

ONTARIO SECURITIES COMMISSION

In the Matter of
The MUTUAL FUND DEALERS ASSOCIATION
AND
OMAR ENRIQUE ROJAS DIAZ (also known as Omar Rojas)

APPLICATION

(For Hearing and Review of a Decision
under sections 21.7 and 8 of the *Securities Act*, R.S.O. 1990, c S. 5)

The Applicant, the Mutual Fund Dealers Association (the “**Applicant**” or the “**MFDA**”), seeks a hearing and review before the Ontario Securities Commission (“**Commission**”) of the decision of the Hearing Panel of the MFDA Central Regional Council dated January 29, 2021 (the “**Decision**”).

A. ORDERS SOUGHT

The Applicant requests that the Commission make the following orders:

1. An Order varying the Decision by imposing a fine on Omar Enrique Rojas Diaz (the “**Respondent**”) pursuant to s. 24.1.1(b) of MFDA By-law No. 1 in the amount of at least \$52,270, or at a minimum, an amount sufficient to disgorge the financial benefit that the Respondent obtained by engaging in the misconduct; or
2. In the alternative, an Order returning the matter to the MFDA Hearing Panel for a penalty hearing.

B. GROUNDS

The grounds for the request and the reasons for seeking a hearing and review are:

1. From December 9, 2013 to July 17, 2018, the Respondent was registered in Ontario as a dealing representative with Royal Mutual Funds Inc. (“**Royal**” or the “**Member**”), a Member of the MFDA. The Respondent worked for the Member from a branch office of Royal’s bank affiliate (the “**Bank**”).
2. In early 2017, the Respondent advised client MC that she had been pre-approved for a line of credit with Royal’s bank affiliate (the “**Bank**”) in the amount of \$10,000. Client MC was not interested in opening a line of credit; however, the Respondent continued encouraging client MC to do so, and on or about February 23, 2017, client MC agreed to open a line of credit with the Bank and the Respondent facilitated the opening of a line of credit for client MC.
3. On or about September 6, 2017, the Respondent changed the contact details (address, telephone number, and email) on client MC’s client profile to fictitious details without client MC’s knowledge or authorization. The changes enabled the Respondent to conceal subsequent activity in client MC’s account from client MC.
4. Between September 8, 2017 and June 29, 2018, without the knowledge or authorization of client MC, the Respondent processed approximately:
 - (a) 30 increases to the credit limit on client MC’s line of credit;
 - (b) 30 withdrawals from client MC’s line of credit; and
 - (c) 15 deposits to pay monthly interest charges so that the line of credit would not go into default.
5. By means of the unauthorized transactions described above, the Respondent misappropriated approximately \$39,270 from client MC’s line of credit and used the monies for his personal benefit.
6. At all material times prior to the discovery of the Respondent’s conduct by the Bank in July 2018, client MC was unaware that any money had been withdrawn from her line of credit by the Respondent.

7. On August 5, 2020, the MFDA issued a Notice of Hearing pursuant to sections 20 and 24 of MFDA Bylaw No. 1 commencing a disciplinary proceeding against the Respondent.
8. On December 8, 2020, the MFDA and the Respondent entered into an Agreed Statement of Facts (“ASF”), wherein the Respondent admitted that between on or about September 8, 2017 and June 29, 2018, he misappropriated approximately \$39,270 from one client, contrary to MFDA Rule 2.1.1 (the “**Standard of Conduct**”).
9. On December 14, 2020, a Hearing on the Merits was held via videoconference before a three-person Hearing Panel of the Central Regional Council of the MFDA during which the parties submitted the ASF and made arguments concerning the appropriate penalties to be imposed.
10. Based on the ASF, the Hearing Panel made a finding of misconduct against the Respondent and proceeded to hear submissions from Staff and the Respondent on the penalty to be imposed. Staff sought:
 - a permanent prohibition from conducting securities related business while in the employ of or affiliated with a Member of the MFDA, pursuant to section 24.1(e) of MFDA By-law No. 1;
 - a fine in the amount of \$52,270, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and
 - costs in the amount of \$5,900, pursuant to section 24.2 of MFDA By-law No. 1, which was supported by bill of costs.
11. On January 29, 2021, the Hearing Panel issued its Reasons for Decision accepting the admission of the Respondent that he had misappropriated approximately \$39,270 from a client, contrary to MFDA Rule 2.1.1, and imposing the following penalties:

