

Re Chau

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Antony Kin San Chau

2024 CIRO 47

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: March 27, 2024 by electronic hearing in Toronto, Ontario

Decision: March 27, 2024

Reasons for Decision: April 16, 2024

Hearing Panel:

Barry Bresner, Chair

Casimir Litwin, Industry Representative

Craig Woolford, Industry Representative

Appearances:

Alan Melamud, Senior Enforcement Counsel

Antony Kin San Chau, Respondent, not in attendance or represented

REASONS FOR DECISION

I. INTRODUCTION

¶ 1 This disciplinary proceeding was commenced by Notice of Hearing dated July 17, 2023, alleging that, between December 14, 2020 and January 28, 2021, Aziz Fatehali Khamisa (“Khamisa”) and Antony Kin San Chau (“Chau”) had failed to disclose an agreement (“the Spirit Agreement”) that was material to a proposed transaction for the change of control of a Member of the MFDA, thereby:

- a) failing to provide full disclosure of the material terms of the proposed transaction, contrary to Mutual Fund Dealer Rules 2.1.1, 2.5.2, and 1.1.2(b) (as it relates to section 3.10 of CIRO By-law No. 1) (formerly MFDA Rules 2.1.1, 2.5.2 and 1.1.2 (as it relates to section 13.7 of MFDA By-law No. 1);
- b) failing to provide information to the MFDA that it required or considered necessary or desirable, contrary to section 3.10 of CIRO By-law No. 1 (formerly, section 13.7 of MFDA By-law No. 1) and Mutual Fund Dealer Rule 2.1.1; or
- c) misleading the MFDA concerning the full terms of the proposed change of control, contrary to Mutual Fund Dealer Rule 2.1.1.

¶ 2 Chau was duly served with the Notice of Hearing and was subsequently given timely notice of the hearing, but never delivered a reply or otherwise responded to the Notice of Hearing or participated in these proceedings.

¶ 3 On February 21, 2024, a CIRO Hearing Panel accepted a settlement agreement between Khamisa and CIRO staff in which Khamisa admitted to failing to disclose the Spirit Agreement to the MFDA and agreed to a one year prohibition from conducting securities related business while in the employ of or associated with any Dealing Member of CIRO registered as a mutual fund dealer, a five year prohibition from acting as an officer, director or acting in a supervisory capacity for any such Dealing Member, a fine of \$40,000 and costs of \$5,000.¹ The proceedings continued as against Chau.

¶ 4 Pursuant to Mutual Fund Dealer Rule 7.3.4 and Mutual Fund Dealer Rules of Procedure (“ROP”) 8.4 and 13.5, when a respondent does not serve a reply or attend at the hearing, the Hearing Panel may proceed with the hearing on the merits in the absence of the respondent and accept the facts alleged in the Notice of Hearing as having been proven. As Chau has ignored these proceedings and neither delivered a reply nor attended at the hearing, the Hearing Panel proceeded with the hearing on the merits and accepted the facts alleged in the Notice of Hearing as having been proven.

¶ 5 CIRO staff submitted, and the Panel admitted into evidence, the affidavit of Karen McGuiness, CIRO’s Senior Vice-President, Office of the Investor, Member Intake, and Innovation, sworn March 21, 2024. In her prior role as Senior Vice-President, Member Regulation, Compliance with the Mutual Fund Dealers Association of Canada (“MFDA”), Ms. McGuiness oversaw the MFDA’s review and approval of the proposed change of control of TeamMax Investment Corp. (“TeamMax”) from Chau to Khamisa.

¶ 6 CIRO staff further submitted, and the Panel admitted into evidence, the affidavit of John Gallimore, Manager of Investigations in the Enforcement Department of CIRO, sworn March 21, 2024, detailing the investigation into the events giving rise to these proceedings.

¶ 7 At the conclusion of the hearing, after due consideration of the affidavit evidence, the facts alleged in the Notice of Hearing and the submissions of CIRO staff, the Panel concluded that Chau had committed the alleged violations and that the sanctions sought by CIRO Staff were appropriate in the circumstances, with reasons to follow. These are those reasons.

II. OVERVIEW

¶ 8 Chau had been registered in the securities industry from approximately 1995 to March 2021 and had been the controlling shareholder, officer and sole director of TeamMax, a member of the MFDA at the material times. Chau was also registered in Ontario and British Columbia as a dealing representative with TeamMax from September 2009 to March 1, 2021 and as the Ultimate Designated Person (“UDP”) from January 4, 2010 to January 10, 2020. He has not been registered in any capacity since March 2021 and TeamMax resigned from membership in the MFDA effective August 12, 2022.

