



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: Vaughan Carmen Spencer

Heard: June 13, 2012 in Toronto, Ontario
Reasons for Decision: July 30, 2012

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.)	Chair
Cheryl Hamilton)	Industry Representative
David W. Kerr)	Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of
)	Canada
Vaughan Carmen Spencer)	Not in attendance personally or by Counsel
)	

A. THE ALLEGATION

1. By Notice of Hearing, dated the 9th day of February, 2012, the following Allegation was made against Vaughan Carmen Spencer (“Respondent”):

Allegation #1: Commencing March 1, 2011, the Respondent has failed or refused to attend for an interview requested by MFDA Staff during the course of an investigation, contrary to s. 22.1 of MFDA By-law No. 1.

B. SERVICE

2. The Notice of Hearing provided for a First Appearance by teleconference before the Hearing Panel at 121 King Street West, Suite 1000, Toronto, Ontario on March 28, 2012, at 10:00 a.m. At that time, the Respondent did not appear. Further, no one appeared on his behalf.

3. At the First Appearance, Enforcement Counsel described the attempts which had been made by Staff to serve the Notice of Hearing on the Respondent. The attempts were described in an Affidavit of Sofi Vasiliadis, sworn February 23, 2012, and an Affidavit of Ian R. Smith, sworn March 27, 2012. These Affidavits were marked as Exhibits 2 and 3.

4. In summary, the evidence showed that:

- (a) The Respondent no longer resided at his last known address as shown on Form 33-109F4 obtained through the National Registration Database.
- (b) A driver’s licence search through the records of the Ontario Ministry of Transportation, did not show a new address.
- (c) A process server, retained by Staff, was advised, by the current inhabitants of the address, that the Respondent had left the address 1½ years earlier.
- (d) The Respondent’s son advised that the Respondent had left Canada for Croatia, that he had occasional contact with his father and would seek to provide his father with the MFDA contact information. No contact with the MFDA was ever made by the Respondent.
- (e) Counsel for the Respondent advised that he had no ability to contact the

Respondent, except through an e-mail address.

- (f) That the e-mail address provided indicated that the e-mails were “undeliverable” and that the address was no longer in service.

5. After considering Exhibits 2 and 3 and hearing the submissions of Enforcement Counsel, the Hearing Panel made an Order, dated March 28, 2012, that:

“Staff has served the Respondent with the Notice of Hearing in accordance with the provisions of Rules 4.2(1)(d) and 4.8(1) of the MFDA Rules of Procedure, by posting the Notice of Hearing on the MFDA’s public website and issuing a news release on February 22, 2012.”

6. Rules 4.2(1)(d) and 4.8(1) provide as follows:

“4.2 Manner of Service – Notice of Hearing

(1) A Notice of Hearing shall be served by one of the following methods:

- (d) by any other means, with the consent of the Respondent or by order of the Hearing Panel.”

“4.8 Order for Substituted Service or Waiver of Service

(1) A Panel may order substituted service or waive the requirement for service of any document where it is satisfied that it is in the public interest to do so or the circumstances giving rise to the requirement to effect service make it unnecessary or impractical to do so.”

7. At the First Appearance, the Hearing Panel further ordered that the Hearing on the Merits was to take place on June 13, 2012, at 10:00 a.m. (Eastern) in the MFDA Hearing Room located at 121 King Street West, Suite 1000, Toronto, Ontario. On March 28, 2012, the MFDA issued a News Release providing notice of the date, time and place of the Hearing on the Merits.

C. HEARING ON THE MERITS

8. The Respondent did not appear at the Hearing on the Merits on June 13, 2012. No one appeared on his behalf. By the date of the Hearing on the Merits, the Respondent had not served and filed a Reply as required by Rule 8.1(1) of the MFDA Rules of Procedure.

9. Enforcement Counsel advised the Hearing Panel that he was ready to proceed and had a witness available to testify if so required.

10. In our view, Rules 7.3(1)(a), 8.1(1), 8.4(1) and 13.5(1) of the Rules of Procedure are apposite. They provide as follows:

“7.3 Failure to Attend Hearing

- (1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
- (a) proceed with the hearing without further notice to and in the absence of the Respondent;
 - (b) accept the facts as alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.”

“8.1 Requirement to Reply

- (1) A Respondent shall serve on every other party and file a Reply within 20 days of the effective date of service of the Notice of Hearing.”

