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: Ronald Morrell Schwartz

Heard: July 3, 2018 in Toronto, Ontario
Decision: July 3, 2018
Reasons for Decision (Penalty): July 20, 2018

REASONS FOR DECISION
(Penalty)

Hearing Panel of the Central Council:

Frederick H. Webber	Chair
Edward V. Jackson	Industry Representative
Kenneth P. Mann	Industry Representative

Appearances:

Lyla Simon	)	Counsel for the Mutual Fund Dealers Association of Canada
Ronald Morrell Schwartz	)	Respondent, not in attendance or represented by counsel

Procedural Matters

1. On May 29, 2018, the Hearing on the Merits ("Hearing") was conducted before a three person Hearing Panel of the Central Regional Council ("Panel"). The Respondent did not attend in person at the Hearing, nor did counsel attend on his behalf. Pursuant to MFDA Rule 7.3, the Hearing proceeded as scheduled in the Respondent's absence.

2. Based on the uncontested allegations in the Notice of Hearing ("NOH") and the evidence and submissions presented by the MFDA at the Hearing, the Panel found that the MFDA had established the Respondent's misconduct as alleged in the NOH as amended. The Hearing Panel's decision was delivered orally at the Hearing, and a Penalty Hearing was scheduled for June 22, 20l8. The penalty hearing date was later rescheduled to July 3, 2018.

3. On June 8, 2018, the Hearing Panel issued its Reasons for Decision regarding the misconduct phase of the proceedings.

4. On June 11, 2018, the MFDA corporate secretary emailed copies of, among other things, the Hearing Panel's Order regarding misconduct dated May 29, 2018, and the Reasons for Decision dated June 8, 2018 to the Respondent's counsel.

5. On June 19 2018, MFDA counsel emailed a copy of her Submissions on Penalty to the Respondent's counsel and asked whether he wanted a copy of her book of authorities. Respondent's counsel replied that he did not want the book of authorities. Neither the Respondent nor his counsel appeared at the penalty hearing.

MFDA Requested Sanctions

6. In its written submissions, the MFDA submitted that the following sanctions would be appropriate and should be imposed on the Respondent by the Panel:

i) 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;

ii) fine in the amount of at least $225,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

iii) costs in the amount of at least $10,000 pursuant to s. 24.2 of MFDA By-law No. l.

7. The MFDA submitted that the Respondent's conduct demonstrated his brazen disregard for the interests of:

a) the clients, by making unauthorized redemptions in their accounts, actively concealing the misconduct, and misappropriating at least $69,035;

b) the Members with whom he was registered, as he failed to follow the Members' policies and procedures and misled the Members in response to inquiries regarding his misconduct in order to conceal his misconduct; and

c) the regulator, in failing to cooperate with the MFDA's investigation.

The Panel agrees with the MFDA's characterization of the Respondent's conduct.

Sanctions Authority

8. If in the opinion of a Hearing Panel, an Approved Person has failed to comply with the provisions of any By-law, Rule or Policy of the MFDA, a Hearing Panel has the power to impose any one or more of the penalties set out in s.24.1.1(a) to (f) of MFDA By-law No. 1.

9. 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.

Factors Regarding Penalty

10. The MFDA submitted that, the primary goal of securities regulation is the protection of investors, including ensuring efficient capital markets and public confidence in the industry. This goal was set out in the Supreme Court of Canada decision in *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, a case which has been cited with approval in subsequent MFDA cases such as *Larson*, 2009 LNCMFDA 30. This panel agrees with this statement of goals and has followed it in coming to its decision.

11. The MFDA submitted that hearing panels have stated that in exercising its discretion to impose sanctions, a hearing panel should consider the following factors:

i) the protection of the investing public;
ii) the integrity of the securities market;
iii) specific and general deterrence;
iv) protection of the MFDA's membership; and
v) protection of the integrity of the MFDA's enforcement processes.

12. Previous hearing panels have set out a number of additional factors that should be considered when determining an appropriate penalty:

i) the seriousness of the allegations proved against the respondent;
ii) the respondent's past conduct, including prior sanctions;
iii) the respondent's experience and level of activity in the capital markets;
iv) whether the respondent recognizes the seriousness of the improper activity;
v) the harm suffered by investors as a result of the respondent's activities;
vi) the benefits received by the respondent as a result of the improper activity;
vii) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
viii) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;

ix) 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;

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

xi) previous decisions made in similar circumstances.

