Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Mervin Evans Visneskie

Heard: May 30, 2018 in Toronto, Ontario
Decision and Reasons (Penalty): June 21, 2018

DECISION AND REASONS
(Penalty)

Hearing Panel of the Central Regional Council:

W. A. Derry Millar	Chair
Guenther W. K. Kleberg	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

Lyla Simon	)	Counsel for the Mutual Fund Dealers Association of Canada
Mervin Evans Visneskie	)	Respondent, not in attendance nor represented by counsel

INTRODUCTION

1. On October 30, 2017, the Hearing Panel found that Mervin Evans Visneskie (the "Respondent"):

a) commencing in 2002, engaged in personal financial dealings with eight clients by requesting and accepting a total of approximately $764,300 from the clients, which he failed to repay in full or otherwise account for, thereby placing his own interests ahead of the clients' interests and creating a conflict or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and Rule 2.1.1; and

b) between 2002 and 2013, misled the Members with whom he was registered with respect to his personal financial dealings with eight clients, thereby interfering with the Member's ability to conduct a reasonable supervisory investigation of the Respondent's activities and failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

2. The Hearing Panel signed an Order dated October 30, 2017, which set out our findings on misconduct and directing that a penalty hearing be scheduled after the Hearing Panel had issued its Reasons for Decision regarding misconduct. The Reasons for Decision (Misconduct) were released on December 7, 2017.

3. Staff communicated with counsel for the Respondent with respect to dates for the penalty hearing. By email dated March 12, 2018, Staff proposed a schedule for the exchange of submissions and a date for the penalty hearing to which counsel for the Respondent replied on March 16, 2018 "Thank you for your email. My client takes no position with respect to the content of your email."[1] Staff provided to counsel for the Respondent by email dated May 18, 2018, a

[1] Exhibit 8.

courtesy copy of Staff's written submissions regarding penalty which was acknowledged by counsel for the Respondent on May 18, 2018.[2].

4. The Respondent did not appear at the penalty hearing and the Hearing Panel proceeded in his absence.

STAFF POSITION ON PENALTY

5. Staff submit that the following substantial sanctions are appropriate and should be imposed on the Respondent by the Hearing Panel:

a) permanent prohibition from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
b) fine in the amount of at least $590,531, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
c) costs in the amount of $15,000 pursuant to s. 24.2 of MFDA By-law No. 1.

6. Staff submit that:

a) The Respondent's conduct demonstrates his utter disregard for the interests of the clients from whom he solicited and failed to repay the amounts owing; and the Members with whom he was registered, as he failed to follow the Member's policies and procedures and misled the Members.
b) The nature and extent of the Respondent's misconduct warrants a permanent prohibition from the securities industry in the interest of protecting investors and MFDA Members, and in order to uphold the integrity of the securities industry as a whole
c) A substantial fine is appropriate to prevent the Respondent from retaining the benefit of his misconduct and to reflect the seriousness of his misconduct. A substantial penalty will serve as a specific and general deterrent, and will enhance

[2] Exhibit 7.

public confidence in the mutual fund industry and the regulatory process more generally.

d) The amount still owing to clients by the Respondent, as far as Staff is aware, is $540,531 for principal (i.e. excluding interest).[3] Accordingly, the fine amount being sought by Staff is the principal amount still owing to clients WR & DR, RB & DB, and RM, as well as at least a $50,000 penalty.

e) Section 24.2 of MFDA By-law No. 1 grants a Hearing Panel the discretion to require an Approved Person to pay the whole or part of the costs of proceedings before the Hearing Panel and any investigations relating to the proceeding.

7. The primary goal of securities regulation is the protection of investors, including ensuring efficient capital markets and public confidence in the industry.[4]

8. In exercising its discretion to impose a penalty, a hearing panel should consider the following factors[5]:

a) the protection of the investing public;
b) the integrity of the securities market;
c) specific and general deterrence;
d) protection of the governing body's membership; and
e) protection of the integrity of the governing body's enforcement processes.

9. MFDA hearing panels have considered these additional factors when determining an appropriate penalty[6]:

a) the seriousness of the allegations proved against the respondent;
b) the respondent's past conduct, including prior sanctions;
c) the respondent's experience and level of activity in the capital markets;

[3] As was set out at para. 10 (page 3) of the Affidavit of Rob Lambshead sworn October 27, 2017 – Exhibit 6.
[4] ***Larson***, 2009 LNCMFDA 30, Decision of the Prairie Regional Council dated October 14, 2009 ["*Larson*"] at para. 72.
[5] ***Larson*** at para. 73.
[6] ***Larson*** at para. 73.

d) whether the respondent recognizes the seriousness of the improper activity;

e) the harm suffered by investors as a result of the respondent's activities;

f) the benefits received by the respondent as a result of the improper activity;

g) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;

h) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;

i) 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;

j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and

k) previous decisions made in similar circumstances.

