



Now New Self-Regulatory Organization of Canada, a consolidation of IIROC and the MFDA

**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 Scott Smockum

Heard: September 23, 2022 by electronic hearing in Toronto, Ontario
Decision and Reasons: February 8, 2023

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

The Hon. Robert P. Armstrong, K.C.
Brigitte J. Geisler
Guenther W. K. Kleberg

Chair
Industry Representative
Industry Representative

Appearances:

Brendan Forbes)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
Jordan Glick)	Counsel for Respondent
)	
)	
Stephen Smockum)	Respondent
)	

I. INTRODUCTION

1. Stephen Scott Smockum (the “Respondent”) was an Approved Person registered with Desjardin Financial Securities Investments Inc. (“Desjardin”), a Member of the MFDA, and GP Wealth Management Corporation (“GP Wealth”), a Member of the MFDA.

2. Pursuant to the *Amended* Notice of Hearing, he was charged with the following Allegations:

Allegation #1: Between August 2016 and July 2019, the Respondent borrowed monies from clients, thereby engaging in personal financial dealings with clients which gave rise to conflicts or potential conflicts of interest that he failed to disclose to the Member or otherwise ensure were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to the Member’s policies and procedures and MFDA Rules 2.1.4, 2.1.1, 2.5.1, and 1.1.2.

Allegation #2: Between in or about August 2016 and February 2019, the Respondent engaged in an outside activity without prior written approval from the Member, contrary to the Member’s policies and procedures and MFDA Rules 1.3, 2.1.1, 2.5.1, and 1.1.2.

Allegation #3: Between on or about April 18, 2017 and January 3, 2018, the Respondent recorded false notes in the Member’s system regarding the reason for redemptions of mutual funds in the accounts of two clients, contrary to MFDA Rule 2.1.1.

Allegation #4: Between August 2016 and ~~July~~ September 2019, the Respondent provided false or misleading statements to a Member on annual update checklists, and during the course of a Member’s investigation into his conduct, contrary to MFDA Rule 2.1.1.

3. Pursuant to the Agreed Statement of Facts dated March 22, 2022 (“ASF”), the Respondent admitted that the facts set out in part 4 in the Agreed Statement constituted misconduct as alleged by the MFDA.

4. The sole issue for this Hearing Panel is to consider the appropriate penalty and costs to be imposed on the Respondent.

II. THE FACTS

5. The following paragraphs in this section are a summary from the Agreed Statement of Facts.

6. The Respondent was registered in the securities industry between April 2006 and September 2019. Between July 2014 and February 2019, he was registered in Ontario as a dealing representative with Desjardin. He was a branch manager for Desjardin from July 2014 to April

2016. From February 2019 to September 2019, the Respondent was registered in Ontario as a dealing representative with GP Wealth.

7. On September 24, 2019, GP Wealth terminated the Respondent upon discovering the conduct described in these Reasons. The Respondent is not presently registered in the securities industry in any capacity.

8. At all material times the Respondent carried on business in the Norwood, Ontario area.

i. The Allegations

a) Allegation #1 – Personal Financial Dealings with Clients

9. The Respondent while registered and employed by Desjardin borrowed monies from eight different clients. He did not inform Desjardin of these loans. Two of these loans were from clients who were vulnerable clients by virtue of their age. He also borrowed money from another client for the purpose of starting a medical marijuana business. This client relied upon her investments for income. Approximately half of that borrowing was repaid by the Respondent to that client. While employed with GP Wealth the Respondent borrowed monies from three clients, two of whom had previously loaned him money. He did not advise GP Wealth of these loans. The loans in total amounted to \$919,315.00.

10. Mr. Smockum repaid a substantial portion of the various loans. However, there was a significant balance of \$208,506.94 owing to former clients, which he never paid. The outstanding balance was paid by Desjardin when these matters came to its attention.

b) Allegation #2 – Outside Activity

11. The Respondent and his brother incorporated a numbered company, which they intended as a vehicle for the operation of a medical marijuana company. The Respondent was a director and shareholder of the company. The company was unable to obtain the appropriate license or approval from the government.

12. The Respondent did not advise Desjardin or GP Wealth of this endeavour. He was required to obtain the approval to proceed with such outside activity.

c) Allegation #3 – Recording False Notes

13. The Respondent processed redemptions in the investment accounts of two clients in the total amount of \$475,000.00. The Respondent made a note in the Desjardin records that the redemptions were to assist the clients in the building of new houses in each case. In fact, the real reason for the redemptions was to provide loans to the Respondent.

