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: Elizabeth Anne VandenBoomen

Heard: October 7, 2013 in Toronto, Ontario
Decision and Reasons: October 30, 2013

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Robert J. Guilday	Industry Representative
Robert C. White	Industry Representative

Appearances:

H.C. Clement Wai	)	For the Mutual Fund Dealers Association of Canada
Elizabeth Anne VandenBoomen	)	Personally in attendance without counsel

Background

1. Elizabeth Anne VandenBoomen (the "Respondent") first became registered as an MFDA salesperson in January 2000. From January 24, 2005 to December 12, 2010 she was registered as a mutual fund salesperson with Partners in Planning Financial Services Ltd. ("PIP"), and worked out of the office in London, Ontario, of AKC Financial Incorporated ("AKC Financial"). PIP was subsequently acquired by another mutual fund dealer.

2. Mr. AKC, the owner of AKC Financial, was registered by the Financial Services Commission of Ontario to sell insurance. The office was a room in AKC's home. It was a two-person operation, AKC and the Respondent. Throughout her career in mutual funds, according to the Respondent's evidence, she never actually sold mutual funds, but simply completed the paperwork for the transactions.

3. The Respondent was AKC's administrative assistant, but she continued her registration as a mutual fund salesperson. Her registration with MFDA was terminated at the end of 2010 and she is not currently registered in the securities industry in any capacity. (Registration documents had her middle name as Jean, which was used in some earlier documents in this hearing, but her real middle name is Anne.)

4. AKC was not registered to sell mutual funds after 2003. His earlier registration as a mutual fund salesperson with Cartier Partners Financial Services ("Cartier") was terminated "with cause" on or about November 5, 2003 because, according to information in the National Registration Database, "he advised he is no longer willing to co-operate with Cartier in any investigation" being conducted by his employer, Cartier, into trades in a foreign currency product. He never subsequently applied to have his registration as a mutual fund salesperson reinstated. Having an administrative assistant with a license to handle the purchase and sale of mutual funds in his office was helpful to AKC when a client was interested in purchasing or selling mutual funds.

5. AKC and AKC Financial dealt not only in insurance products, but also in exempt securities (securities that do not require a prospectus or registration), in tax avoidance charitable

schemes, and in other investment products, as well as in physical items such as precious metals, diamonds, and paintings.

6. AKC Financial's website stated in 2012:

> For the past 12 years, [AKC] has focused his expertise on locating and implementing innovative, compliant tax and investment strategies for wealthy clients. After spending a number of years in the investment field, [AKC] has found that many financial advisors do not assist their clients with finding appropriate programs to minimize tax and increase long-term yields. This is where [AKC Financial] differs from other financial investors. Whether he is recommending a client buy diamonds, invest in gold or convert their investments to cash, [AKC] is dedicated to finding innovative ways to make money for his clients."

7. PIP was informed of the Respondent's *general* arrangement with AKC from the beginning of their relationship. The Respondent told PIP that 80 per cent of her time was spent as an administrative assistant and 20 per cent on mutual funds.

Methods of Operation

8. The Respondent did not have any clients of her own. All the clients were AKC's clients. AKC met with the clients and made investment recommendations to them. The Respondent did not attend most of the meetings between AKC and the clients at which investment recommendations were discussed. When she did attend meetings with clients, her participation was limited to observing and supporting AKC's advice and recommendations.

9. The Respondent would then do the paper work for the transactions that AKC had recommended and the clients had agreed upon. When these involved mutual funds, the Respondent would put the transactions through PIP, using the Respondent's representative code. The Respondent would receive and retain the compensation forwarded to her by PIP for the mutual fund transactions that were processed through PIP.

10. The Respondent did not assess the suitability of the investment recommendations made by AKC to the clients or the various trades processed in the clients' accounts and instead relied on AKC to assess suitability.

11. Nor did the Respondent participate in the discussions of, or assess the risk tolerance of, the clients or determine their investment objectives. AKC advised the Respondent of the clients' risk tolerance and their investment objectives.

