



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: Gerard H. Brake and Mavis E. Brake

**Heard: October 27 and 28, 2008, Winnipeg, Manitoba
Panel Decision: December 3, 2008**

**DECISION AND REASONS
(Misconduct)**

Hearing Panel of the Prairie Regional Council:

Robert Hucal	Chair
M.E. (Elaine) Bradley	Industry Representative
Erwin Granson	Industry Representative

Appearances:

Maria Abate)	For the Mutual Fund Dealers Association
Charles Toth)	of Canada
Mavis Brake)	Attended Personally
Gerard Brake)	Not in attendance personally or represented
)	by counsel – represented by Mavis Brake by
)	letter of Authority

THE ALLEGATIONS

1. By Notice of Hearing dated the 12th day of March, 2008, the following allegations were made against Gerard H. Brake and Mavis E. Brake (“Respondents”):

Allegation #1: Between November 2003 and August 2006, the Respondents had or continued in occupations that were not disclosed to or approved by the Member, contrary to MFDA Rule 1.2.1(d).

Allegation #2: Between November 2003 and August 2006, the Respondents engaged in securities related business outside the Member by selling more than \$1 million in shares of corporations that they owned and operated, to 24 clients, which sales were not carried on for the account of the Member or through the facilities of the Member, contrary to MFDA Rule 1.1.1(a).

Allegation #3: Between November 2003 and August 2006, the Respondents sold more than \$1 million in shares of corporations that the Respondents owned and operated to 24 clients, thereby giving rise to a conflict of interest which the Respondents failed to disclose to the clients and to the Member and which the Respondents 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 2.1.1.

Allegation #4: Between November 2003 and August 2006, the Respondents solicited and accepted more than \$1 million from 24 clients to be invested on their behalf in corporations that the Respondents owned and operated and have failed to return or otherwise account for the monies, contrary to MFDA Rule 2.1.1.

Allegation #5: Between November 2003 and August 2006, the Respondent Mavis E. Brake failed to fulfill her obligations as a Branch Manager by intentionally concealing from the Member conduct and outside business activities that the Respondents were engaging in that contravened the Member’s policies and

procedures and MFDA regulatory requirements, contrary to MFDA Rule 2.5.3(b) and 2.1.1.

Allegation #6: Commencing May 20, 2006, the Respondents have refused to produce for inspection and provide copies of documents and records requested by the MFDA during the course of an investigation, contrary to section 22.1(b) of MFDA By-law No. 1.

2. The allegations were the result of extensive investigations carried out by investigators of the MFDA. In general, the documents placed in evidence disclosed that both Respondents were involved in persuading existing clients and others to invest in corporations owned or controlled by the Respondents and were established for the purpose of developing cottage properties as long term investments and for personal and third-party lease purposes.

SERVICE – NOTICE OF HEARING

3. The Respondent, Mavis Brake, appeared on her own behalf and provided a letter from the Respondent, Gerard Brake, authorizing Mavis Brake to act as his agent. No counsel appeared in either of their interests.

4. At the First Appearance on April 23, 2008, affidavits were filed indicating that the Notice of Hearing was sent to the Respondents and receipt acknowledged. On that date the Respondents asked for a lengthy period to prepare and they were accordingly provided with hearing dates six months hence, commencing October 27, 2008.

5. Prior to the commencement of the proceedings, we were told that several emails and letters went forward to the Respondents requesting their involvement and participation. No response was filed and no indication was given that the Respondents or either of them was planning to participate. All materials in the possession of the Panel were delivered to the Respondents.

6. It was clear that every reasonable attempt was made by MFDA staff to ensure that the Respondents, if they chose, could participate fully in the hearing.

7. It should be noted that the Respondent, Mavis Brake, who appeared on her own behalf and on behalf of Gerard Brake, indicated to the panel, not immediately, but by her eventual representations, that although she was appearing on her own and on Gerard Brake's behalf, her only motive was to tell her story by written submission. She waived her rights to examine any witnesses, after being granted an adjournment on the first day to prepare to examine David Sharpe, MFDA Director of Investigations, whose evidence was introduced by affidavit. She concurrently waived her right to examine Wendy Tschetter, who was offered as a witness. Both David Sharpe and Wendy Tschetter were in attendance at the hearing. She also gave up her right to call her own witnesses or introduce evidence. Her request on the second day of the hearing was for a further two-day adjournment to provide a written submission "to tell her side of the story". The Panel, recognizing the difficult task before her, granted an adjournment to November 17, 2008, by which date she was to provide a written submission. MFDA counsel was requested to provide its submission by that date as well.

