Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**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: David George Rounthwaite

Heard: July 16, 2012 in Toronto, Ontario
Reasons for Decision: July 30, 2012

# REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

| | |
|---|---|
| The Hon. Patrick T. Galligan, Q.C. | Chair |
| Brigitte J. Geisler | Industry Representative |
| Cheryl Hamilton | Industry Representative |

Appearances:

| | | |
|---|---|---|
| Lyla Simon | ) | Counsel, Mutual Fund Dealers Association of |
| | ) | Canada ("MFDA") |
| David George Rounthwaite | ) | Respondent, appeared in person |
| | ) | |

1. The Staff of the Mutual Fund Dealers Association ("MFDA") and the Respondent entered into a settlement agreement which they had negotiated pursuant to s. 24.4.1 of MFDA By-law No. 1. They submitted the settlement agreement to this Hearing Panel, pursuant to Rule of Procedure 15.1, for approval or rejection. After considering the settlement agreement, the other material filed and upon hearing the submissions made by Enforcement Council and by the Respondent, we issued an order accepting the settlement agreement. These are our reasons for making that order.

**THE CONTRAVENTIONS**

2. The Respondent admits that he:

(i) engaged in discretionary trading as part of his general practice; and specifically, from 2006 to 2009, engaged in disciplinary trading in 29 instances in the accounts of 14 clients, seven of whom had provided the Respondent with a Limited Trading Authorization, contrary to MFDA Rule 2.3 and Rule 2.1.1, and the terms of his registration as a mutual fund salesperson; and

(ii) facilitated an investment by a client in 2008 in a charitable donation program which had not been approved for sale by Worldsource and after CRA had disallowed the charitable donation program in 2007, contrary to MFDA Rules 2.1.4, 1.2.1(d), and Rule 2.1.1

**TERMS OF SETTLEMENT**

3. The Respondent agreed to the following terms of settlement:

(i) the Respondent shall pay a fine in the amount of $20,000;
(ii) the Respondent shall pay costs in the amount of $5,000;
(iii) the Respondent shall attend in person at the Settlement Hearing; and
(iv) the Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations.

**THE CIRCUMSTANCES**

4. The circumstances are set out in detail in paragraphs 13-25 inclusive of the Settlement Agreement, which are attached as Appendix 'A' to these Reasons for Decision. The following is a brief summary of them.

5. Discretionary trading. Between 2006 and 2009 the Respondent made 29 discretionary trades on behalf of 14 clients. Seven of those clients had provided him with limited trading authorization. Following discussion with the clients, the Respondent would undertake the selection of investments and complete the transactions without confirmation by the clients. Upon completion of the transactions, the Respondent would write to his clients setting out the details of the completed transactions. There have been no client complaints and no known losses from the discretionary trades.

6. Facilitating investments not approved by the Member. From 2003 to 2007 the Respondent recommended investments to 47 clients whereby they invested in a tax shelter charitable donation program. Ultimately Canada Revenue Agency disallowed the donations. The clients were reassessed. The Respondent had himself invested in the program and was also reassessed. The Respondent had advised his employer that he was facilitating referrals to the tax shelter, however, he did not properly seek or receive authorization to sell or refer the product.

**SERIOUSNESS OF THE CONTRAVENTIONS**

7. Discretionary trading is fundamentally wrong. Subject to certain exceptions, which are not applicable here, Member Rule 2.3.1 absolutely prohibits it. We agree with the reasons which Ms. Simon submitted for the prohibition. It:

(i) undermines the client's right and ability to make informed decisions about their financial affairs;
(ii) subverts the ability of a Member to properly supervise trading activity; and
(iii) destroys the integrity of the audit trail.

8. Jurisprudence emanating from MFDA Hearing Panels is consistent that even when an Approved Person fully apprises a client of the details of a transaction, after it has been made, a discretionary trade is still wrong. See *Re O'Brien*, [2008] LNCMFDA 17 and *Re Price*, [2011] MFDA Case No. 200814.

9. Facilitating the investment in investments which have not been approved by the Member deprives the Member of its opportunity to fulfill its obligation to supervise Approved Persons employed by it. Consequently it is a serious matter.