12. The arrangement was fraught with potential problems. The compliance machinery of the MFDA and of its Member firm, PIP, is designed to control improper transactions. AKC was not being routinely supervised by any governmental or self-regulatory organization. Even with respect to mutual funds, the Respondent did not play a role in assessing the products that were being recommended to AKC's clients and did not assess the risk tolerance of the clients. She was not concerned with the standard "know-your-client" and "know-your-product" rules.

13. The Respondent left quality of the products, suitability of the investments, and risk tolerance to AKC. As the Respondent said in her very brief Reply to the allegations dated April 9, 2013, she "trusted that AKC was experience [sic] enough to perform due diligence and was honest enough to keep the clients well being paramount...I NEVER [her emphasis] recommended, sold, referred or facilitated any sale. I only completed apps and paperwork or forwarded any requested information or documents to the clients for their perusal or signature."

Allegations by MFDA

14. On February 1, 2011, PIP reported to the MFDA that it had received a statement of claim in a civil law suit brought by a husband and wife, Client X and Client Y, against PIP, AKC, AKC's wife, and the Respondent, alleging that the plaintiffs had purchased inappropriate highly-speculative investments. The plaintiffs were seeking close to a million dollars in damages. That law suit was subsequently settled, without public disclosure of its terms. The Respondent was not required to contribute to the settlement. As required by MFDA rules, the law suit was reported by PIP to the MFDA.

15. PIP conducted its own examination, as did the MFDA. As a result of the PIP investigation, the Respondent's relationship with PIP and registration with MFDA was terminated. The MFDA Staff investigation led to two specific allegations. On March 15, 2013, the MFDA issued a Notice of Hearing that the Respondent had allegedly engaged in the following conduct contrary the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between March 2005 and December 2010, the Respondent:

(a) facilitated a stealth advising arrangement whereby AKC, an unregistered person, engaged in securities related business with clients of the Member, contrary to MFDA Rules 1.1.1(c) and 2.1.1; and

(b) failed to perform the necessary due diligence to learn the essential facts relative to the clients to ensure that the investments recommended to and trades made in the accounts of the clients were suitable for the clients and in keeping with the clients' investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

Allegation #2: Between April 2007 and June 2007, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of the Member by recommending, selling, facilitating the sale of, or making referrals in respect of the sale of an investment product to clients FM and CM outside the Member, contrary to MFDA Rules 1.1.1, 2.4.2 and 2.1.1.

The Hearing

16. A one-day hearing was held on October 7, 2013. MFDA Staff's case was presented through an affidavit by Stephen Davis, an investigator in the Enforcement Department of the MFDA.

17. The Respondent was not represented by counsel, although she had been so represented when she was interviewed by MFDA Staff on February 9, 2012. She did not dispute the evidence that had been presented by MFDA Staff. In her evidence at the hearing she agreed with MFDA counsel that the "facts are not in dispute."

18. The Respondent also stated in her testimony that she should have been more vigilant, stating: "I now understand how wrong it was."

Stealth Advising

19. The first allegation, set out above, relates to what is called "stealth advising." A MFDA Staff Notice of November 14, 2007 (MSN-0067) describes the MFDA's concerns with stealth advertising:

> MFDA staff has become aware of situations where non-registered individuals have engaged in securities related business through various arrangements with Approved Persons of MFDA Member firms. Under such arrangements, client accounts are set up at the Member with the registered Approved Person as the representative of record, and trading activity is processed using the Approved Person's representative code. However, a non-registered individual services the account and this individual provides advice and makes recommendations to clients with respect to securities in the account, directing the registered Approved Person to place trades. The arrangements between the non-registered individual and the Approved Person are structured so that the non-registered individual receives compensation, often a portion of the commissions paid to the Approved Person by the Member. The compensation may be paid directly or through the division of revenue to the branch operating company, or through inflated rent or management fees. Essentially, the non-registered individual maintains a book of business without registration, by executing trades through a registrant. This is done without notice to, or approval of the Member.
>
> The non-registered individual involved in the arrangements may have been terminated by or resigned from a Member or may never have been registered. The individual may also conduct other business with the clients, such as insurance, at offices that are shared with Approved Persons of the Member. This may add to client confusion with respect to the registration status of the non-registered individual.