“8.4 Effect of Failure to Deliver a Proper Reply

- (1) Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do one or more of the following:
- (a) proceed with the hearing without further notice to and in the absence of the Respondent;
 - (b) accept the facts as alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1;
 - (c) order that the Respondent pay costs, at any stage of the proceeding, regardless of the outcome of the proceeding and in addition to any other penalties and costs imposed on the Respondent, in an amount which reflects the extent to which, in the Hearing Panel’s discretion, the hearing will be or has been unnecessarily prolonged or complicated by the failure of the Respondent to deliver a proper Reply;
 - (d) prohibit, restrict, or place terms on the right of the Respondent to call witnesses or present evidence at the hearing.

“13.5 Where a Respondent Fails to Attend a Disciplinary Hearing

- (1) Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance Rule 7.3.”

11. After carefully considering our options, we decided to proceed in accordance with Rules 7.3(1)(a) and 8.4(1)(a) and requested Enforcement Counsel to prove the Allegation by means of admissible evidence.

D. THE EVIDENCE

12. The evidence before the Hearing Panel with respect to this matter consisted of an Affidavit of Ian R. Smith ("Smith"), sworn June 5, 2012. This was marked as Exhibit 4. This Affidavit established the following:

- (a) Smith is employed as a Senior Investigator in the Enforcement Department of the MFDA. Smith conducted an investigation into the business conduct of the Respondent.

Registration History

- (b) The Respondent was registered in Ontario as a Branch Manager with the IPC Investment Corporation (“IPC”) from January 10, 2001 until July 18, 2007. Prior to IPC, the Respondent was registered as:
 - (i) a Branch Manager with Assante Financial Management Ltd. from October 1999 to January 2001; and
 - (ii) a Branch Manager with Financial Concept Corporation from October 1993 to October 1999.
- (c) The Respondent is currently not registered in the securities industry in any capacity.
- (d) IPC has been a member of the MFDA since March 8, 2002.

Failure to Cooperate

The Nunweiler matter

- (e) The MFDA commenced a disciplinary proceeding against Conrad Arthur Nunweiler (“**Nunweiler**”), a former Approved Person registered in British Columbia with IPC, pursuant to a Notice of Hearing issued on October 5, 2010.
- (f) The Hearing on the Merits in the Nunweiler matter occurred on March 7, 2012. At the conclusion of the Hearing, the Hearing Panel announced that it had found that Nunweiler engaged in misconduct as alleged by Staff and imposed on Nunweiler a permanent prohibition, a fine of \$250,000, and costs of \$15,000. The Hearing Panel’s Reasons for Decision in the Nunweiler matter have yet to be released.
- (g) In or about November 30, 2010, Nunweiler filed a Reply, which at paragraph 1 under the heading “Additional Facts and Conclusions” states: “*[Nunweiler] was approached by the Member who recommended and encouraged [Nunweiler] to initiate certain actions including conduct alleged in the Notice of Hearing.*”
- (h) By email dated January 5, 2011, Nunweiler’s agent advised Staff that the Respondent was the Member representative referred to in Nunweiler’s Reply.

Staff’s investigation of the Respondent

- (i) On January 19, 2011, David Halasz, MFDA Enforcement Counsel, emailed the Respondent and advised him that he had been identified as a person who may have information relevant to the Nunweiler proceeding, and requested that the Respondent contact Staff in order to discuss the matter.
- (j) On January 20, 2011, in response to Enforcement Counsel’s email, the Respondent’s counsel advised that the Respondent had contacted him as a result of Enforcement Counsel’s January 19, 2011 email to the Respondent, and counsel

requested that any further communications from Staff to the Respondent be sent through counsel.

- (k) On January 20, 2011, Enforcement Counsel sent an email to the Respondent's counsel seeking specific information in relation to the Respondent's alleged involvement in the matters underlying Staff's allegations against Nunweiler.
- (l) By letter dated January 24, 2011, the Respondent's counsel provided information in response to matters requested by Enforcement Counsel. The Respondent's counsel advised that the Respondent denied that he recommended and encouraged Nunweiler to initiate the activities alleged against Nunweiler in the Nunweiler proceeding, and provided some information about the Respondent's interest in a company involved in the matters underlying the Nunweiler proceeding.
- (m) In an amended Reply filed by Nunweiler dated February 14, 2011, Nunweiler made further allegations with respect to the Respondent's involvement in the matters at issue in the Nunweiler proceeding.
- (n) The amended Reply raised additional questions that Staff sought to have the Respondent answer. On March 1, 2011, Smith sent an email to the Respondent and to his counsel advising that Staff was conducting an investigation into the Respondent's conduct concerning allegations that the Respondent:
 - (i) was aware of and encouraged Nunweiler to borrow from clients of IPC; and
 - (ii) conducted an outside business activity that was not disclosed to and approved by IPC.