**CIRCUMSTANCES OF MITIGATION**

10. In determining an appropriate remedy it is always necessary to consider mitigating circumstances. The circumstances of mitigation which we take into account are:

(a) The Respondent has no prior disciplinary history after many years of working in the financial services industry.
(b) He neither sought nor obtained any improper benefits from his work for his clients.
(c) While it does not go to liability, the fact that he fully reported to clients on transactions mitigates from the gravity of the discretionary trades.
(d) He has cooperated fully with Staff and has admitted his contraventions. That shows remorse and an intention to fully comply with what is expected of an honest person in the industry.
(e) Pursuant to the terms attached to his transfer of registration, the Respondent has completed two required courses. He also took an additional course to further his knowledge of the securities industry.
(f) There were no client complaints.

**THE DUTY OF A SETTLEMENT HEARING**

11. It is well settled that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties in their settlement agreement. Rather, our duty is to determine whether the penalty is a reasonable one and whether it meets the objectives of the

disciplinary process which are to maintain the integrity of the Investment Services Industry and to protect the public. In *Re Professional Investments (Kingston) Inc.*, [2009] LNCMFDA 9 at paragraph 13 the following appears:

> 13. In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. As has been said: "The settlement process is one of negotiation and compromise and the penalty imposed following a settlement will often be less onerous than one imposed following a Hearing where similar findings are made."

12. See also *Re Raymer*, [2009] LNCMFDA 15 at paragraph 4:

> 4. It is generally agreed that hearing panels should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness given the conduct of the Respondent. (See, for instance, *Re Rodney Jacobson*, June 11, 2007, Prairie Regional Council, No. 200712; *Re Clark*, [1999] I.D.A.C.D. No. 40, and *Re Milewski*, [1999] I.D.A.C.D. No. 17.)

13. The courts have addressed the importance of settlements and have approved of their place in the disciplinary process. See *B.C. Securities Commission v. Seifert*, [2006] BCJ No. 225, where the following appears at p. 49:

> Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing. …

14. Finally we refer to the comments of an IIROC Hearing Panel in the recent case of *Re Vorstadt*, [2012] IIROC at p. 4:

> Before leaving this case we wish to stress the importance of respect for the settlement process. Settlement leads to fair, efficient and economical resolution of

disciplinary matters. The settlement process should be encouraged and supported. In *Re Clarke*, [1999] I.D.A.C.D. No. 40, the Hearing Panel stated, at p. 3:

> The panel must be cognizant of the importance of the settlement process and should not interfere lightly in a negotiated settlement. [Emphasis added.]

We subscribe to that view.

**GUIDELINES AND OTHER DECISIONS**

15. In determining whether a settlement is a reasonable one, a hearing panel is entitled to look at regulatory guidelines and other decisions. Guidelines are not binding upon a hearing panel and cannot derogate from its responsibility to decide what might be an appropriate penalty in a given case. However guidelines are useful in that they show what penalties Members of the industry consider to be generally appropriate. In this case the guidelines for discretionary trading suggest a minimum fine of $5,000. The fine agreed to in this case is substantially in excess of that.

16. Decisions in other cases can often be of some assistance in helping to indicate what might be a reasonable range of penalties. It is always necessary to be cautious about relying too heavily on decisions in other cases because no two cases are ever the same. We were referred to three decisions which involve discretionary trading. They were *Re O'Brien (supra), Re Price*, [2011] MFDA No. 200814 and *Re Moro*, [2007] MFDA No. 200714. The fine agreed to in this case is well within the range of fines in those cases.

17. In *O'Brien* a permanent prohibition against conducting securities business was imposed. The facts in *O'Brien* were so egregious and his disciplinary history was so extensive that we do not consider it a comparable case to this one in respect to the prohibition aspect of a penalty.

18. In both *Price* and *Moro* there were prohibitions imposed restricting the Respondents from a supervisory role for a two-year period. However, in those cases, they were against acting in supervisory capacities. They do not suggest that a reasonable penalty for conduct such as this must include a prohibition against conducting securities investment activities in any capacity. We are of the opinion that in all of the circumstances it was not unreasonable for the parties to

agree upon a penalty which did not prohibit the Respondent from earning his livelihood in the securities business.

19. The *Price* and *Moro* decisions dealt only with the issue of discretionary trading arising through the use of blank pre-signed forms. This matter also involves the secondary issue of the referral to the tax shelter product when the Respondent was aware that other clients had been reassessed. The penalty imposed reflects the seriousness of both of these transgressions.