13. In the MFDA case of *Tonnies,* 2005 LNCMFDA 7, the hearing panel regarded its role as similar to the role of a Securities Commission when determining the appropriate penalty to impose in an enforcement proceeding. The hearing panel in *Tonnies* 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…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.

14. 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 harm to the capital markets, thus also advancing the goal of enhancing the investor protection.

15. This panel agrees that the factors and principles stated in paragraphs 10, 11, 12 and 13 are appropriate and has applied them in coming to its decision on penalty.

MFDA Penalty Guidelines ("Guidelines")

16. The MFDA Penalty Guidelines are further guidance hearing panels customarily rely on when determining appropriate penalties. The Guidelines, as applicable to this case, were contained in the MFDA written submissions and were reviewed with the Panel at the hearing. This Panel has taken the Guidelines into account in coming to its decision on penalty.

Application of factors

Respondent's experience and activity in the market

17. The Respondent was an experienced registrant, having been registered and employed as a dealing representative (previously referred to as a "mutual fund salesperson") since 2002.

18. The Respondent has not been registered in the securities industry in any capacity since October 24, 2014, when his registration was terminated by the Member.

Respondent's disciplinary history

19. On March 19, 2007, the MFDA issued a warning letter to the Respondent regarding referrals to securities outside the facilities of the Member and without the Member's approval. The MFDA acknowledged that a warning letter is not generally considered to be formal discipline, but submitted that was appropriate for the Panel's consideration. Aside from the warning letter, the Respondent had no formal disciplinary history.

20. This Panel agrees with the MFDA's position that, while the lack of prior formal disciplinary history may be a mitigating factor in certain circumstances, it should receive minimal weight (if any) in this matter and agrees with the statement in the MFDA case of *Ogalino*, 2014 LNCMFDA 7:

> "While Hearing Panels usually consider the fact that a Respondent has no disciplinary history as a circumstance of mitigation, we do not accept that, in this case, it can derogate from the necessity that this Respondent be removed from the industry."

Seriousness of the allegations proved against the Respondent

21. This Panel agrees with the MFDA position that the misconduct engaged in by the Respondent in the present case is ongoing, very serious, and should attract a commensurate penalty. By conducting unauthorized redemptions in client accounts, misappropriating clients'

monies, actively misleading the clients and Members as to what was taking place, and failing to cooperate with an MFDA investigation, the Respondent breached MFDA Rules and failed to adhere to the required ethical standards of the industry.

22. The penalty herein must reflect and address these failures. As was the case in the MFDA matter of *Latour*, 2016 LNCMFDA 180, the Respondent in the present case has demonstrated by his conduct that he is un-governable and should not be involved in the securities business.

Whether the activity was an isolated incident or part of a larger pattern of conduct involving multiple clients

23. The Respondent's misconduct started in 2009, and continued until his registration was terminated, thus the proven misconduct cannot be said to have been an isolated incident, or even a series of isolated incidents. The underlying reason for the unauthorized redemptions was explicitly to misappropriate clients' monies for the Respondent's own benefit, and the Respondent was unjustly enriched to the direct detriment of the clients' interests.

24. In addition to the unauthorized redemptions and misappropriation of client monies he engaged in, the Respondent also created elaborate fictitious account statements and distributed them to the affected clients, an additional indicator that this was a deliberate and planned pattern of misconduct.

25. To this day, there are clients whose monies have not been repaid in full or at all. Additionally, the Respondent misled the Members with whom he was registered with respect to his personal financial dealings with the clients, thereby interfering with the Member's ability to conduct a reasonable supervisory investigation of the Respondent’s activities.

Concealment of the activity from the Member

26. This Panel agrees with the MFDA’s submission, that the Respondent specifically and continuously concealed his activities from the Members during the course of the misconduct itself,

and again during the course of the Member's investigation, thus thwarting the Member's ability to perform its supervisory duties.

Harm suffered by investors as a result of the Respondent's activities

27. The harm suffered by the clients in this matter has been severe and very long lasting. A number of the victims considered the Respondent a friend, and they all trusted him with their investments. The clients discovered the misappropriation well after the thefts occurred and have experienced significant challenges in seeking to recover their losses from the Members, fund companies, or other institutions.

28. As was the situation in the *Latour* case (supra), the Respondent herein demonstrated "dishonest and inexcusable conduct toward senior and vulnerable clients who suffered greatly, to his profit, from his misconduct."