14. Similar redemptions for one of the same clients and another client were recorded as funds to be used for the purchase of properties to build houses. In fact the redemptions were used to provide loans to the Respondent.

d) Allegation #4 – Misleading the Member

15. On April 5, 2017, and May 22, 2018, the Respondent in his Annual Compliance Update Checklist for Desjardin stated that he had not engaged in any conflict of interest by borrowing money from clients. These statements were clearly false.

16. On September 20, 2019, two clients advised GP Wealth that the Respondent borrowed monies from them and as a result GP Wealth commenced an investigation of the Respondent's conduct. When initially interviewed by GP Wealth the Respondent advised that he had only borrowed money from one client and that all monies had been repaid. When the true state of affairs was put to the Respondent, he admitted to borrowing money from eight clients as described above.

17. A further investigation by GP Wealth, which included contacting all clients whose accounts were serviced by the Respondent produced no questions or concerns.

18. By agreeing to the Agreed Statement of Facts the Respondent has admitted his responsibility for the alleged misconduct. The MFDA admits that by so doing "the Respondent has saved the MFDA the time, resources and expenses that would have been necessary to conduct a fully contested hearing of the allegations."

III. THE POSITION OF COUNSEL FOR THE MFDA

19. Counsel for the MFDA filed written submissions of 42 pages. It is not necessary to set these out in detail. Counsel for the MFDA rely on the Agreed Statement of Facts, which established that the Respondent engaged in conduct in breach of the Member's Policies and Procedures and the MFDA Rules as set out in Allegations 1, 2, 3 and 4 above.

20. As already indicated, the only remaining issue for this Panel is to determine the appropriate penalty to be imposed on the Respondent. Counsel for the MFDA submits that the appropriate penalty is as follows:

- a) A permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or association of any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- b) A fine of at least \$325,000.00 pursuant to s. 24.1.1 (b) of MFDA By-law No.1; and
- c) Costs in the amount of \$10,000.00 pursuant to s. 24.2 of MFDA By-law No. 1.

21. Counsel for the MFDA emphasizes the serious nature of the misconduct in this case. The Respondent borrowed a total of \$919,315.00 from eight clients over a three-year period. He has not paid back \$208,506.94 to two of his clients.

22. By borrowing from his clients, counsel for the MFDA submitted that the Respondent's conduct represented a serious conflict of interest and constituted an abuse of the trust and confidence that his clients placed in him. The Respondent admits that he did not inform his clients, or his Members, of the conflict of interest, and did not take reasonable steps to address the conflicts by the exercise of responsible business judgement influenced only by the best interests of the client.

23. The fact that the Respondent was unable to repay a substantial portion of the monies borrowed reveals the potential detrimental implications of engaging in such activity, contrary to regulatory obligations. It is only the fact that the Member stepped up to make the clients whole that the consequences were not more severe.

24. The Respondent took advantage of his professional relationship with his clients to his financial advantage and placed his clients' money at risk. Such misconduct is considered a serious breach of the MFDA Rules and the Policies and Procedures of the Member, which resulted in a benefit to the Approved Person, Mr. Smockum.

See *Davies (Re)*, [2016] Hearing Panel of the Central Regional Council MFDA File No. 2020008 at para. 58.

25. Counsel further submits that an Approved Person's engagement in financial dealings with a client has always been regarded as a serious breach of MFDA Rules, punishable in most cases by a prohibition from working in the industry and a substantial fine.

26. The Respondent also failed to disclose his outside business activity involving his ownership and position as a director of a numbered company. The company was set up to carry on a medical marijuana business. The Respondent obtained a loan from a client to finance the business, which never in fact operated due to the failure to obtain the appropriate governmental approval. The Respondent did not advise Desjardin of this outside activity, which he was obliged to do.

27. The Respondent created false notes in the Member's back-office system concerning redemptions in accounts of two clients, which in fact were for loans to the Respondent. This prevented Desjardin from discovering the purpose of the redemptions in order to protect their clients. Such conduct also involved a serious conflict of interest.

28. Counsel for the MFDA submit that the proposed penalty will serve as a deterrent to the Respondent in the future and will also serve as a general deterrent to others in order to protect investors. In respect of this position counsel for the MFDA cited the Ontario Securities Commission decision in *Re Mithras Management Ltd et al.* (1990) 13 O.S.C.B. 1600 at 1610 and the Supreme Court of Canada case in *Cartaway Resources Corp. (Re)* 2004 SCC 26 at para. 61.