PRESENTATION OF EVIDENCE

8. The primary evidence before the Hearing Panel consisted of a total of 28 pages in two affidavits of David Sharpe, the MFDA's Director of Investigations. Forming part of the affidavits was a series of 82 exhibits.

9. Under the Rules of Procedure, the Hearing Panel may admit as evidence any testimony or document considered relevant and in this situation we allowed the affidavit evidence by way of sworn statement of Mr. Sharpe. Mr. Sharpe was made available as a witness. The Respondents, as indicated, waived their right to cross-examination.

REGISTRATION

10. From November 2003 to August 2006, Gerard Brake was registered as a mutual

fund salesperson with FundEx. Gerard and his wife, Mavis Brake, the other Respondent in this proceeding, operated a branch office of FundEx which used the trade name Brake Securities Ltd. (“Brake Securities”). On August 21, 2006, Gerard was terminated by FundEx and he has not been registered in the securities industry in any capacity since that time.

11. Between December 2003 and August 2006, Mavis Brake was registered as the Branch Manager of the FundEx branch at which she and Gerard Brake were employed. On August 21, 2006, FundEx terminated Mavis and she has not been registered in the securities industry in any capacity since that time.

Allegation #1 – Failure to Disclose Outside Interests

12. The Respondents were registered as indicated, as Salesperson and Branch Manager respectively.

13. The Respondents, it was determined during the investigation, participated in four outside businesses or dual occupations without disclosure or approval by FundEx. The Affidavit of David Sharpe disclosed involvement by the Respondents in Pride, Pride II, LNU Leasing and 5199230 Manitoba.

14. The Uniform Applications for Registration submitted by the Respondents on November 6, 2003 only declared involvement in three outside businesses (as to Gerard Brake) and as to one outside activity by Mavis Brake.

15. The investigation found failure on Mavis Brake’s part in her capacity as Branch Manager, in response to specific requests, to disclose Gerard Brake’s involvement in Pride. Evidence was provided in that regard. FundEx, as was best determined, was not advised or aware of these undisclosed activities. In addition, the Respondent Mavis Brake, in reply to specific requests by FundEx, failed to disclose participation in Pride.

16. On the Registration Renewal Application dated December 5, 2005, Gerard Brake disclosed involvement in Pride and Pride II for the first time, but Mavis did not. Neither Respondent disclosed involvement in 5199230 Manitoba and LNU Leasing.

17. The Investigation confirmed that over the course of their employment with FundEx, neither Respondent disclosed or obtained approval from FundEx to participate in outside businesses, contrary to their obligations to FundEx and contrary to MFDA Rules, requiring prompt disclosure of outside activities. The evidence shows that although the Respondents were asked by FundEx on at least eight occasions whether they were involved in outside business activities, the Respondents either chose not to disclose their involvement at all or did so in a manner which was not forthright.

18. The Respondents chose not to examine Mr. Sharpe on his affidavits and specifically waived that right after initially requesting an adjournment (which was granted) during the first hearing day.

19. In their written argument, the Respondents claimed FundEx was advised of everything. There was no evidence to that effect.

Allegation #2 - Engaging in Sale of Securities of Related Businesses Outside the Member

Allegation #3 - Failure to Disclose Conflict of Interest and Failure to Exercise Responsible Business Judgment

Allegation #4 - Failure to Account for or Return Invested Monies

20. In August, 2003, the Respondents solicited FundEx clients to invest in Pride and Pride II. This solicitation was confirmed by the Respondents' interviews and by printed marketing material provided in evidence. An interview of witness Wendy Tschetter, an employee of the Respondents and an investor in the outside businesses, confirmed those actions by Gerard Brake. The proposed investment process required redemption of

mutual fund holdings, including RRSPs and utilization of the monies to purchase shares in corporations owned or controlled by the Respondents.

21. Wendy Tschetter confirmed her personal investment in the Respondents' Pride companies by the redemption process aforesaid. Investors were invited to meetings at the FundEx branch office operated by the Respondents.

22. The Brakes' response to Wendy Tschetter's sworn evidence was that it was hostile, full of threats, highhanded, terroristic and false. No evidence was introduced to reflect this rather unique argument.

