



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: Alain Armand Joseph Theroux

Heard: October 21 2013, in Toronto, Ontario
Reasons for Decision: April 1, 2014

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Frederick H. Webber)	Chair
David W. Kerr)	Industry Representative
Simon Destrempe)	Industry Representative

Appearances:

Michelle Pong)	Enforcement Counsel, Mutual Fund Dealers
)	Association of Canada
)	
Alain Armand Joseph Theroux)	Respondent, Not in attendance or represented by
)	counsel
)	

Disciplinary Hearing

1. The disciplinary hearing in this matter was held on October 21, 2013, pursuant to a Notice of Hearing dated May 7, 2013, a copy of which is attached hereto as Schedule “A” (“Notice of Hearing”). In accordance with the Notice of Hearing, a first appearance took place on July 8, 2013. Alain Armand Joseph Theroux (the “Respondent”) did not appear and the Panel made an Order dated July 8, 2013 for substituted service of the Notice of Hearing and setting October 21, 2013 for the Hearing on the Merits. The Respondent did not appear at the hearing on October 21, 2013. At the commencement of the hearing an affidavit of Nadia Dedic dated October 16, 2013 was filed as exhibit 3. This affidavit establishes that all reasonable and required efforts were made by the MFDA to notify the Respondent of the hearing. In addition, the Respondent failed to deliver a Reply to the Notice of Hearing as required by the MFDA Rules of Procedure. In these circumstances, Rules 8.4(1) and 7.3 authorize the Panel to proceed with the hearing without further notice to, and in the absence of, the Respondent and to accept the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing.

2. Accordingly, the Hearing Panel ordered that the Hearing on the Merits proceed in the absence of the Respondent and accepted the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing.

Allegation

3. The only allegation against the Respondent set out in the Notice of Hearing was:

Commencing April 2012, the Respondent has failed or refused to provide documents and information to the MFDA and to attend an interview requested by the MFDA during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.

Facts

4. The facts giving rise to the allegation are set out in detail in the Notice of Hearing and the

affidavit of Nadia Dedic filed as Exhibit 3 in this proceeding and need not be repeated at length herein. In summary, following the filing of a Member Event Tracking System (“METS”) report on or about December 1, 2011, an MFDA investigation revealed possible impropriety by the Respondent regarding an investment by his client through Synergy Group (2000) Inc. (“Synergy”).

5. Commencing with a letter dated February 13, 2012, the MFDA made repeated requests (detailed in the Notice of Hearing and the affidavits filed as exhibits 1 and 3) that the Respondent provide documents and information, and attend an interview with the MFDA regarding the Synergy investment but, other than an email dated April 16, 2012 in which the Respondent told the MFDA that he had advised the client about the Synergy investment, the Respondent failed to comply with the MFDA requests.

6. As set out in the Notice of Hearing, due to the Respondent’s failure to provide documents and information to, and attend for an interview with the MFDA, the MFDA was unable to determine the full nature and extent of the Respondent’s conduct in relation to the subject matter of its investigations, and no allegations were made against the Respondent in relation thereto. The only allegation involved the failure to cooperate.

Failure to Cooperate

7. Under section 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations of an Approved Person (“AP”) as it considers necessary or desirable in connection with any matter related to the AP’s compliance with the By-laws, Rules and Policies of the MFDA. In carrying out its duty under section 21, section 22 empowers the MFDA to require the AP to submit a written report, produce documents for inspection and attend and give information, regarding the matter under investigation.

8. Correspondingly, section 22.1 compels the AP to cooperate with the MFDA section 22.1 investigation requirements.

9. MFDA Hearing Panels have consistently held that a failure by an AP to cooperate with an MFDA investigation by failing to provide information, documents or a written report when requested to do so, is serious misconduct, contrary to section 22.1. Such failure to cooperate subverts or frustrates the MFDA's ability to perform its regulatory function to fully investigate a matter and determine all the relevant facts and undermines the integrity and effectiveness of the self-regulatory system. The MFDA submissions referred the Panel to a number of cases in support of these propositions. See for example: Re Ferguson [2013], MFDA file No. 201233, Re Spencer [2012] MFDA file No. 201139, Re Gizzo [2011] MFDA file No. 201024, Re Desbois [2010] MFDA file No. 200822, and cases cited therein.

10. Based on the number of MFDA attempts to have the Respondent supply documents and information and to attend an MFDA interview as set forth in the Notice of Hearing and the aforesaid affidavits, it is the decision of this Panel that the Respondent has failed to cooperate with the MFDA contrary to section 22.1 of By-law No. 1 as provided in the allegation against him.

Penalty

11. Pursuant to section 24.1.1 of MFDA By-law No. 1, the Panel may impose any of the penalties set out in section 24.1.1 (a) – (f). The MFDA Penalty Guidelines recommend, and the MFDA sought:

- A minimum fine of \$50,000; and
- A permanent prohibition.

12. In addition, the MFDA sought costs in the amount of \$7,500 pursuant to section 24.2 of By-law No. 1.

13. In addition to the Penalty Guidelines, the Panel was referred to a number of previous cases for guidance as to the appropriate penalty in this case. Cases such as Re Arnold Tonnies [2005] MFDA file No.200503 and Re Stephan Headley [2006] MFDA file No. 200509 establish

the following factors that panels should consider when considering an appropriate penalty:

- a) The seriousness of the proven allegations;
- b) The Respondent's past conduct
- c) The Respondent's experience and level of activity in the capital markets;
- d) Respondent's recognition of the seriousness of the improper activity;
- e) Harm suffered by investors caused by the improper activity;
- f) Risk to investors and the capital markets were the Respondent to continue to operate in the capital markets;
- g) Damage to the capital markets caused by the Respondent's improper activity;
- h) Deterrence not only of the Respondent, but to others who may participate in the capital markets from repeating the improper activity;
- i) Need to alert others to the consequences of inappropriate activities to capital markets participants; and
- j) Previous decisions in similar cases.