29. In this case counsel for the MFDA submit "that the principles of specific and general deterrence mandate that the full amount imposed by the Hearing Panel should be greater than the amount, which the Respondent has not repaid under the loan agreements." Counsel emphasized that the Respondent benefited in this case by arranging the loans without the costs associated with institutional financing. Also, as indicated above, the Respondent did not fully repay the loans obtained from two of his clients, which totaled \$208,506.94.

30. Counsel for the MFDA further submit that in respect of the principle of general and specific deterrence prior hearing panels have imposed fines that at a minimum provide for the disgorgement of the financial benefit obtained by the Respondent due to his misconduct. See *Touissant (Re)*, [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201039 Reasons for Decision on Penalty, June 22, 2001. At the same time, it is reasonable to take into account the repayments of the various loans that the Respondent did make, although a substantial amount remained outstanding. It must be noted, however, that when the Respondent sold his property, he used the proceeds to invest in another property and to repay his father \$20,000 of the monies borrowed by him, rather than repaying his clients. In the circumstances here counsel for the MFDA

submit that the amount of the fine should exceed the amount the Respondent has not repaid to his clients, which in this case is \$208,506.94.

31. Counsel for the MFDA submit that the fact that Desjardin repaid the aforesaid amount to the Respondent's clients is not a mitigating factor. Counsel cites the case of *Mutual Fund Dealers Association (Re)*, 2021 LNONOSC 400 at paras. 39-40, where the Ontario Securities Commission said:

Whether the loss was suffered by the client who was targeted or the Bank that compensated that client, the seriousness of the Respondent's dishonesty, the amount of financial harm suffered and the corresponding financial benefit obtained are all unaffected.

32. In respect of the proposed prohibition counsel for the MFDA further submit that the seriousness of the misconduct in this case warrants the ultimate penalty of removal from the securities related business in the mutual funds industry, which is required to protect the public.

IV. THE POSITION OF THE RESPONDENT

33. Mr. Smockum swore an Affidavit, which was filed in this hearing in which he described his family and their financial position. Mr. Smockum is 48 years old and married with 6 children – 5 biological children and 1 nephew over whom he and his wife have court ordered custody. The children's ages are 26, 24, 18, 13, 12 and 8 years. Five of the six children live at home and are financially dependent on their parents. The 8-year-old suffers from serious health issues.

34. In respect of income Mr. Smockum and his wife are both employed. Mr. Smockum has a job in construction and his wife runs a daycare operation out of their home. In 2019 Mr. Smockum's net income was \$19,424.00 and his wife's net income was \$8,020.00.

35. In 2020, the household net income was \$61,798.00. Mr. Smockum's net income was \$32,496.00 and his wife's net income was \$29,302.00. They have not filed their 2021 tax returns. They anticipate their net income for 2021 would be similar to 2020.

36. In 2020, they sold their house in Norwood, Ontario for \$755,000.00. There were two mortgages on the house – a first mortgage of \$525,000.00 at 8% interest and a second mortgage of \$84,874.09. At the conclusion of the sale, they realized a net payment of \$85,527.20. Out of those proceeds Mr. Smockum paid \$20,000.00 to his father in partial payment of an outstanding debt of \$60,000.00.

37. In May 2020, Mr. Smockum purchased a new home in Norwood, Ontario for \$426,000.00. They have a mortgage on the second home of \$400,000.00. An appraisal of the house in February 2021 valued the house at \$540,000.00. Since that time home values in the Norwood area have declined.

38. In May 2022, the present house in Norwood suffered significant damage due to a tornado. The estimate for storm damage was \$20,000.00. At the same time they discovered the foundation to their house was leaking. To pay for these repairs Mr. Smockum and his wife have taken out a second mortgage of \$48,000.00 with monthly payments of \$480.00.

39. Both Mr. Smockum and his wife have personal loans totaling \$24,555.00 on which the interest rates are 35.99%. They have two MasterCard credit cards with small balances owing. They have two chequing accounts with a total cash balance of \$4,102.00. They own two vehicles – a 2015 Dodge Ram 1500 with approximately 280,000 km and a 2017 Dodge van with approximately 225,000 km.

40. Mr. Smockum and his wife have no other assets or savings. They have an RESP account with a total value of \$2,878.01. However, that is described as “grant money only” and cannot be withdrawn.

41. All of the above financial information is taken from Mr. Smockum’s Affidavit. He was not challenged on these facts.

42. Counsel for Mr. Smockum emphasized in their submissions that Mr. Smockum has shown remorse and fully cooperated with the MFDA investigation. Counsel relies on the Sanction Guidelines of the MFDA, which have been referred to in prior MFDA decisions. These principles include the following:

- a) The imposed sanction is not to be intended to be punitive;
- b) The sanction should not be crushing;
- c) The sanction must be proportionate;
- d) The monetary penalty, which is beyond the means of the individual responsible cannot be justified on the basis that it will not deter others who are better off; and
- e) A penalty should not deprive a person of his livelihood.