20. This description accurately describes the relationship between AKC and the Respondent. The Staff Notice goes on to say:

> These situations raise several significant regulatory concerns. Individuals in the above scenarios are providing advice with respect to trades in securities without registration with the appropriate securities regulatory authorities. In addition, such arrangements also fail to satisfy the MFDA Rules regarding the conduct of securities related business on behalf of an MFDA Member firm. Under MFDA Rule 1.1.1(c) the relationship between the Member and any person conducting securities related business on account of the Member must be that of:
>
> (a) An employer and employee,
> (b) A principal and agent, or
> (c) An introducing dealer and carrying dealer.

> From a practical perspective, Members are constrained in their abilities to properly supervise the trading activities taking place under such arrangements. Further, there is a danger that individuals may use these types of sales arrangements to make recommendations to divert client money to unregulated investment schemes or other purposes. Conflicts of interest that are not properly managed with respect to personal financial dealings involving other business pursuits may lead to situations where clients are exposed to significant potential harm. Members may also be exposed to significant liability.

21. The MFDA concerns expressed in the preceding paragraph are well illustrated by Allegation #1.

22. MFDA Staff introduced evidence concerning Clients X and Y, a husband and wife who brought the law suit mentioned in an earlier paragraph. Their portfolio contained a large number of mutual funds. Mrs. Y herself had over half a million dollars in mutual funds in 2005. Some of these mutual funds were sold on AKC's recommendation, they alleged, and the funds were then invested in highly speculative, inappropriate investments. The Respondent did the paper work for all of those transactions and, using her representative code, submitted the mutual fund trade forms for processing.

23. We find that the Respondent engaged in the conduct alleged in Allegation 1(a) and (b) and is in breach of the standard of conduct rule set out in Rule 2.2.1:

> Each Member and each Approved Person of a Member shall:
>
> (a) deal fairly, honestly and in good faith with its clients;
> (b) observe high standards of ethics and conduct in the transaction of business;
> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
> (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation

The Respondent's conduct is a breach of all of the above subsections. In particular, we find that the Respondent's conduct is "detrimental to the public interest" for the reasons stated in the MFDA Staff Notice set out above.

Securities-Related Business Outside the Member

24. Allegation #2 relates to a set of transactions involving Mr. FM and Mrs. CM. AKC recommended that the couple sell some of their mutual funds and purchase units in New Life Capital. In the case of Mrs. CM, somewhat over $65,000 worth of AGF Canadian Bond fund was sold, which generated withdrawal fees of about $1,600. The proceeds of the $65,000 sale were then used to purchase units in New Life Capital.

25. New Life Capital was a venture which purchased life insurance policies at a discount from persons who wanted to give up their policies as well as from persons who were likely to die soon and needed the money to get by until they died. The purchases are often referred to as "viatical settlements." (The word viatical apparently comes from the Latin *viaticus*, meaning "relating to a journey," presumably the journey in these cases being death.) The HIV-AIDS crisis contributed to the growth of these ventures. In a letter dated April 10, 2007, AKC wrote to Mr. FM and Mrs. CM in glowing terms about the investment:

> The New Life Capital program that I want you to invest in offers an 8% annual dividend with an additional equity return, projected at 15% a year...I wish to roll over funds from your RRSPs to make this investment allocation. There are fees to withdraw your money but the upside through New Life quickly makes up for the cost...I believe that a decision to stay in an unfruitful investment because of fees to redeem would be "penny wise and pound foolish."

26. The New Life Capital program subsequently went into receivership and the couple lost their money. The story of New Life Capital can be seen in the Ontario Securities Commission's regulatory proceedings against the principals of the venture. See *In the Matter of L. Jeffrey Pogachar et al*, March 28, 2012 and the penalty hearing, July 6, 2012. AKC was not a principal and so was not involved in those proceedings. The OSC concluded at page 21, amongst other findings, that the principals "engaged in acts relating to securities that they knew or reasonably ought to have known perpetrated a fraud on investors contrary to section 126.1(b) of the Act."