¶ 9 At the material time, the MFDA reviewed all proposed changes of control of a Member, pursuant to section 13.7 of MFDA By-law No. 1², in order to ensure that the Member would continue to be able to satisfy its obligations to clients and meet its regulatory requirements. As part of that review, the MFDA would consider

¹ *Khamisa (Re)*, (2024) CIRO 32

² Section 13.7 of MFDA By-law No. 1 states, in relevant part, “Notwithstanding the provisions of this Section 13, if the business or ownership of a Member is proposed to be reorganized or transferred, amalgamated or otherwise combined in whole or in part with another person (including a Member) in a manner which the Member or its business will cease to exist in, or will be substantially changed from, its then current form, or a change of control of a Member may occur, the Member (not less than 30 days prior to the proposed effective date of such event) shall give written notice to the Corporation. Upon receipt of such notice, the Corporation shall review the proposed transaction and may request from the Member, its auditors or any other person involved in the transaction, such information as it or the Board of Directors may require including, without limitation...any other information as the Corporation may consider necessary or desirable. The Corporation may either (a) approve the proposed transaction (which approval may be subject to terms and conditions) or (b) direct that the transaction not be completed if the Corporation determines in its sole discretion that the obligations of the Member to its clients cannot be satisfied or the By-laws and Rules will not be complied with by the Member or any continuing, new or reorganized entity, as the case may be.”

the impact of the change of control on the Member's operations, finances and any outstanding compliance issues, complaints or investigations. MFDA staff would also consider the disciplinary history and experience of the person who would be taking control of the Member and the continuing role, if any, of the person previously in control. In performing its review, the MFDA necessarily relied on full disclosure of the terms and conditions of the transactions by the Member and the individual parties to the transaction.

¶ 10 As submitted by CIRO and accepted by the Hearing Panel in *Re Khamisa*³, the purpose of section 13.7 is to enable the MFDA to fulfill its obligations to protect the public and maintain confidence in the mutual fund industry by reviewing proposed changes of control to ensure that such changes are not detrimental to the Member's ability to meet its obligations to the MFDA and its clients. The MFDA necessarily relies on the full and frank disclosure of the terms of proposed transactions by its Members to enable it to perform a proper review.

¶ 11 In November 2020, Khamisa provided informal notice to the MFDA of his intention to purchase the shares of TeamMax from Chau and, on December 14, 2020, he emailed a copy of the Share Purchase Agreement between Khamisa and Chau to the MFDA. Chau was copied on Khamisa's email. The Share Purchase Agreement provided for Khamisa's purchase of the shares of TeamMax for \$320,000 and contained an 'entire agreement' clause which stated, in relevant part, that the Share Purchase "Agreement contains the entire agreement between the parties. All negotiations and understandings have been included in this Agreement".

¶ 12 The MFDA sought additional information regarding the proposed transaction, including TeamMax's corporate organization chart, Chau's continuing role with TeamMax and any anticipated changes to TeamMax's operations post-closing. By email of December 15, 2020, Khamisa advised that he would replace Chau as an officer and director, that no changes to operations were anticipated and that Chau's only role would be that of a dealing representative. Chau was copied with the email.

¶ 13 On December 18, 2020, the MFDA advised Khamisa and Chau, by email, that the MFDA would approve the transaction subject to two conditions: (1) evidence that TeamMax would continue to comply with the MFDA's requirement that it hold an appropriate financial institution bond; and (2) evidence of approval or non-objection to the transaction by the Ontario Securities Commission. Those conditions were satisfied on or about January 28, 2021 and the transaction was fully approved by the MFDA.

¶ 14 On October 12, 2021 Khamisa sent an email to the MFDA attaching a Statement of Claim issued on July 30, 2021 in the Ontario Superior Court of Justice, naming Chau and TeamMax Insurance Ltd. as plaintiffs and Khamisa and TeamMax Investment Corp. as defendants. In that Statement of Claim, Chau alleged breaches by Khamisa of an agreement dated December 11, 2020, titled "Strictly Private and Confidential (NDA) – Ultimate Spirit of Agreement TeamMax Investment Corp." ("the Spirit Agreement"), which provided that, upon the transfer of ownership to Khamisa, Chau would retain control over the existing Advisors Network, the Advisor's Grid, Lease and Development and would have signing authority over the TD Bank operating account and a right to approve any sale of shares. The Spirit Agreement also provided that it would take priority over the Share Purchase Agreement. As pleaded in the Statement of Claim, "[t]he effect of the [Spirit Agreement] is that Chau retains full control over all decision making related to the Advisor Network, receipt of all overrides paid on the Advisor Network – this being the case regardless of whether Chau is a licensed advisor." In the action, Chau claimed damages, including payment of the \$320,000 purchase price for the shares of TeamMax.