Smith requested that the Respondent contact Staff within five days in order to schedule an interview for the purpose of providing a statement about his knowledge of the matters under investigation.

- (o) Smith sent the March 1, 2011 email to the Respondent at the email address: "vaughancspencer@aol.com", which was an email address that Enforcement

Counsel advised Smith that the Respondent's son, Jeff Spencer, had provided to Staff in order to contact the Respondent. Based on the Respondent's counsel's letter to Staff dated January 20, 2011, Smith knew that this email address was one where the Respondent had previously received emails.

- (p) Having received no response from the Respondent or his counsel to his March 1, 2011 email, Smith sent a further email to the Respondent and his counsel on March 10, 2011 requesting that the Respondent contact Staff within five days to schedule an interview. In the email, Smith advised the Respondent of his obligations as a former Approved Person to cooperate with Staff's investigation.
- (q) On March 10, 2011, the Respondent's counsel emailed Smith (copying the email to the Respondent) advising that the Respondent had not contacted him as a result of Staff's emails, and that he had no ability to contact the Respondent other than through the email address that Staff had been communicating with the Respondent to date.
- (r) On March 29, 2011, Smith emailed the Respondent and advised him that he was required to attend at the offices of the MFDA for an interview on April 8, 2011 in order to answer Staff's questions, and that should the Respondent fail to attend at the scheduled time, that Staff would consider initiating a disciplinary proceeding against him.
- (s) The Respondent did not respond to Smith's March 29, 2011 email, and did not attend on April 8, 2011 (or at all) for an interview requested by Staff for the purpose of investigating the Respondent's conduct.
- (t) As a result of the Respondent's failure to cooperate with Staff's investigation, Staff has been unable to determine the full nature and extent of the relationship, if any, between the Respondent and Nunweiler with respect to the matters described in the Nunweiler proceeding, nor has Staff been able to determine the full nature and extent of whether the Respondent engaged in any outside business activities for which the Respondent did not disclose to or obtain approval from IPC.

E. THE LAW

13. Sections 21 and 22.1 of MFDA By-law No. 1 provides as follows:

“21. POWER TO CONDUCT EXAMINATIONS AND INVESTIGATIONS

The Corporation shall make such examinations of and investigations into the conduct, business or affairs of any Member, Approved Person of a Member or any other person under the jurisdiction of the Corporation pursuant to the By-laws and/or Rules as it considers necessary or desirable in connection with any matter relating to compliance by such person with:

21.1 the By-laws, Rules or Policies of the Corporation;

21.2 any securities legislation applicable to such person including any rulings, policies, regulations or directives of any securities commission; or

21.3 the by-laws, rules, regulations and policies of any self-regulatory organization.”

“22. INVESTIGATORY POWERS

22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

(a) to submit a report in writing with regard to any matter involved in any such investigation;

(b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and

(c) to attend and give information respecting any such matters;

(d) to make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.”

14. We are, unanimously, of the view that the established conduct of the Respondent in this matter was a clear violation of s. 22.1 of MFDA By-law No. 1 and that the Allegation against the Respondent has been established.

15. Staff sought the following penalties against the Respondent:

- (a) a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member;
- (b) a fine in the amount of \$50,000.00; and
- (c) costs in the amount of \$7,500.00.

G. FACTORS TO BE CONSIDERED

16. Hearing Panels, on numerous previous occasions, have outlined the factors which should be considered when determining the appropriate penalty. We believe that Staff correctly set out these factors when it made the following written submissions:

- (a) It is submitted that when determining the appropriate penalties to impose, a Hearing Panel should consider:
- (b) The protection of the investing public;
- (c) The integrity of the securities markets;
- (d) Specific and general deterrence;
- (e) The protection of the MFDA's membership; and
- (f) The protection of the integrity of the MFDA's enforcement processes.

In the Matter of Arnold Tonnies, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 27, 2005, at page 22.

17. Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- (a) The seriousness of the allegations proved against the Respondent;
- (b) The Respondent's past conduct, including prior sanctions;

- (c) The Respondent's experience and level of activity in the capital markets;
- (d) Whether the Respondent recognizes the seriousness of the improper activity;
- (e) The harm suffered by investors as a result of the Respondent's activities;
- (f) The benefits received by the Respondent as a result of the improper activity;
- (g) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- (h) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- (i) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- (j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- (k) Previous decisions made in similar circumstances

Lamoureux (re), [2002] A.S.C.D. No. 125 at para. 11.