- (a) a permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of, or associated with any Member of the MFDA; and
 - (b) an order that the Respondent pay costs to the MFDA in the amount of \$2,500.
12. The Hearing Panel rejected the MFDA's request for a fine and thereby allowed the Respondent to retain the benefit of monies he misappropriated from client MC.
13. This application for a hearing and review is based upon the following:
- a. the Hearing Panel erred in law, proceeded on an incorrect principle, and adopted an approach inconsistent with the public interest by imposing a penalty that, at a minimum, did not require the Respondent to disgorge monies that he had misappropriated;
 - b. the Hearing Panel erred in law and proceeded on an incorrect principle by concluding that imposing a financial penalty against the Respondent, who will otherwise retain the benefit of monies he misappropriated, "would punish past conduct which as Mithas states is not our role";
 - c. the Hearing Panel erred in law and proceeded on an incorrect principle when it concluded that it was a mitigating factor with respect to penalty that the bank forgave the amounts the Respondent had withdrawn from the client's line of credit;
 - d. the Hearing Panel erred in law and proceeded on an incorrect principle by ignoring or failing to address in its decision specific provisions of the MFDA's Sanction Guidelines that were relevant to this case, including provisions addressing the importance of general deterrence and disgorgement of the benefits received by a Respondent as a result of misconduct;

- e. the Hearing Panel erred in law and proceeded on an incorrect principle by imposing a penalty that does not advance the objective of general deterrence and investor protection;
- f. the Hearing Panel erred in law and proceeded on an incorrect principle when it treated the Respondent's inability to pay as a predominate sanction factor, and when it concluded that it would be "neither fair nor appropriate" to impose a financial penalty against the Respondent because of his inability to pay, without adequately considering the "egregious nature" of his misconduct and the need for general deterrence;
- g. the Hearing Panel's failure to impose a financial penalty on the Respondent in this case is inconsistent with the public interest in light of the seriousness of his misconduct and the financial benefit that he received, and its decision is inconsistent with the approach of other securities regulatory bodies including the Ontario Securities Commission; and
- h. such further and other grounds as counsel may advise and the Commission may permit.

C. DOCUMENTS AND EVIDENCE

The Applicant intends to rely on the following documents and evidence at the hearing and review:

1. MFDA Notice of Hearing issued August 5, 2020;
2. Transcript from the first appearance dated September 29, 2020;
3. Order dated September 29, 2020 arising from the first appearance;
4. Agreed Statement of Facts entered into by the MFDA and the Respondent dated December 8, 2020;
5. MFDA Staff's written submissions dated December 10, 2020;
6. MFDA Staff's Bill of Costs (summary) re. the Hearing on the Merits;
7. Transcript from the Hearing on the Merits held on December 14, 2020;

8. MFDA News Release dated December 15, 2020 (“MFDA Hearing Panel reserves judgment on sanctions in the matter of Omar Enrique Rojas Diaz”);
9. MFDA Staff’s supplemental written submissions dated January 14, 2021;
10. The decision dated January 29, 2021 that is the subject of the request for a hearing and review;
11. MFDA News Release dated February 1, 2021 (“MFDA Hearing Panel issues Decision (Penalty) and Reasons in the matter of Omar Enrique Rojas Diaz”);
12. Order (final) – once issued; and
13. Such other documents as counsel may advise and the Commission may permit.

DATED this 2nd day of March, 2021

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