¶ 15 The Spirit Agreement had not been disclosed to the MFDA at any time prior to the MFDA's approval of the change of control transaction. Upon reviewing the Statement of Claim, the MFDA sought a copy of the Spirit Agreement from TeamMax's Chief Compliance Officer and a copy was provided by Khamisa on December 10, 2021.

¶ 16 In connection with the MFDA's investigation of the failure to disclose the Spirit Agreement, Khamisa was interviewed by MFDA Staff on December 17, 2021 and January 14, 2022. During his interviews, Khamisa advised

³ *Supra* at para. 21.

that the Spirit Agreement had been drafted by Chau and that Chau had directed him to not disclose the Spirit Agreement when seeking approval from MFDA Staff for the share sale. The Spirit Agreement solely benefitted Chau.

III. ANALYSIS

¶ 17 It is evident that Chau deliberately withheld disclosure of the Spirit Agreement to MFDA Staff at the time approval was being sought for the sale of his shares of TeamMax to Khamisa. In addition to Chau's express instruction to Khamisa in that regard, the "Strictly Private and Confidential" nature of the Spirit Agreement and the fact that it expressly contradicts the 'entire agreement' clause of the Share Purchase Agreement, corroborates Khamisa's advice that Chau did not want it disclosed to MFDA Staff.

¶ 18 It is also evident that the Spirit Agreement would have been relevant and material to the analysis by MFDA Staff of the proposed share sale and might well have affected the granting of approval of the transaction or the nature and extent of the conditions attached to the approval of the transaction. Chau's ongoing control of TeamMax's Advisor Network and his signing authority over TeamMax's operating bank account, notwithstanding that he was no longer an officer or director, are factors that would reasonably be expected to have a material impact on TeamMax's operations.

¶ 19 As noted previously, the review of change of control transactions by MFDA Staff includes a consideration of the experience and qualifications of the person who would have control of and be responsible for the Member post-closing of the transaction. The failure to disclose the Spirit Agreement misled MFDA Staff by failing to reveal the true nature and extent of Chau's continuing control of the operations of TeamMax. In approving the transaction, MFDA Staff had relied on the misrepresentation that Chau's only role post-closing would be as a dealing representative.

¶ 20 Chau and TeamMax had been subject to ongoing regulatory investigations at the time the MFDA's approval was being sought for the share sale to Khamisa. Those investigations later resulted in MFDA Staff commencing proceedings against Chau and TeamMax and ultimately led to findings of misconduct by MFDA Hearing Panels. Chau's disciplinary history would have been material to MFDA Staff in deciding whether to approve the transaction or to the conditions attached to any such approval if MFDA Staff had been made aware of Chau's continuing control over TeamMax operations post-closing.

¶ 21 The deliberate failure to disclose the Spirit Agreement was a breach of section 13.7 of MFDA By-law No. 1 which frustrated the MFDA's ability to properly review and assess the consequences of the proposed share sale and constituted:

- a) a failure to provide full disclosure of the material terms of the proposed transaction, contrary to Mutual Fund Dealer Rules 2.1.1, 2.5.2, and 1.1.2(b) (as it relates to section 3.10 of CIRO By-law No. 1) (formerly MFDA Rules 2.1.1⁴, 2.5.2 and 1.1.2⁵ (as it relates to section 13.7 of MFDA By-law No. 1));
- b) a failure to provide information to the MFDA that it required or considered necessary or desirable, contrary to section 3.10 of CIRO By-law No. 1 (formerly, section 13.7 of MFDA By-law No. 1) and Mutual Fund Dealer Rule 2.1.1; or
- c) misleading the MFDA concerning the full terms of the proposed change of control, contrary to Mutual Fund Dealer Rule 2.1.1.

IV. SANCTION

⁴ MFDA Rule 2.1.1 requires Members and Approved Persons to deal fairly, honestly and in good faith with clients, observe high standards of ethics and conduct in the transaction of business and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

⁵ MFDA Rule 1.1.2 requires Approved Persons to comply with the MFDA's By-laws and Rules. The Respondent was an Approved Person.