Tonnies, supra, at p. 23.

18. An additional source of factors to be taken into account when determining the appropriate penalties to be imposed in disciplinary proceedings are the MFDA Penalty Guidelines. The Penalty Guidelines are intended to assist Hearing Panels, Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings. As stated in the introduction to the Penalty Guidelines under the heading "Purpose of The MFDA Penalty Guidelines":

"Range is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel."

19. The MFDA Penalty Guidelines recommend a minimum fine of \$50,000.00 and a permanent prohibition for failure to cooperate.

H. CONSIDERATIONS IN THE PRESENT CASE

20. Staff submitted that the penalties requested were appropriate for, *inter alia*, the following reasons:

- (a) The Respondent has engaged in serious misconduct. The Respondent's failure to cooperate with Staff's investigation demonstrates a fundamental breach of his obligations as an Approved Person;
- (b) Although at first the Respondent provided some information to Staff, he ultimately failed to attend an interview with Staff regarding allegations that he: (i) engaged in outside business activities, and (ii) recommended or encouraged Nunweiler to borrow money from IPC clients;
- (c) By failing to respond to repeated requests from Staff to attend for an interview, the Respondent's conduct illustrates that he intentionally failed to cooperate with the investigation by Staff;
- (d) The Respondent's failure to cooperate has effectively undermined Staff's ability to continue the investigation and determine the full nature and extent of the Respondent's conduct;
- (e) Although the Respondent has no past disciplinary history with the MFDA, it is submitted that this factor should be given very little weight in light of the serious misconduct associated with undermining the ability of the regulator to perform its function by fully investigating his conduct and determining, in an expeditious manner, all of the relevant facts;
- (f) The Respondent's failure to cooperate demonstrates his unwillingness to comply with regulation of the securities industry and the necessity of participants within the industry to provide timely responses to the requests of regulators to assist them in their investigation;
- (g) The Respondent has not responded to this proceeding. The Respondent has not shown that he recognizes the severity of his misconduct, nor has he accepted any responsibility; and
- (h) Generally, Hearing Panels have imposed similar penalties to those sought in the present case when an Approved Person has failed to cooperate with Staff during an investigation.

In the Matter of Kevin Debois, [2010] Hearing Panel of the Central Regional Council, MFDA File No. 200822, Hearing Panel Decision dated March 16, 2010, at para. 10.

In the Matter of Robert Brick, [2007] Hearing Panel of the Central Regional Council, MFDA File No. 200705, Hearing Panel Decision dated October 29, 2007, at p. 20.

In the Matter of Brian Somerset Campbell, [2008] Hearing Panel of the Pacific Regional Council, MFDA File No. 200805, Hearing Panel Decision dated June 26, 2008, at p. 5.

In the Matter of Anthony McPhail, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200505, Hearing Panel Decision dated June 15, 2005, at p. 3.

Tonnies, supra, at p. 26.

21. After considering the established evidence and the submissions of Staff, the Hearing Panel is unanimously of the view that the requested penalties outlined in paragraph 14(a) and (b) above are appropriate. With these penalties, we hope to communicate to both the public and the mutual fund industry that serious consequences will befall those who seek to frustrate the MFDA in performing its regulatory mandate.

I. COSTS

22. Section 24.2 of By-law No. 1 provides, in part, that:

“A Hearing Panel may in any case in its discretion require that the Member or Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section 24.3 and any investigations relating thereto.”

23. Staff requested a Cost Order in the amount of \$7,500.00 on the basis that this amount would permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and the Hearing, such that these costs do not have to be borne by the MFDA or subsidized by those Members and Approved Persons of the MFDA who did not engage in the type of activity engaged in by the Respondent.

24. We agree with this submission. We also note that this amount is consistent with the amounts awarded by other MFDA Hearing Panels in similar circumstances.

J. ORDER

25. At the conclusion of the Hearing on the Merits, we made the following Order:

- (a) a permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA;
- (b) a fine in the amount of \$50,000; and
- (c) costs in the amount of \$7,500.

DATED this 30th day of July, 2012.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.
Chair

“Cheryl Hamilton”

Cheryl Hamilton,
Industry Representative

“David W. Kerr”

David W. Kerr,
Industry Representative

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