23. Both Respondents acknowledge receiving and reading MFDA Rules prohibiting Approved Persons from selling securities outside the accounts and facilities of the Member.

24. The Shareholder's Register of Pride, Pride II and 5199230 showed former FundEx clients holding share interests. When asked, the Respondents failed to disclose these dealings with FundEx clients.

25. Although Mavis Brake was not a shareholder, director or officer of the various corporations, she was directly involved in steering FundEx clients to make the investments in the Pride companies.

26. Based on documentation made available, the total amount invested in Pride and Pride II by FundEx clients was in excess of \$1,000,000. The amount does not include shares purchased by FundEx clients in LNU Leasing or 5199230 Manitoba.

27. The Respondent, Mavis Brake, in response to a specific request, failed to disclose that Gerard was paid for management services provided to Pride, when in fact the financial statements of Pride showed business advisory fees paid to Gerard Brake. Final confirmation of this involvement was frustrated by lack of cooperation from Mr. Brake

by his failure to provide answers to his undertakings during interviews and his failure to respond.

28. The marketing material for Pride and Pride II describes the project as a long term investment, but failed to disclose adequately that potential risks were associated with the investment, including the possible difficulty of disposing of their shares. The investigation was unable to determine if any form of Offering Memorandum was prepared for distribution to potential investors. The written material directed to investors simply encouraged redemption of mutual funds or restructure of investments to invest in shares of Pride, representing potential returns of 30% to 40%. Gerard Brake acknowledged that no specific disclosure was provided explaining that Pride was unrelated to FundEx, nor was there any disclosure of risks or conflicts.

29. The Respondent, Mavis Brake, indicated that although she intended to prepare a disclosure document to investors, it was never prepared.

30. It appears clear that investors in the outside business activities of the Respondents never received full information regarding the risks associated with these investments, nor of the full extent of the Respondents' interests in the businesses.

31. The Brakes argued that all corporations were private and therefore exempt. We considered this to be an irrelevancy.

32. The investigation revealed that as of October 24, 2008, no investors had been repaid and no accounting had been provided to confirm that the monies were used for the purposes represented by the Respondents. The undertakings given by the Respondents to provide information which would enable MFDA investigators to track the current whereabouts of the invested funds have never been met.

33. The Brakes claim that all actions were done in accordance with an approved business plan. There was no evidence in that regard.

34. After presentation of affidavit evidence in regard to these allegations, the Respondents chose not to examine Mr. Sharpe.

Allegation #5 – Failure of Mavis Brake to Fulfill her Obligations as Branch Manager

35. The obligation of a Branch Manager is to ensure that all business conducted by Approved Persons at the Branch, including, in this case, Registrant Gerard Brake, complies with applicable securities legislation and the Rules of the MFDA. In addition, FundEx policies and procedures were to be complied with, including advising FundEx of any irregularities or contraventions of any pertinent regulation or compliance policies and, inter alia, to monitor all redemptions of mutual funds and unusual trades identified by FundEx. The Respondent Mavis Brake acknowledged that her obligations included disclosure of outside business activities.

36. The evidence shows that the Respondent Mavis Brake was aware of and participated in and had a direct or indirect interest in outside business activities not disclosed to FundEx, including her knowledge of Gerard Brake's involvement in Pride, Pride II, 5199230 Manitoba, LNU Leasing ("Respondents' Companies"), the solicitation of FundEx clients to invest in the Respondents' Companies; the redemption of mutual funds to obtain monies to invest in the Respondents' Companies; the borrowing of money from FundEx clients to cover costs relating to the operation of the Respondents' Companies; and the lack of advice to FundEx clients relating to potential or actual conflict of interest which existed as a result of the investments in the Respondents' Companies.

37. Employee Wendy Tschetter advised MFDA investigators that the Respondent Mavis Brake instructed Branch employees to remove and conceal evidence of Respondent Gerard Brake's involvement in outside business activities. The MFDA investigation revealed that the Respondent Mavis Brake misled FundEx regarding reasons for client redemptions by advising FundEx that "purchase of cottage" and "private reasons" were the rationale for the redemptions, when she otherwise admitted she was aware the clients were purchasing shares in the Respondents' Companies.