¶ 22 In determining an appropriate sanction, the Hearing Panel considered the relevant factors identified in prior decisions and in CISO's Sanction Guidelines. In the present matter, particular attention was paid to the following factors:

- a) **Seriousness of the misconduct** – As submitted by CISO Staff, the material nondisclosure by Chau undermined the ability of the MFDA to review the proposed transaction in order to fulfill its obligation to protect the public and maintain confidence in the capital markets. In the slightly different, but analogous, context of a failure to cooperate, the Hearing Panel in *Chow (Re)* stated:
 - (i) “When a Member or Approved Person refuses to fully comply with their obligation to cooperate with Staff’s enforcement efforts to investigate complaints and concerns, they prevent the MFDA from performing its obligation to ensure the regulatory system achieves its goals of protecting the investor and fostering public confidence in the Markets and the securities industry as a whole.”⁶
 - (ii) The seriousness of the misconduct is aggravated by the fact that Chau was the owner, sole director and officer of TeamMax and that he used his control to intentionally prevent the disclosure of the Spirit Agreement in order to mislead the MFDA regarding the terms of the proposed transaction.
- b) **Past Conduct of the Respondent** – Chau was the subject of an application brought by MFDA Staff in 2014 arising from a number of compliance failures by TeamMax and Chau’s failure to address those compliance issues. In 2022, Chau entered a settlement agreement with MFDA Staff which resulted from his failure to fulfill his supervisory responsibilities as UDP of TeamMax and with respect to compliance with an order of a MFDA Hearing Panel. The Sanction Guidelines recognize that a “respondent’s prior disciplinary record is an aggravating factor and may warrant a harsher sanction”.⁷
- c) **Absence of Mitigating Factors** – Chau has chosen to not participate in this proceeding, has provided no explanation for his conduct and has neither expressed remorse nor committed to not re-offend. The evidence does not disclose any mitigating factors.
- d) **Financial Consequences of the Misconduct** – There is no evidence of a financial loss to TeamMax clients or a financial gain to Chau as a direct result of the misconduct. The Statement of Claim issued by Chau against Khamisa alleges that he has not been paid the \$320,000 purchase price for his shares.
- e) **Integrity of the Capital Markets** – As noted above, the failure to disclose the Spirit Agreement prevented the MFDA from performing its responsibility to properly assess the proposed change of control transaction. Conduct which interferes with the MFDA’s ability to regulate the industry has the potential to undermine confidence in the regulatory system and the integrity of the capital markets.
- f) **Specific Deterrence** – The permanent prohibition of Chau’s further participation in the mutual fund industry is the ultimate form of specific deterrence. That sanction is warranted in this case given that Chau intentionally caused the non-disclosure of the Spirit Agreement and has a history of non-compliance with regulatory requirements. There is no basis for concluding that, if Chau were permitted to work in the industry in the future, he would comply with the regulatory requirements. The permanent ban is required to protect

⁶ *Chow (Re)*, 2022 LNCMFDA 9 at para. 68-69.

⁷ Sanction Guidelines, p. 5 (#3)

the investing public and the integrity of the markets.

- g) **General Deterrence** – Given the seriousness and intentional nature of the misconduct, a substantial fine is warranted as a deterrent to others who might be tempted to engage in similar conduct. MFDA Staff sought a fine of at least \$65,000. The Hearing Panel concluded that a fine of \$65,000 would be an adequate deterrent in the circumstances.
- h) **Prior Decisions** – There is no prior decision, other than *Khamisa (Re)*⁸, which addresses an appropriate sanction for the Respondent’s conduct. In the *Khamisa* matter, the sanction included a time-limited prohibition, a fine of \$40,000 and costs of \$5,000. However, it has been recognized by both the Courts and Hearing Panels that settlements often contain an element of compromise and do not necessarily reflect the appropriate penalty in all cases. Further, *Khamisa* was less-blameworthy than Chau. Chau drafted the Spirit Agreement for his own benefit and directed *Khamisa* to not disclose it to the MFDA in seeking approval for the proposed transaction. The circumstances warrant a more substantial fine than that agreed to by *Khamisa*. The Hearing Panel has concluded that a fine in the amount of \$65,000 reflects the seriousness of the conduct and, as noted above, serves as an appropriate deterrent.

V. COSTS

¶ 23 MFDA Staff also seek costs of \$6,000. That amount is supported by the Bill of Costs filed by Staff and appears to be a reasonable amount that fairly reflects the time and resources expended by the MFDA in this matter.

VI. CONCLUSION

¶ 24 For the reasons stated above, it was ordered and directed that:

- a) Antony Kin San Chau is permanently prohibited from conducting securities related business while in the employ of or associated with any Dealing Member of CIRO registered as a mutual fund dealer, pursuant to Mutual Fund Dealer Rule 7.4.1.1(e);
- b) Antony Kin San Chau shall pay a fine of \$65,000 in certified funds pursuant to Mutual Fund Dealer Rule 7.4.1.1(b);
- c) Antony Kin San Chau shall pay costs in the amount of \$6,000 in certified funds pursuant to Mutual Fund Dealer Rule 7.4.2.

DATED at Toronto, Ontario this 16TH day of April 2024.

“Barry Bresner”

Barry Bresner, Chair

“Casimir Litwin”

Casimir Litwin, Industry Representative

“Craig Woolford”

Craig Woolford, Industry Representative

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⁸ *Supra*