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 and IN THE MATTER OF A SETTLEMENT HEARING PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Domenic Fanelli and Michele Torchia

Heard: December 3, 2010 in Toronto, Ontario
Reasons for Decision: January 17, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.	Chair
Darcy M. Lake	Industry Representative
Robert C. White	Industry Representative

Appearances:

Michelle Pong	)	For the Mutual Fund Dealers Association of Canada
Thomas Kent	)	For the Respondent, Domenic Fanelli
Domenic Fanelli	)	In Person
Michele Torchia	)	The Respondent, Michele Torchia, did not appear

1. As set out in the Notice of Hearing, the MFDA alleged five violations by Fanelli and two violations by Torchia of the by-laws, rules or policies of the MFDA. Upon the commencement of proceedings, the Panel was advised that Fanelli had entered into a settlement agreement with Enforcement Counsel for the MFDA. We are also advised that, notwithstanding proper service of the Notice of Hearing, Torchia had not served or filed a reply. Torchia did not appear nor was he represented by counsel. He has not participated in any way in the hearing process.

FANELLI MATTER

2. We decided to proceed with the Fanelli matter. At the outset of the proceedings, we considered a joint motion by Staff and counsel for the Respondent Fanelli to move the proceedings in camera. We granted that motion. We then considered, in detail, the provisions of the Settlement Agreement itself. Counsel for the MFDA accepted admissions by Fanelli as to contraventions found in paragraphs 21, 22 and 23 of the Settlement Agreement rather than proceed with all the alleged violations of the original five allegations found in the Notice of Hearing. We heard submissions as to the applicable precedents that should guide this Panel in determining whether to accept or reject the settlement. We next heard submissions as to why this particular Settlement Agreement met the appropriate criteria.

3. In that regard, counsel reviewed the registration of Fanelli with Investors Group Financial Services Inc. from February 1998 to September 2003 when he resigned in good standing and his subsequent registration with AXA Financial Services Inc. from February 2005 to October 2005. Counsel then went on to review the details of the Settlement Agreement and the reasons for arriving at the Agreement.

4. After hearing all of the submissions from both counsel, we retired to consider both the Settlement Agreement and the applicable legal principles. After deliberation, we unanimously concluded that it was appropriate to accept the Settlement Agreement. After the Panel returned to the hearing room, we advised both counsel of our decision that the allegations had been proven, on the balance of probabilities.

5. As a Panel, we are obviously concerned with the type of conduct which is reflected in the Settlement Agreement, particularly when the Respondent appears to have received funds from certain participants in the investment schemes. We believe, however, that the settlement fairly addresses the concerns that we have. In determining whether the Settlement Agreement should be accepted, we have considered a number of factors. These factors include the public interest, whether the Settlement Agreement is reasonable and proportionate, the issues of specific and general deterrence, prevention of this type of conduct in the future, the confidence and integrity of the Canadian capital markets and the Mutual Fund Dealers Association and the regulatory process. It would appear that there are some mitigating factors, in that the Respondent Fanelli cooperated with the investigators and reached a settlement agreement. The admissions made by the Respondent Fanelli reduced the costs and time involved and led to certainty as to the procedures to be followed. Fanelli has voluntarily ceased to be registered to conduct securities related business.

PENALTY

6. We invited submissions from counsel for the MFDA as to penalty. Counsel, first of all, advised that the Respondent Fanelli had agreed to the following sanctions:

(a) The Respondent shall be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member;

(b) The Respondent shall pay a fine in the amount of $5,000 upon the acceptance of this Settlement Agreement;

(c) The Respondent shall pay $1,000 in respect of the costs of the investigation and settlement of this matter upon the acceptance of this Settlement Agreement; and

(d) The Respondent will attend, in person, on the date set for the Settlement Hearing.

7. We are of the view that the negotiated settlement should not be disturbed provided that the penalties are within the reasonable range of appropriateness. In that regard, we have considered the remarks of the Panel of the District Council in *Re Milewski*, [1999] I.D.A.C.D. No. 17 decided on July 28, 1999. The Panel made these comments at page 9 of that decision:

> Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

8. We have carefully reviewed the MFDA Penalty Guidelines and the effect of these penalty guidelines on this type of conduct. The proposed penalty in the amount of $5,000.00 by way of a

fine, together with costs in the amount of $1,000.00, is below the recommended amount found in the penalty guidelines. As Mr. Kent, his counsel, said, Fanelli has accepted his mistake and agrees to the prohibition. Mr. Kent refers to the various paragraphs of the reply as filed in this hearing. It is his submission that the Respondent Fanelli was really a titular head in the process who was involved in the balancing act which did not include soliciting. Furthermore, Fanelli cooperated with the MFDA in many aspects of this matter, including his willingness to subject himself to a 4½ hour interview by MFDA Staff and his willingness to enter into a Settlement Agreement. His failure to cooperate related to the failure to produce bank statements which related to a joint bank account with his wife. Fanelli, at the present time, is employed in the construction industry. He has limited assets. He is the sole support of his wife and family. Mr. Kent's submission, on behalf of Fanelli, is that Fanelli was not responsible for the investments made in Kewl. Fanelli has provided the MFDA with certified funds in the amount of $6,000.00, which will be released upon acceptance of the Settlement Agreement.

9. In summary, while we found the amount of the fine under the terms of the settlement to be lower than the stated general guidelines, we accepted the reasons as to why this would be appropriate in the circumstances. For all of the above reasons, we accepted the Settlement Agreement and signed the appropriate order presented to us as the conclusion of the hearing. We agreed to provide reasons for our decision at the hearing. These are our reasons.

TORCHIA MATTER

10. After concluding the Fanelli matter, we invited Enforcement Counsel to proceed with the Torchia matter. As Torchia failed to deliver a reply and did not appear, Rule 8.4(1) applies. This Rule allows the Panel to proceed without further notice to Torchia. Rule 7.3 applies which

allows the Panel to accept the facts alleged and conclusions drawn by the corporation in the Notice of Hearing as proven and impose penalties and costs described in section 24.1 and 24.2, respectively, of MFDA By-law No. 1. Pursuant to that rule, we accept the facts alleged against Torchia in the Notice of Hearing, in paragraphs 6, 7, 20, 21, 24, 25, 26, 27, 28, 30, 32, 33, 34 and 35. As earlier noted, Torchia did not attend nor was he represented by counsel.

11. In summary, we are satisfied Torchia has received proper notice of proceedings. We also confirm on the authority of *Taub* v. *Investment Dealers Association of Canada*, [2009] O.J. No. 3552 that the Panel has the jurisdiction to rule as to Torchia's conduct.

12. The allegations referred to in the various paragraphs cited above deal with the failure to properly prepare Know Your Client forms. The actions of Torchia reveal a breach of the required standard of conduct. In addition, he failed to cooperate by refusing to provide information and documents when requested during the investigation. He further would not provide a statement in writing or conduct an interview with the MFDA. The investigation could not be completed because of this failure.

13. We consider the penalties suggested reflect the necessity of the protection of the investor, the serious allegations of misconduct, the past conduct of the Respondent, the harm suffered by the investors, any benefits that may have been received by the Respondent, the risk to investors in the capital markets and the damage which may been caused to the integrity of the capital markets. We have also considered specific and general deterrence as well as previous decisions made in similar circumstances. There is a further reason why the penalty sought is appropriate. The penalty reflects the serious breach of the KYC obligations in that he did not meet or receive instructions from the people who were making the investments. In addition, he failed to

cooperate with MFDA by failing to give statements or interviews on an intentional basis. Although he has no previous disciplinary history, this aspect of the case bears very little weight because of the seriousness of the conduct.

14. The loss by the client could not be directly connected to Torchia nor could the MFDA determine if other clients had been adversely affected because of Torchia's failure to cooperate. It is not clear whether he received any benefits but it is clear that he is unwilling to comply with the necessary requirements of the securities industry. The penalty as suggested is appropriate based on the previous decisions which are found at Tabs 12, 13, 14 and 15 of the book of authorities. These decisions all involve a minimum fine of $50,000.00 and costs. These sums are similar to the sums sought in this particular case. The summary on penalty as provided by counsel for the MFDA at paragraph 38 of counsel's submissions accurately reflects the necessary approach.

15. In the result, the following penalty is imposed upon the Respondent Torchia:

(a) A permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1;

(b) A fine in the amount of $65,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and

(c) Costs in the amount of $7,500 attributable to conducting the investigation and hearing of the matter, pursuant to section 24.2 of MFDA By-law No. 1.

DATED this 17th day of January, 2011.

"John Webber"
The Hon. John B. Webber, Q.C.
Chair

"Darcy Lake"
Darcy M. Lake,
Industry Representative

"Robert White"
Robert C. White,
Industry Representative

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