43. Counsel submits that there is no indication where the proposed fine of \$325,000.00 comes from. Counsel submits that it represents 75% more than the amount that was borrowed and not repaid.

44. Counsel further submits there is simply no ability to pay the amount of the suggested fine. Counsel finally submits that a reasonable fine would be \$24,000.00 payable over 24 months.

V. CONCLUSION

45. We agree that the appropriate penalty in this case should include a permanent prohibition as proposed by counsel for the MFDA, a substantial fine and costs. We turn our consideration to the amount of the fine.

46. The suggested fine of Respondent's counsel is simply unrealistic. It relies only upon the present circumstances of the Respondent and his information regarding his challenging family situation. It fails to take into account the fact that the Respondent borrowed the very large sum of \$919,315 from his clients and continues to be the beneficiary of unpaid loans of \$208,506.94. Although Desjardin has paid this amount to the affected clients, it does not obviate the fact that the Respondent has received these monies in a manner which is a serious violation of the regulations respecting conflicts of interest.

47. In looking at prior cases before the MFDA, the penalties for this kind of violation have included a premium above the amount of money which was borrowed, even when the Respondent has fully repaid the clients, which is not so in the present matter. These penalties have ranged from \$25,000 to \$300,000 and can be seen in the following precedents.

Yalkezian (Re), [2022] MFDA Hearing Panel of the Central Regional Council, MFDA File No. 202164, Reasons for Decision dated March 3, 2022

Chapman (Re), [2021] Hearing Panel of the Central Regional Council, MFDA File No. 201934, Decision on Penalty issued June 22, 2021

48. The Respondent's failure to disclose an outside interest to the Member is not a trivial matter or a mere violation of a technicality. The Respondent intended to operate a business, for profit, which information would have been valuable to his Member to assess whether this would impact upon his relationships and obligations to his clients. In this respect, fines in prior matters have ranged from \$35,000 to \$250,000.

Wemple (Re), [2017] Hearing Panel of the Central Regional Council, MFDA
File No. 201654, Reasons for Decision dated June 9, 2017

Notis (Re), [2019] Hearing Panel of the Central Regional Council, MFDA File
No. 201953, Reasons for Decision dated December 4, 2019

49. The purpose of making notes in the Member's record keeping system is to ensure that there is a proper audit trail for transactions with clients. The Respondent entered false information respecting the purpose of the clients' redemptions. This resulted in concealing from the Member that the borrowings were, in fact, for the purpose of personal loans to the Respondent, which, if it had been known to the Member, would have put a halt to the behavior and prevented further harm to clients. In the matter of making false notes with the intention of misleading the Member, the fines have ranged from \$15,000 to \$20,000.

Botescu (Re), [2020] Hearing Panel of the Central Regional Council, MFDA
File No. 202008, Reasons for Decision dated May 11, 2020

Jain (Re), [2011] Hearing Panel of the Central Regional Council, MFDA File
No. 201130, Reasons for Decision dated March 14, 2012

50. A further aggravating issue is the misinformation provided to both Members by whom the Respondent was employed. The Respondent indicated that he had not borrowed from clients, which was clearly not the case. In the matter of misleading the Member, the fines have ranged from \$13,500 to \$25,000.

Davidson (Re), [2021] Hearing Panel of the Central Regional Council, MFDA
File No. 202018, Reasons for Decision dated June 29, 2021

Bilton (Re), [2020] Hearing Panel of the Central Regional Council, MFDA File
No. 202005, Reasons for Decision dated April 14, 2020

51. We have had consideration for the factors to be taken in mitigation on the Respondent's behalf: cooperation with the MFDA, admitting the misconduct through the Agreed Statement of Facts thereby saving the MFDA the time and costs associated with conducting a contested hearing and no prior disciplinary record.

52. In our view, the appropriate fine in this case is \$275,000 with Mr. Smockum given 24 months to pay.

53. In the result an Order will go providing for a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or association of any MFDA member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1; a fine of

\$275,000 pursuant to s. 24.1.1(b) of MDFA By-law No.1; and costs in the amount of \$10,000 pursuant to s. 24.2 of MFDA By-Law No. 1.

DATED this 8th day of February, 2023.

“Robert P. Armstrong”

The Hon. Robert P. Armstrong, K.C.
Chair

“Brigitte J. Geisler”

Brigitte J. Geisler
Industry Representative

“Guenther W. K. Kleberg”

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