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 ("MFDA")
AND EARL CRACKOWER ("the Respondent")

CASE #: 200506

HEARING PANEL:	The Hon. Fred Kaufman, C.M., Q.C., Chair Paul Griffin Christopher Marrese
DATE OF HEARING:	July 20, 2005
MFDA COUNSEL:	Robert DelFrate

The respondent appeared in person

DECISION

As set out in the Notice of Hearing, the Respondent, Earl Crackower, was charged as follows:

> **Allegation #1:** Between January 1994 and October 2003, the Respondent had, and continued in, another gainful occupation that was not approved by the Member, contrary to MFDA Rule 1.2.1(d).
>
> **Allegation #2:** Between January 1994 and October 2003, the Respondent solicited and accepted monies from clients in the total amount of $3.4 million, more or less, which he failed to return or otherwise account for, thereby failing to deal fairly, honestly and in good faith with his clients and

engaging in business conduct which was unbecoming and detrimental to the public interest, contract to MFDA Rule 2.1.1.

Allegation #3: On November 11, 2003, the Respondent misled the MFDA by stating in response to an inquiry from the MFDA that he had only borrowed or solicited monies from one client when he knew that to be an incorrect response, thereby:

i. failing to comply with his obligations under s. 22.2 of MFDA By-law No. 1; and

ii. failing to observe high standards of ethics and conduct in the transactions of business, contrary to MFDA Rule 2.1.1(b).

Allegation #4: On July 6, 2004, the Respondent failed to attend at the offices of the MFDA and give information for the purpose allowing the MFDA to investigate a complaint made against the Respondent, contrary to s. 22.1(c) of By-Law No. 1.

The Particulars, again as set out in the Notice of Hearing, are as follows:

Registration History

1. From March 1993 to November 2003, the Respondent was registered in Ontario as a mutual fund salesperson for Worldsource Financial Management Inc. ("Worldsource"). Worldsource became a Member of the MFDA on June 20, 2002.

2. On November 21, 2003, the Respondent was terminated for cause by Worldsource as a result of the events described herein. He is not currently registered in the securities industry in any capacity.

Allegations #1 and #2

3. Between January 1994 and October 2003, the Respondent solicited and accepted monies from certain of his mutual fund clients whom he led to believe would be participating in non-mutual fund investment opportunities. The clients were, for the most part, elderly individuals with limited investment knowledge and low investment risk tolerance.

4. The Respondent led three of the clients to believe that he would invest their monies by either providing bridge financing to small businesses that were unable to obtain loans from conventional lenders or by placing their monies in some other form of non-mutual fund investment. The Respondent led these clients to believe that their investments would be secure and would yield a higher rate of return than the clients would earn from the mutual funds or fixed income investments in which they would otherwise invest.

5. The Respondent provided each client with a promissory note as evidence of the monies that had been given to the Respondent to invest on the client's behalf. The promissory note set out the terms on which the initial investments and the returns thereon would be repaid to the client.

6. Thereafter, the Respondent would, from time to time, provide cheques to each client. The Respondent led each client to believe that these cheques represented payments on account of their investments. In fact, there is no evidence that Respondent ever used any of the monies given to him by the clients to provide bridge financing to third parties or that he invested the monies in any other type of investment.

7. The Respondent did not disclose to Worldsource that he was placing the clients in these purported investments and there is no evidence that any of the monies advanced to the Respondent by the clients were ever paid to, received by, or otherwise reflected in the books and records or brought to the attention of Worldsource.

8. In October 2003, Worldsource commenced an investigation of the Respondent in response to a complaint made by one of the clients (the "Complainant"). In January 2004, Worldsource concluded its investigation and determined that 42 clients of the Respondent had given him monies to invest on their behalf, of which 35 were still owed cumulatively, $3,494,617.00, all of which was unaccounted for.

9. On April 13, 2004, the Respondent filed an assignment in bankruptcy in which he acknowledged that 33 of his mutual fund clients were unsecured creditors to whom he owed, cumulatively $3,390,475.00.