Benefits received by the Respondent as a result of the improper activity

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

Whether the Respondent recognizes the seriousness of the improper activity/Impact of the Failure to Cooperate

30. The Respondent has failed to cooperate with the MFDA investigation, thus potentially hindering Staff s ability to know the full scope and impact of the misconduct. There is no evidence that the Respondent has recognized the seriousness of his misconduct or has accepted responsibility for his misconduct.

Deterrence

31. As acknowledged in numerous cases, deterrence is one of the most important considerations for a hearing panel in arriving at a penalty. Specific deterrence of future misconduct by the Respondent must be achieved. In addition, this Panel agrees that 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.

Quantum of the Fine - Comparator Cases

32. While not binding, this Panel has reviewed cases submitted by the MFDA which considered similar issues in support of its position that in the present matter, the total fine imposed on the Respondent should be $225,000, apportioned as follows:

a)	Misappropriation	$125,000
b)	Misleading clients and Member	$25,000
c)	Failure to Cooperate	$75,000
d)	TOTAL	$225,000

Unauthorized Trading and Misappropriation

33. As submitted by the MFDA, it is common practice for MFDA hearing panels considering a fine for misappropriation of client monies to fix the amount at a quantum at least 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." *Ogalino*, *supra*, at paragraph 31.

34. The MFDA submitted that he Hearing Panel ought to take into account that the Respondent has retained the benefit of not repaying the clients, not paying interest to the clients, and that the clients may have lost the opportunity to have realized interest or other gains on their monies.

35. In addition, the MFDA submitted that, as both a specific and general deterrent, it is appropriate for the Panel to send a message that the total fine imposed in such circumstances will not amount to merely disgorgement or 'the cost of doing business'. In the present case, it would be appropriate for the Panel to impose a fine corresponding to at least the amount of the principal known to have been misappropriated from the clients (being $69,035), plus a fine amount of at least $25,000 as contemplated in the Penalty Guidelines.

36. This Panel agrees with the principles stated in paragraphs 32, 33 and 34. It also considered the cases submitted by the MFDA. Based upon the foregoing, this Panel agrees that a fine of $125,000 is appropriate for the misappropriation activities of the Respondent in this case.

Misleading Clients and Members

37. As was stated in the MFDA case of *Adeola*, 2015 LNCMFDA 10:

> "MFDA Hearing Panels have consistently held that an Approved Person contravenes the standard of conduct set out in MFDA Rule 2.1.1 when he or she completes account forms and loan applications with information which he or she knows, or ought to know, is false."

38. This Panel agrees with the MFDA submission, that creating and distributing fake account statements to clients is at least as egregious as falsifying client KYC information on account documents and loan applications, if not more so.

39. Accordingly, this Panel agrees that a fine amount of $25,000 regarding the creation and distribution of fictitious account statements and misleading the clients and Member regarding same.

Failure to Cooperate

40. In the recent MFDA decision in *Cudmore*, MFDA File No. 201737, the hearing panel set out its rationale for the penalty imposed, as follows:

> The privilege of operating in a regulated securities industry requires that each participant conduct themselves in a manner that is in the public interest. Although not a true fiduciary standard, the Approved Person must expect to be held to higher standard. That required standard does not allow nor contemplate conduct that would cause investors and the general public to question the integrity of the Approved Person or Member of the MFDA. By failing to cooperate and ignoring repeated communications from Enforcement Staff the Respondent demonstrated a disregard for the obligations he had undertaken by virtue of his membership and registration as an Approved Person. Such a demonstration is in the opinion of the panel a clear breach of the high standard and ethical conduct of business, conduct unbecoming and contrary to the public interest. It is evidence of an unwillingness to be regulated in accordance with industry practice and standards. The Respondent's conduct was detrimental to the public and industry interest.

41. Based on failure to cooperate decisions reviewed by the Panel, the Panel agrees with the MFDA request for a fine of $75,000 regarding the Respondent's failure to cooperate in this matter.

Decision

42. In summary, having regard to all the circumstances of the present case, the Panel has decided that the appropriate penalty to be imposed on the Respondent is as follows:

a) permanent prohibition from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member;

b) fines totaling $225,000, apportioned as follows:

   i. Misappropriation: $125,000

   ii. Misleading clients and Members: $25,000

   iii. Failure to cooperate: $75,000

c) costs in the amount of $10,000.

43. An order to this effect was signed by the Panel at the end of the hearing on July 3, 2018.

DATED this 20th day of July, 2018.

"Frederick H. Webber"

Frederick H. Webber
Chair

"Edward V. Jackson"

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Industry Representative

"Kenneth P. Mann"

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