10. Staff submit:

a) The hearing panel in an MFDA matter has been described as having a role similar to the role of a Securities Commission when determining the appropriate penalty to impose in an enforcement proceeding. In *Tonnies*, the hearing panel cited the Ontario Securities Commission decision in *Re Mithras Management Ltd. et al.* (1990), 13 O.S.C.B. 1600 at 1610 for the proposition that:

> We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.[7]

b) The general deterrence objective is said to be a main objective when determining the appropriate penalty to impose, including sending a message to the industry regarding the impugned misconduct, as it tends to promote the prevention of future

[7] ***Tonnies***, 2005 LNCMFDA 7, Decision of the Prairie Regional Council dated June 27, 2005 at para. 45.

harm to the capital markets, thus also advancing the goal of enhancing the investor protection.[8]

c) The MFDA Penalty Guidelines are further guidance hearing panels customarily rely on when determining appropriate penalties.[9] The Penalty Guidelines recommend consideration of the following minimum penalties for the MFDA Rules that have been breached including a minimum fine of $5,000, writing or rewriting industry courses, suspension, and permanent prohibition in egregious cases.

11. Staff in their submissions reviewed the application of the factors outlined above to the facts of this case. Staff submit:

a) It is clear that the Respondent was an experienced registrant. He was employed in the industry as a dealing representative from 1995 to his employment was terminated on November 20, 2013 by the Member for the conduct giving rise to this proceeding.

b) While the Respondent has not been the subject of a prior MFDA disciplinary proceeding which may be a mitigating factor, this should be given little weight here because of the seriousness of the misconduct found by the Hearing Panel.

c) The misconduct found to have been committed by the Respondent in the present case is ongoing, very serious, and should attract a commensurate penalty.

d) MFDA Rule 2.1.1[10] is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct which MFDA hearing panels have consistently stated that the Rule encompasses "the most fundamental obligations of all registrants in the securities industry".[11] In borrowing and misappropriating the clients' monies, and actively misleading the Members as to what was taking place, the Respondent failed to adhere to the required standard. The penalty imposed must address and reflect these failures.

[8] ***Larson*** at para. 74.
[9] MFDA Staff Notice 0060 issued January 18, 2007 ("**Penalty Guidelines**").
[10] MFDA Rule 2.1.1.
[11] ***Larson*** at para. 56.

e) As an important element of investor protection, MFDA Rule 2.1.4[12] requires that :

i. Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.

ii. In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).

iii. Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.

f) In the present case, the Respondent was the author of the conflicts he engaged in; he failed to disclose the conflicts to the Members or to the clients; and he acted continuously against the clients' interests. The penalty must reflect and address these failures. As was the case in the MFDA matter of *Latour*, the Respondent in the present case has demonstrated by his conduct that he is ungovernable and should not be involved in the securities business.[13]

12. Staff submit:

a) The proven misconduct cannot be said to have been an isolated incident, or even a series of isolated incidents. In addition to the solicitation and misappropriation of

[12] MFDA Rule 2.1.4.

[13] ***Latour***, 2016 LNCMFDA 180, Decision (Penalty) of the Central Regional Council dated December 19, 2016 ["*Latour*"] at para. 22.

client monies the Respondent engaged in, the Respondent implemented repeated redemptions from the clients' mutual fund accounts in order to fund some of the loans to himself, an additional indicator that this was a deliberate and planned pattern of misconduct.

b) The Respondent engaged in prolonged and repeated personal financial dealings with eight clients by soliciting and accepting large sums of monies, which he failed to repay in full or otherwise account for. To this day, there are clients whose monies have not been repaid. Additionally, between 2002 and 2013, the Respondent misled the Members with whom he was registered with respect to his personal financial dealings with the eight clients, thereby interfering with the Member's ability to conduct a reasonable supervisory investigation of the Respondent's activities.

c) There is no evidence that the Respondent ever explained to any of the clients the conflict of interest or the mutual fund redemptions from their accounts. To the contrary, it appears on the totality of the evidence that the Respondent ensured the clients understood as little as possible about the dealings. The terms of the loans were often not committed to writing, and where they were committed to writing, the promissory notes were undated or the loans were not secured. Staff submits that it can be said that the clients were not aware of and did not understand the nature or the significance of the conflict of interest.