27. It is a risky type of investment. The United States Securities and Exchange Commission states on its website (October 10, 2013): "Viatical settlements can be risky investments. For these reasons, you should exercise caution and thoroughly investigate *before* you consider investing in a viatical settlement." New Life Capital was not a product approved by PIP for sale by its salespersons.

28. The MFDA policy respecting outside business activities is well known to all registrants. See MFDA Staff Notice MSN-0040, dated May 20, 2005. At a minimum, the Member should be fully informed of the activity. PIP did not know about the purchase of New Life Capital units by FM and CM.

29. Allegation #2 states:

> Between April 2007 and June 2007, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of the Member by recommending, selling, facilitating the sale of, or making referrals in respect of the sale of an investment product to clients FM and CM outside the Member, contrary to MFDA Rules 1.1.1, 2.4.2 and 2.1.1.

30. We find that the Respondent`s conduct falls under Allegation #2 in that she facilitated the sale of the New Life units by participating in the sale of the mutual funds and preparing the paperwork for all the transactions involved in these transactions. We find that she is in breach of Standard of Conduct Rule 2.1.1.

Penalty

31. We have had considerable difficulty in deciding what the penalty should be. The two allegations are each serious and warrant a significant penalty. MFDA Staff sought a five-year prohibition, a fine in the range of $15,000 to $25,000, and costs of $10,000.

32. The Respondent was not, however, the central individual in the activities. She was a pawn in AKC's endeavours. AKC was the key figure, and he is no longer subject to the jurisdiction of the MFDA. Jurisdiction is lost five years after a person ceases being a registrant.

33. She had been an administrative assistant in the years before she became associated with PIP. She says she became a registrant because others working in the industry said it would help her career. She never bought or sold mutual funds as a registrant. AKC used her registration for his own purposes.

34. The Respondent does not want to re-enter the securities industry. She is now unemployed and has some serious family-related issues which make it difficult for her to work outside her home. It will be very difficult for her to pay a fine. Many persons in her position do not show up for their disciplinary hearing. She came from Strathroy, just outside London, Ontario, to participate and to explain that she had not realized the extent of her wrongdoing. She trusted AKC who, by all accounts, was a forceful and persuasive person.

35. We have decided that the main penalty should be a permanent ban on re-entry into the industry. Such a ban will serve as a significant deterrent to others who allow themselves to facilitate MFDA activity without knowing their clients and the products being bought or sold.

36. There have been a number of cases of stealth advising and many more cases on outside activities. The penalty in each case depends on the facts of the case. One case cited to us by MFDA counsel, *Re Mary Elizabeth Rygiel*, June 25, 2007 (File #200708), raised an issue which we discussed at some length with MFDA counsel. In that case, the Respondent received a three-year prohibition, a $5,000 fine and costs of $1,000. In some respect the activities of the Respondent in the *Rygiel* hearing were more serious than in this case because she was a "designated compliance officer."

37. The penalty in *Rygiel* was worked out, however, as a settlement agreement. We were told that no attempt to negotiate a settlement was made in the present case because the Respondent did not have any funds and settlement agreements require that an arrangement be made to pay the fine and costs now or at designated times in the future. This may make sense where the person wants to continue in the industry. We wonder why all settlement agreements should require a firm payment arrangement. We think that there are cases, such as the present case, where they should not. A Settlement Agreement would have simplified the proceedings.

38. The Respondent was not represented by counsel at the hearing. If she had been, perhaps something could have been worked out. Counsel for the MFDA acknowledged, helpfully, that in a case like this, a permanent prohibition from re-entering the industry could well result in a penalty and costs that are far less than they otherwise might be.

39. We have concluded and so order that a permanent ban on re-entry, a penalty of $5,000, and costs of $5,000 would be reasonable in the circumstances of this case.

DATED this 30th day of October, 2013.

"Martin L. Friedland"

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

"Robert J. Guilday"

Robert J. Guilday,
Industry Representative

"Robert C. White"

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Industry Representative

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