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 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Stephen Arnold Smith

Heard: February 8, 2011 in Toronto, Ontario
Reasons for Decision: March 2, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.	Chair
David W. Kerr	Industry Representative
Guenther Kleberg	Industry Representative

Appearances:

Francis Roy	)	For the Mutual Fund Dealers Association of Canada
	)	
Stephen Arnold Smith	)	Not in attendance or represented by counsel
	)	

1. The Mutual Fund Dealers Association of Canada (the "MFDA") alleged five violations by the Respondent of the By-laws, Rules or Policies of the MFDA in the original Notice of Hearing, dated September 28, 2010. The Panel was advised that, in fairness to the Respondent, certain amendments should be made to the Notice of Hearing. The first amendment was to insert the word "former" before the words "client WS". MFDA Investigative Staff indicated that this amendment accurately reflects the fact situation herein. The second amendment was to paragraph 6, which confirmed that the Claimant's mutual fund investments were not transferred to Quadrus Investment Services Ltd. ("Quadrus") when the Respondent registered there. This amended Notice of Hearing was sent to the Respondent by MFDA counsel on Tuesday, February 1, 2011 at 3:17 p.m. with a covering email which made reference to the amendments and the reasons for the same.

2. The Respondent was invited to advise as to whether he objected to any of the amendments. Counsel for the MFDA did not receive any notice from the Respondent as to these amendments to the Notice of Hearing.

3. The Respondent was invited to advise as to whether he objected to any of the amendments. Counsel for the MFDA did not receive any notice from the Respondent as to these amendments to the Notice of Hearing.

4. The Panel reviewed the affidavit evidence. The Panel heard the *viva voce* evidence of the Claimant as to his original investment with the Respondent and the amount of money he had paid to the Respondent. The Claimant described his efforts to recover the monies from the Respondent including taking a promissory note. He commenced action upon the promissory note. A default judgment was granted against the Respondent. The Claimant indicated that only $500.00 had been paid on the outstanding judgment. He continues his attempts to recover his money.

5. In addition, counsel advised the Panel that as a result of the amendments to the Notice of Hearing, Allegations #1, #3 and #4 should not proceed. They were withdrawn upon the request of counsel.

6. The remaining Allegations read as follows:

Allegation #2: Between September 2004 and February 20, 2007, the Respondent failed to deal fairly, honestly and in good faith with former client WS by deliberately misleading client WS about the status of his investment in Smith & Tomyak, contrary to MFDA Rule 2.1.1.

Allegation #5: Commencing on or about May 12, 2009, the Respondent has failed to produce for inspection copies of documents and records requested by the MFDA during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.

7. The Panel ruled that it has jurisdiction over the Respondent. He is bound to observe and comply with the MFDA Rules, and, notwithstanding his resignation from his position as a mutual funds salesman on February 20, 2007, he is still subject to discipline proceedings pursuant to the MFDA Rules. It is clear from the case of *Investment Dealers Association of Canada v. Taub*, [2009] O.J. No. 5032 (Ont. C.A.), 2009 ONCA 628, at paras. 42 – 46, that there is no statutory impediment preventing self-regulatory organizations like the MFDA from continuing to exercise jurisdiction over a former member.

8. As the Respondent failed to appear, the MFDA Rules allow the Panel to proceed without further notice to the Respondent. The Rules also allow the Panel to accept as proven the facts alleged in the conclusions found in the Notice of Hearing. Therefore, we accept the facts alleged in the Notice of Hearing, at paragraphs 4, 5, 7, 16, 17, 18, 19, 20, 22, 23, 25 and 26. We were satisfied that the contraventions alleged have been proven on a balance of probabilities.

9. The Panel then invited Enforcement Counsel to make his submissions as to penalty. Mr. Roy submitted that the following penalties are appropriate:

(a) a permanent prohibition from conducting securities related business in any capacity over which the MFDA has jurisdiction, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
(b) a fine in the amount of $50,000 for failing to cooperate during an MFDA investigation, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

(c) a fine in the amount of $26,000 for engaging in conduct unbecoming an Approved Person, pursuant to s. 24.1.1(b) of the MFDA By-law No. 1; and

(d) costs attributable to conducting the investigation and prosecution of this matter be paid by the Respondent, in the amount of $7500, pursuant to section 24.2 of MFDA By-law No. 1.

10. The penalties suggested must reflect the protection of the investor, serious allegations of misconduct, conduct of the Respondent, harm suffered by the Complainant, benefits that have been received by the Respondent, and generally the risk to investors and capital markets including damage which may have been caused to the integrity of the capital markets. We have also considered specific and general deterrence, as well as previous decisions referred to by counsel made in similar circumstances.

11. There is a further reason why the penalties sought are appropriate. The penalties reflect the serious failure to deal fairly, honestly and in good faith with the Complainant by deliberately misleading the Complainant about the status of the $26,000 investment. In addition, the Respondent failed to cooperate with the MFDA by refusing to give statements or interviews. Although he has no previous disciplinary history this aspect of the case bears very little weight because of the seriousness of the conduct.

12. It is clear that he received the benefit of $26,000 from the Complainant. It is clear that he is unwilling to indicate where those funds have now been lodged, or what possibility of recovery exists. This penalty will communicate to both the public and the industry that serious consequences will befall those who frustrate the MFDA in performing its regulatory mandate.

13. In addition, the MFDA penalty guidelines recommend fines and prohibition. The fine for failure to cooperate is set at a minimum of $50,000 together with a permanent prohibition. The Panel agrees with the submissions of counsel as to the various factors that must be considered, as set forth in paragraph 46 of his submission.

14. Finally, with reference to the proposed fine in the amount of $26,000, we find it to be a disgorgement of the funds that the Respondent received from the Complainant. This penalty is consistent with these previous MFDA cases as cited: *In the Matter of Earl Crackower*, [2005]

Hearing Panel of the Ontario Regional Council, MFDA File No. 200506, Panel Decision dated July 20, 2005; *In the Matter of Robert Roy Parkinson*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200501, Panel Decision dated April 29, 2005; and *In the Matter of Raymond Brown-John*, [2005] Hearing Panel of the Pacific Regional Council, MFDA File No. 200502, Panel Decision dated June 27, 2005. There is no reason why, under these circumstances, the Panel should not impose the permanent prohibition as requested.

15. In the result the following penalties and costs are imposed upon the Respondent:

(a) A permanent prohibition from conducting securities related business in any capacity over which the MFDA has jurisdiction pursuant to s. 24.1(e) of MFDA By-law No. 1;
(b) A fine in the amount of $50,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
(c) A fine in the amount of $26,000 for engaging in conduct unbecoming an approved person pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
(d) Costs in the amount of $7,500 attributable to conducting the investigation and hearing of the matter pursuant to s. 24.2 of MFDA By-law No. 1

DATED this 2nd day of March, 2011.

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

"David Kerr"
David W. Kerr,
Industry Representative

"Guenther Kleberg"
Guenther Kleberg,
Industry Representative

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