10. The Respondent has not returned or otherwise accounted for any of these monies.

11. By soliciting and accepting monies from his clients for the purpose of facilitating their participation in the non-mutual fund investment opportunities described above, the Respondent had and continued in another gainful occupation that was not approved by Worldsource, contrary to MFDA Rule 1.2.1(d).

12. By soliciting and accepting monies from his clients as described above and by failing to return or otherwise account for the monies, the Respondent failed to deal fairly, honestly and in good faith with his clients and engaged in business conduct which was unbecoming and detrimental to the public interest, contrary to MFDA Rule 2.1.1(a) and (c).

Allegation #3 - Misleading the MFDA

13. In October 2003, the MFDA commenced a review of the issues raised by the Complainant.

14. By letter dated October 31, 2003, the MFDA requested, through Worldsource, that the Respondent respond in writing to questions concerning his activities including, among other things, whether the Respondent had ever borrowed moneys from, or solicited among any client, other than the Complainant, to borrow or lend money on any other occasion.

15. By letter dated November 11, 2003, the Respondent denied that he had ever borrowed money from or solicited any client, other than the Complainant, to borrow or lend money on any other occasion, when he knew this to be an incorrect response. As set out in paragraph 5 above, the Respondent has provided clients (other than the Complainant) with promissory notes evidencing the monies he had received from them prior to November 2003.

16. By providing a response to the MFDA that was false and misleading, the Respondent failed to comply with his obligations under s. 22.2 of By-law No. 1 and failed to observe high standards of ethics and conduct in the transaction of business contrary to MFDA Rule 2.1.1(b).

Allegation #4 - Failure to Attend and Give Information

17. By letter dated May 27, 2004, the MFDA advised the Respondent that he was required, pursuant to s. 22.1(c) of By-Law No. 1, to attend at the offices of the MFDA on June 15, 2004 to give information respecting matters under investigation by the MFDA. The Respondent was advised that his failure to attend and be examined may result in disciplinary proceedings pursuant to s. 24.1.1. of By-Law No. 1.

18. By fax dated June 1, 2004, the Respondent, through his counsel, advised that he was willing to be examined but was unavailable on June 15, 2004. The Respondent requested that the examination be rescheduled to another date.

19. On June 3, 2004, the Respondent agreed to be examined on July 7, 2004. By letter dated June 3, 2004, the MFDA confirmed the agreement.

20. By fax dated July 6, 2004, the Respondent advised the MFDA that he would not be attending the interview scheduled for July 7, 2004. The Respondent did not attend to be examined on July 7, 2004, nor has he made himself available to be examined at any time thereafter, contrary to s. 22.1(c) of By-law No. 1.

21. By letter dated July 7, 2004, the MFDA advised the Respondent that his failure to attend and give information constituted a breach of s. 22 of By-Law No. 1 and that disciplinary proceedings were under consideration.

At the hearing, MFDA counsel filed an affidavit by Ian Smith, an investigator with the Enforcement Department of the Association. It was supported by 19 Exhibits, which included interviews with two of the Respondent's alleged victims. It also included a letter written by the Respondent on May 5, 2005, addressed to Mr. DelFrate. In it, the Respondent admitted that he "borrowed" funds from clients for his personal use. He also admitted that he had lied when the first complaint was filed against him because "I panicked and quite frankly I did not know what to do."

The evidence of the two investors is clear. Mr. Crackower invited them to place funds with him rather than in mutual funds provided by his employer, a practice which he did not disclose to his firm. These funds, he told the investors, would be used for bridge loans, and the return would exceed what they could earn with other placements. There is no suggestion in the evidence that these were in any way personal loans, as he latter suggested, and both witnesses (who gave their evidence to two investigators) dismissed this suggestion. Indeed, as one of them put it, "I nearly fell off my chair" when Crackower referred to her investment as a loan.

