he carried on any other outside business activities and, in particular, omitted to state that he had solicited investments in Stone Securities from clients and other individuals without the knowledge or approval of Investia.

41. Following the complaint by AC's daughter to the OSC on or about August 15, 2012, which had been passed on to the MFDA, MFDA Staff made repeated requests of the Respondent to produce documents and records relating to Stone Securities and to attend at another interview to provide a statement regarding the subject matter of client AC's complaint. The Respondent never replied to Staff's requests and never submitted to an interview. Nor did he submit a Reply to the Notice of Hearing.

42. Due to the Respondent's failure to respond truthfully and completely to inquiries by MFDA Staff at the December 2, 2011 interview, as well as his subsequent failure commencing August 24, 2012 to cooperate with MFDA Staff's investigation following receipt of client AC's complaint, the full nature and extent of the Respondent's misconduct remains unknown. In particular, it is not known whether he may have misappropriated additional monies from the clients and other individuals identified by MFDA Staff during the course of its investigation, or from other clients and individuals who were not identified by MFDA Staff during its investigation.

Our Decision on Liability

43. The Panel has no hesitation in finding that Allegation #1, relating to misappropriation, and Allegation #2, relating to failure to cooperate with an investigation, have been proved. As noted above these allegations are as follows:

> **Allegation #1**: Between March 26, 2009 and March 1, 2011, the Respondent misappropriated at least $859,723.45 from four clients, thereby failing to deal fairly, honestly and in good faith with the clients and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.

Allegation #2: The Respondent failed to cooperate with an investigation of his activities by MFDA Staff by:

a) failing to respond truthfully to questions posed by MFDA Staff and withholding relevant information from MFDA Staff during an interview on December 2, 2011; and
b) commencing August 24, 2012, failing to attend an interview to provide a statement and produce documents and records as request by MFDA Staff during the course of an investigation;

contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Penalty

44. The Respondent's conduct was egregious. It seriously harmed innocent and vulnerable clients, misled the Dealer Member, and damaged and continues to damage the capital markets through the pending criminal charge. Whether the clients whose investments have disappeared will ever recover their losses remains to be seen.

45. The conduct involved a number of clients over a number of years. It was all done in a planned and deliberate and conniving manner. It was not a coincidence that the Respondent chose the name Stone Securities, a name almost exactly the same as the name of a reputable mutual fund company that his clients had invested in over the years.

46. The Respondent's failure to cooperate has delayed the resolution of the issue and has prevented the MFDA from knowing the full extent of the Respondent's improper conduct.

47. It is clear that the Respondent should be suspended from conducting securities related business for life and we order that there be 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.24.11(c) of MFDA By-law No. 1.

48. We accept Counsel's recommendation that we impose costs of $7,500.

49. There has to be a substantial financial penalty in this case that reflects the seriousness of the conduct, the amount that was misappropriated, and that will act as a deterrent to the Respondent and others. It is not just that the clients lost substantial sums, but that those funds went directly to the Respondent and may no longer be available for the clients to recover. A penalty should "help to re-establish the trust of the public." (*Re Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill* [2009] File No. 200834 at para 4.).

50. There are a number of MFDA cases where the disgorgement of the amount misappropriated is a major factor in the fine imposed: see, for example, *Re Brake and Brake* [2009] File No. 200804; *Re Headley* [2006] File No. 200509.

51. General deterrence is important in the securities industry, where those participating are normally knowledgeable and rational persons. As Justice Louis LeBel stated for a unanimous Supreme Court of Canada, where the Court upheld the importance of general deterrence in securities-related matters (*Cartaway Resources Corp.* [2004] 1 SCR 672 at paras 55 and 60; see also *Re Vickers* [2014] IIROC 26):

> "The conventional view is that participants in capital markets are rational actors. This is probably more true of market systems than it is of social behaviour. It is therefore reasonable to assume, particularly with reference to the expertise of the Commission in regulating capital markets, that general deterrence has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders."
>
> "In my view, nothing inherent in the Commission's public interest jurisdiction ... prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary consideration in making orders that are both protective and preventative."

52. We have decided not to impose two separate penalties for the two allegations, but to lump them together. They are interrelated. The failure to cooperate may well have limited the ability of the MFDA to discover the extent of the Respondent's misconduct.

53. We therefore impose a total fine of $1,500,000.00.

DATED this 19th day of August, 2014.

"Martin L. Friedland"
Martin L. Friedland, C.C., Q.C.
Chair

"Vlasios Kardaras"
Vlasios Kardaras
Industry Representative

"Vasant Pachapurkar"
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