**IMPACT OF THE PENALTY**

20. Monetary penalties are imposed to act as specific and general deterrence. The Respondent is an individual with limited resources. He is not a large organization. The penalty composed of a fine of $20,000 and costs of $5,000 is a significant penalty to him. The Panel noted that the Respondent had made payment of the penalty to the MFDA, which funds were held in escrow pending the resolution of this hearing. The penalty imposed is sufficient to act as a specific deterrent to this Respondent and should be sufficient to alert all Approved Persons that similar conduct will attract significant consequences.

**DECISION**

21. At the conclusion of the hearing we withdrew from the hearing room. We considered the circumstances of this case and reached the conclusion that the settlement was a reasonable one. Therefore we accepted it.

**DATED** this 30th day of July, 2012.

"P.T. Galligan"
The Hon. P. T. Galligan, Q.C.
Chair

"Brigitte J. Geisler"
Brigitte J. Geisler,
Industry Representative

"Cheryl Hamilton"

Cheryl Hamilton,
Industry Representative

Doc 305901

## APPENDIX 'A'

**Respondent's Misconduct**

13. In February 2010, Worldsource supervisory staff identified irregularities in the Respondent's client files including blank signed forms, evidence of discretionary trading, and an unauthorized referral arrangement.

14. Worldsource commenced a supervisory investigation, which included an interview with the Respondent, and a review of all of the Respondent's client files. Further instances of discretionary trading were found.

15. MFDA Staff also conducted an investigation, which revealed that the Respondent had engaged in discretionary trading and an unauthorized referral arrangement or outside business activity in relation to sales of a tax shelter charitable donation program, ParkLane Donations for Canada ("ParkLane").

*Discretionary Trading*

16. The Respondent's general practice was to meet with a client and determine their general investing intentions and have the client sign a trade form without the particulars of the trade(s) indicated on the form. Once the client had left his office, the Respondent would decide on the particulars of the trade(s) and populate the appropriate fund codes, number of units and names of the mutual funds to be traded on the form. Alternatively, in some instances, the Respondent obtained a Limited Trading Authorization ("LTA") from the client with respect to their account, and then decided on the particulars of the trade and populated the details of the trade on the trade processing form. In both cases, the Respondent would then submit the trade for processing. In both cases, the client did not determine the specific elements of the trade(s).

17. Following the processing and confirmation of the trades, the Respondent would send the client a follow-up letter setting out the details of the completed transactions.

18. Twenty-nine specific instances of this form of 'authorized' discretionary trading were identified in accounts serviced by the Respondent during the period 2006 to 2009. These

instances occurred in the accounts of 14 clients, seven of whom had provided the Respondent with a Limited Trading Authorization.

19. There have been no client complaints and no known client losses concerning the authorized discretionary trading engaged in by the Respondent.

*Outside Business Activity / Conflict of Interest*

20. From 2003 to 2007, the Respondent recommended and facilitated investments by 47 clients and four individuals in ParkLane, a tax shelter charitable donation program.

21. The Respondent also personally invested in ParkLane as follows: $47,250 in 2003; $27,900 in 2004; $27,900 in 2005; and $26,000 in 2006.

22. The Respondent earned approximately $57,558 in sales commissions in relation to the clients and individuals to whom he sold or referred the ParkLane product.

23. In 2007, the Canada Revenue Agency ("CRA") disallowed all donations to ParkLane, and the participants (including the Respondent) were reassessed.

24. In 2008, the Respondent facilitated one client investing in ParkLane notwithstanding that the Respondent had by then already been advised by CRA that it was disallowing ParkLane as a charitable donation program and that individuals who had invested in it were having their tax returns reassessed.

25. The Respondent advised Worldsource on his annual registration renewals that he was facilitating referrals to "ParkLane"; however, he did not elaborate on the nature of the referral in his disclosure and at no time did he properly seek or receive Worldsource's authorization to sell or refer ParkLane in accordance with Worldsource's policies and procedures for doing so and the requirements of MFDA Rule 1.2.1(d).[1]

[1] MFDA Rule 1.2.1(d) has since been renumbered as MFDA Rule 1.2.1(c). The wording of the Rule has not changed.