d) In his Reply, the Respondent stated that he did not deny that he engaged in personal financial dealings with the eight clients, but went on to state that that the Member firms with whom he was registered were aware of his personal financial dealings and that he received either explicit or tacit approval of his branch supervisors and/or compliance personnel prior to entering into or continuing with any personal financial dealings.

e) This is not a case where the Member might have approved the Respondent's personal financial dealings had the activities been brought to the Member's attention as required as the Member conducted an investigation in the present matter, found the misconduct to be a serious violation, and terminated the Respondent. All of such steps come at a cost to a Member in terms of time and

resources, and demonstrate that this Member took the Respondent's misconduct very seriously.

f) The Respondent was an experienced registrant, and was well aware that borrowing money from clients was prohibited, both under MFDA Rules, as well as pursuant to the Member's policies and procedures.

g) The Respondent specifically and continuously concealed his activities from the Member during the course of the misconduct itself, and all over again during the course of the Member's investigation, thus thwarting the Member's ability to perform its supervisory duties.

h) The harm suffered by the clients in this matter has been severe and very long-lasting. As was the case in the MFDA matter of *Latour*, the Respondent herein demonstrated "dishonest and inexcusable conduct toward senior and vulnerable clients who suffered greatly, to his profit, from his misconduct."[14]

i) The impugned clients have suffered considerable harm as a result of the Respondent's misconduct. Some clients have had to commence civil litigation in order to attempt to recover their monies. The Respondent's non-responsiveness has gone on for so long that a number of the clients, already aged at the time of the loans, have since died. Significantly, a number of the clients have yet to be repaid either in part or in full, and it appears they may never be repaid.

j) The Respondent directly benefited as a result of his activities. He took the clients' monies, thus preferring his own interests over those of the clients

k) The Respondent has not accepted responsibility for his misconduct. He has not fully admitted his misconduct, and he has attempted to shift blame for his actions from himself onto others.

13. Staff further submit that:

a) The present case requires a strong and unambiguous message to industry participants, including investors, that such misconduct will not be tolerated and will attract serious consequences. As one MFDA Hearing Panel stated, a "penalty must

[14] ***Latour*** at para. 16.

re-affirm public confidence in the regulatory system, and to do this, it must be seen to act as a general deterrent."[15]

b) It is common practice for MFDA hearing panels considering fines for personal financial dealings (misappropriation) to fix the fine amount at a quantum at, or greater than, the amounts that were found to have been misappropriated. The rationale for this is that "the fine should be not less than the amount of the misappropriation. A lesser fine could give the appearance that the Respondent was profiting from his/her theft."[16]

c) In the present matter, the fine imposed on the Respondent should be at least $590,531, the amount of the principal known to have been misappropriated from and not repaid to the clients, plus a fine amount.

d) The Hearing Panel should take into account that the Respondent has retained the benefit of not paying interest to the clients, and that the clients have lost the opportunity to have realized interest or other gains on their monies.

ANALYSIS AND DECISION

14. The facts of this case are set out in detail in our Reasons for Decision (Misconduct) dated December 7, 2017.

15. We agree with the submissions of Staff with respect to the principles applicable to the determination of the appropriate penalty in this matter and the application of those principles to the facts of this case to as set out above.

16. The conduct of the Respondent in this case was serious and egregious. As stated in our Reasons:

> 19. The Respondent in this case engaged in personal financial dealings with eight of his clients. He borrowed money from his clients and failed to repay

[15] ***Brown-John***, 2005 LNCMFDA 6, Decision of the Pacific Regional Council dated June 27, 2005 at p. 5.
[16] ***Ogalino*** at para. 17.

the clients in full or otherwise account for the money he borrowed from them. The Respondent placed his interests before that of his clients. As a result, on the evidence before us, he created a conflict of interest or potential conflict of interest which he failed to disclose to the Member and which he did not ensure was addressed by either himself or the Member "by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d)."

20. The Respondent has acted in a manner completely contrary to the standards of conduct required of an Approved Person. The Respondent betrayed his clients by borrowing money from them and failing to repay them in full. He placed himself in a conflict of interest or a potential conflict of interest and put his interests ahead of the interests of his clients. The Respondent's conduct breached Rules 2.1.1 and 2.1.4. We found at the Hearing on the Merits that the Respondent is guilty of misconduct with respect to Allegation No. 1.