When invited to address the evidence led by enforcement counsel, Mr. Crackower told that panel that "I admit to all of it." He voiced his deep regret to the victims, and added that if it were at all possible he would make complete restitution, but he was unable to do so. Indeed, he had recently filed for bankruptcy, listing all victims as his creditors.

We also note that, although many of the Respondent's activities took place before he became an Approved Person under the jurisdiction of the MFDA, his activities were in existence at the time of his membership and continued thereafter. Consequently, his conduct was subject to the by-laws, rules and regulations of the MFDA.

Given the evidence, as well as the Respondent's admissions, the panel found the charges proven.

The Penalty Phase

The number of victims is large, and so is the amount of which they were defrauded. As the Respondent himself suggested, he used monies from Peter to pay Paul - a classic Ponzi scheme which, as all Ponzi schemes must, eventually collapsed. In the end, there was no money left, and the complaints started to roll in. While some of the Respondent=s victims were financially more astute than others, it is not without significance that their average age, as calculated by the forensic investigators, was 76. These, then, were largely retirement funds.

This is Mr. Crackower' first brush with the MFDA. The only other mitigating factor is that he admitted his guilt, and therefore avoided the necessity not only of a lengthy hearing, but also of the need to have his victims appear before the panel in person. Apart from these two facts, it is hard to find any reason why the panel should be lenient.

The violations are serious. The Respondent's private business deals, undisclosed as they were to the MFDA member firm for which he worked, were not only to the extreme detriment of his clients, but also in conflict with the work for which he was employed. We note, as the Respondent himself informed us, that charges are now pending against him in the criminal courts. We do not in any way presume to prejudge these. What we have to deal with is his conduct which we have found to be in violation of MFDA by-laws, rules and regulations, which require the highest standard of those who are bound by them. As was recently said by a panel of the MFDA's Pacific Regional Council, if the public is to have confidence in the role of self-governing professions, deviations from this high standard must be dealt with severely: see *Re Arnold Tonnies*, June 28, 2005, No. 200503, and the authorities cited therein.

With respect to Allegations #1 and #2, the panel was presented with past decisions regarding the quantum of fines imposed by other panels. Generally speaking, these cases suggest that, with respect to misappropriation of funds and borrowing money from clients, the fine should roughly equal the amounts misappropriated or borrowed, and we see no reason to deviate from this practice in the case now before us. (See, for instance, *Re Robert Roy Parkinson*, April 29, 2005, No. 200501, and the authorities cited therein.)

With respect to Allegations #3 and #4, the panel was presented with past decisions dealing with failure to cooperate. There do not appear to be any cases, however, which deal explicitly with misleading an investigation. MFDA counsel argued that the penalty for misleading should be at least equal to penalties imposed for noncooperation. Otherwise, it would imply that it is better to lie during an investigation than to just not cooperate. We found this argument to be logical and persuasive.

Considering the gravity of the violations, the time-span over which they occurred, and the number of persons affected by the Respondent's conduct, the Council, after hearing from the parties, decided to impose the following sanctions:

1. A permanent prohibition on the Respondent from engaging in any securities related business while in the employ of, or sponsored by, any MFDA member;

2. A fine in the global amount of $3,400,000 for the violations set out in Allegations #1 and #2 of the Notice of Hearing;

3. A fine in the amount of $50,000 for the violation set out in Allegation #3;

4. A fine in the amount of $50,000 for the violation set out in Allegation #4;

5. Costs in the amount of $7,500.

At the conclusion of the hearing, when we pronounced the sanctions to be imposed on the Respondent, we noted that, were it within our power, we would have much preferred to order restitution to the victims. But that is a matter for a different forum and not within the panel's jurisdiction.

Given at Toronto, Ontario, this 22nd day of August, 2005.

"Fred Kaufman"
The Hon. Fred Kaufman, C.M., Q.C., Chair

"Paul Griffin"
Paul Griffin

"Christopher Marrese"
Christopher Marrese

Doc # 64136