38. Additionally, it was alleged that in her capacity as Branch Manager, Mavis Brake: (a) permitted the Respondent Gerard Brake to file a Uniform Application for Registration which did not disclose Gerard Brake's involvement in the Respondents' Companies; (b) withheld information regarding civil legal actions commenced against Gerard Brake and Brake Securities; and (c) failed by the conduct set out in (a) and (b) to fulfill her supervisory obligations as Branch Manager.

39. The Respondents were given the opportunity to examine David Sharpe with respect to the portion of his affidavit relating to Allegation #5 and to examine Wendy Tschetter, offered as a witness, but declined and waived the right to further examination.

Allegation #6 - Failure to Produce and Provide Documents and to Cooperate

40. The evidence discloses that notwithstanding numerous and continuing efforts by MFDA investigators, the Respondents failed to provide records, documents or copies of documents to assist the investigation of the complaint made against them.

41. The efforts of the MFDA investigators to obtain documents were thwarted by the Respondents' actions, which included the following:

- Failure to provide answers to undertakings agreed to be provided by May 19, 2006;
- Failure to provide answers to undertakings by Gerard Brake as promised on or before April 3, 2007 (as to Mavis Brake) and April 9, 2007 (as to Gerard Brake);
- Failure to respond to March 22, 2007 letters and emails to Gerard Brake of April 3, 2007 and April 9, 2007;
- Failure to provide answers to undertakings as promised in writing by Gerard Brake on April 16, 2008;

- Failure to provide documents or information as promised in writing by Mavis Brake on April 19, 2007;
- Failure to respond to MFDA registered/regular mail correspondence to both Respondents advising of intended litigation;
- Failure to respond to MFDA letter to lawyer alleging to act on behalf of both Respondents on June 5, 2007; and
- Failure to provide answers to undertakings arising from interviews conducted by MFDA investigators on May 4, 2006, March 20, 2007 and March 21, 2007.

42. The Panel was advised that the Respondents had not provided MFDA investigators with documentation as requested as of October 27, 2008, the date the hearing commenced.

43. The Affidavit evidence was unchallenged by the Respondents and no request was made to examine Mr. Sharpe.

44. The Panel has considered the written arguments of the parties and it has been unanimously determined that the misconduct has been proven with respect to all of the allegations set out in the Notice of Hearing.

45. The undisputed evidence, in broad terms, was rather unfavourable, but as no representation was made by the Respondent, Gerard Brake, we cannot respond to the issue of remorse, determine whether or not the Respondent ever understood the severity of his actions or are we able to consider any explanation. Some active involvement on Gerard Brake's part, although he was not obliged, would have been of importance to us in determining our decision. The breaches alleged are serious and appeared to be planned, deliberate and long lasting. The Respondent Gerard Brake did not cooperate with the MFDA investigation or admit misconduct of any nature. The number of victims was large and the Respondent Gerard Brake may have received substantial personal benefits as no monies were returned and none were accounted for, except on a minimal basis.

46. The Panel has considered the evidence presented as well as the written arguments of the parties and it has been unanimously determined that the alleged misconduct as set out in the Notice of Hearing has been proven with respect to all allegations set out therein, in regard to both Mavis Brake and Gerard Brake.

47. In considering our disposition of this matter, we felt it was important to deliver as balanced and even-handed a decision as possible. It should be noted that neither of the Respondents had a history of misconduct or discipline and that is a positive factor. However, Gerard Brake failed to appear and Mavis Brake chose not to participate. The Brakes were allowed, at their request, to have three weeks to prepare written arguments.

48. Almost immediately, the Brakes filed a Motion seeking to nullify the Hearing, notwithstanding their seeming cooperation and our response to their requests. The Motion was denied. Within three days, second Motions were filed, seeking the same remedy. Those Motions, too, were rejected. Notwithstanding those tactics, the Brakes filed a final Argument, as they had requested to do, on the date required by our Order.

49. The Argument was, to our minds, unnecessarily vitriolic and abusive. The fact that the Brakes disagreed with the MFDA position does not warrant the accusatory position taken by them. The expressed irrelevancies did nothing to support their arguments.

50. We are of the opinion that the Brakes deliberately intended to delay the process as long as possible.

51. We expect that a further Hearing will be convened with respect to the argument relating to penalty and we will issue a supplementary decision in that regard, as necessary.

Dated this 3rd day of December, 2008.

“Robert Hucal”

Robert Hucal
Chair

“Elaine Bradley”

M.E. (Elaine) Bradley
Industry Representative

“Erwin Granson”

Erwin Granson
Industry Representative

Doc #157214