17. We also found:

21. On the evidence before us, the Respondent failed to disclose to, or seek approval of, the Member, for his personal financial dealings, and misled the Member with respect to his personal financial dealings with his clients. He failed to disclose his personal financial dealings with his clients on the annual questionnaires he submitted to the Member. He misled the Member during its investigation of his conduct by:

a. denying that he had borrowed $89,800 from clients WR and DR and stating that the amount he had borrowed was 80,000;
b. stating he would "take care of" the outstanding balance he owed to clients WR and DR; and

c. denying that he had any other loan arrangements with any other clients.

22. He further misled the Member by:

a. stating that he had repaid $1,700 every two months (totaling $56,000) to clients WR and DR since borrowing money from them in 2002;
b. stating that he had spoken to client DR that day and would be resolving the balance he owed to clients WR and DR within six months;
c. denying that he had borrowed $491,900 from clients RB and DB and stating that the amount he had borrowed was $125,000;
d. stating that he had repaid clients RB and DB in full;
e. denying that he had borrowed $135,000 from clients AS and DS and stating that the amount he had borrowed was $110,000; and
f. denying that he had any other loan arrangements with any other clients.

18. The public must be protected from Approved Persons who act as the Respondent has acted in this case with his clients and who misled his Member employer. In our view, the conduct of the Respondent warrants the ultimate sanction of permanent prohibition from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member and we so order.

19. We also agree with Staff that the Respondent's conduct warrants the imposition of a substantial fine. We, however, disagree with the fine suggested by Staff. On the evidence before us, the Respondent borrowed $764,300 from clients and repaid for principal, excluding interest,

$223,769 leaving a balance that remains unpaid of $540,531 without taking into account any amount for interest on these outstanding amounts.

20. In our view, the fine proposed by Staff of $540,531 plus $50,000 for a total of $590,531 does not act as a sufficient deterrent to prevent further misappropriations of funds by Approved Persons. In our view, the fine must be large enough to ensure that Approved Persons will not be tempted to view "the total fine imposed in such circumstances will not amount to merely disgorgement or 'the cost of doing business' (albeit misconduct)" as submitted by Staff.

21. In our view, a penalty of $50,000 over the amount remaining unpaid of $540,531 is not a sufficient deterrent. In our view, the appropriate fine is $650,531 representing the unpaid amount of $540,531 plus a penalty of $110,000 and we so order. While we are unaware of the Respondent's financial situation and his ability to pay the fine and repay the money still owing to his clients, as stated by the hearing panel in *Brauns (Re)*,[17] "we do not wish the payment of any fine to impede restitution to those affected by the Respondent's misconduct." In *Brauns*, the hearing panel structured the fine to permit it to be reduced by any payments made to former clients of Mr. Brauns during an 18 month period after the penalty decision was released. We agree with this approach and adopt it here; accordingly, we make a similar order here.

22. As noted above, Staff seeks costs in the amount of $15,000. At the penalty hearing, we requested that Staff provide us with a Bill of Costs. On June 13, 2018, we were provided with the Bill of Costs and the Written Costs Submissions of Staff of the MFDA. We have reviewed Staff's Costs Submissions and the Bill of Costs. Until Friday, October 27, 2017, when counsel for the Respondent advised counsel for Staff that neither the Respondent nor his counsel would be attending the hearing on Monday, October 30, 2017, Staff was preparing for a contested hearing. The time claimed by Staff in the Bill of Costs does not include time spent on a variety of matters which would have been compensable if claimed. In our view, the amount claimed for costs, including disbursements, is reasonable and we order the Respondent to pay costs in the amount of $15,000.

[17] 2014 LNCMFDA 9 at para. 17.

CONCLUSION

23. For the reasons set out above, the Hearing Panel orders that the Respondent:

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

b) shall pay within 18 months a fine in the amount of $650,531, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 but the amount of the fine shall be reduced by any amounts paid by the Respondent within 18 months of the date of this order to individuals referenced in the Notice of Hearing who have not been repaid or to their representatives or to the beneficiaries of their estates as part of a settlement of a civil action or in satisfaction of any court imposed order (excluding amounts paid for costs or interest) or by other means as restitution for amounts loaned to the Respondent; and

c) shall pay costs to the MFDA in the amount of $15,000 pursuant to s. 24.2 of MFDA By-law No. 1.

DATED this 21st day of June, 2018.

"W. A. Derry Millar"

W. A. Derry Millar
Chair

"Guenther W. K. Kleberg"

Guenther W. K. Kleberg
Industry Representative

"Joseph Yassi"

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