14. This Panel agrees with the Penalty Guidelines and cases referred to that, in determining an appropriate penalty, the Panel should have regard to the following principles:

- The protection of the investing public, MFDA's membership and its enforcement process;
- The integrity of the securities market;
- Specific and general deterrence.

15. Having regard to the factors and principles listed above, in this case, this Panel feels that both specific deterrence of the Respondent and general deterrence will be accomplished by a permanent prohibition of the Respondent and a fine of \$50,000, as requested by MFDA counsel. The Panel stated in the hearing and wishes to emphasize in these reasons, the importance of general deterrence, that it regards the failure to cooperate with MFDA investigations as serious misconduct and that in appropriate future cases of failure to cooperate, the MFDA should consider requesting higher fines than the minimum set out in the Penalty Guidelines.

16. It is the order of this Panel that the following penalties and costs are imposed upon the Respondent:

- 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 MFDA Member, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
- a fine in the amount of \$50,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and
- costs in the amount of \$7,500, pursuant to section 24.2 of MFDA By-law No. 1.

17. It is also ordered that, if at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 1st day of April, 2014.

“Frederick H. Webber”

Frederick H. Webber,
Chair

“David W. Kerr”

David W. Kerr,
Industry Representative

“Simon Destrempes”

Simon Destrempes,
Industry Representative



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Re: Alain Armand Joseph Theroux

NOTICE OF HEARING

NOTICE is hereby given that a first appearance will take place by teleconference before a hearing panel of the Central Regional Council (the "Hearing Panel") of the Mutual Fund Dealers Association of Canada (the "MFDA") in the hearing room located at 121 King Street West, Suite 1000, Toronto, Ontario on July 8, 2013 at 10:00 a.m. (Eastern), or as soon thereafter as the hearing can be held, concerning a disciplinary proceeding commenced by the MFDA against Alain Armand Joseph Theroux (the "Respondent").

DATED this 7th day of May, 2013.

"Jason D. Bennett"

Jason D. Bennett
Corporate Secretary

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario, M5H 3T9
Telephone: 416-943-7431
Facsimile: 416-361-9781
Email: corporatesecretary@mfd.ca

NOTICE is further given that the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Commencing April 2012, the Respondent has failed or refused to provide documents and information to the MFDA and to attend an interview requested by the MFDA during the course of an investigation, contrary to s. 22.1 of MFDA By-law No. 1.

PARTICULARS

NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:

Registration History

1. From March 23, 1992 to July 3, 2008, the Respondent was registered in Ontario as a mutual fund salesperson with PFSL Investments Canada Ltd. (“PFSL”), a Member of the MFDA.
2. From November 17, 2003 to April 4, 2008, the Respondent was also registered as a Branch Manager with PFSL.
3. On July 3, 2008, PFSL terminated the Respondent for reasons unrelated to this proceeding and he thereafter ceased to be a registrant.
4. The Respondent is not currently registered in the securities industry in any capacity.
5. During the material time, the Respondent worked and resided in Hamilton, Ontario.

Background

6. This matter came to the attention of MFDA Staff (“Staff”) on or about December 1, 2011 when PFSL filed a report on the MFDA’s Member Event Tracking System (“METS”) in accordance with MFDA Policy No. 6. The METS report concerned a news article published on-line on November 24, 2011 in Moneyville, the personal finance section of the Toronto Star (the “Article”). The Article stated that an individual had lost \$10,000 as a result of participating in a tax shelter investment strategy through the Synergy Group (2000) Inc. (“Synergy”), which was offered to him by a Primerica representative.¹

7. The Article further stated that the Synergy tax shelter investment strategy offered shares in small businesses which produced dividends for investors when the businesses did well and produced business losses entitling investors to tax savings when the businesses did poorly (the “Synergy Strategy”).

8. Following publication of the Article, PFSL investigated the matter and determined that the individual referenced in the Article was PFSL client MG and that the Primerica representative referred to in the Article was the Respondent. PFSL contacted client MG and deemed client MG’s concerns regarding the Synergy Strategy to be a complaint in accordance with MFDA Rule 2.11 and MFDA Policy No. 2 (the “Complaint”).

PFSL’s Response

9. On January 9, 2012, following its review of the Complaint, PFSL issued client MG a substantive response stating, among other things, that client MG was aware during the material time that Synergy and the Synergy Strategy were in no way affiliated with PFSL.

10. On or about April 21, 2012, PFSL and client MG settled the Complaint.

Staff’s Investigation

¹ PFSL is the mutual fund dealer affiliated with Primerica Canada.

11. Following receipt of the METS Report, Staff commenced an investigation of the matter which found evidence, among other things, that:

- a) in November 2007, the Respondent explained and provided documentation to client MG regarding the terms and features of the Synergy Strategy including that:
 - i. participants in the Synergy Strategy joined an association of independent consultants entitled to share in the profits and losses of the association;
 - ii. the Synergy Strategy operated in partnership with a Canadian company known as Integrated Business Concepts Inc. (“IBC”);
 - iii. the Synergy Strategy involved purchasing units in small to medium sized businesses managed by IBC;
 - iv. IBC provided investors in the Synergy Strategy with T2124 forms detailing investors’ shares of profits or losses as a member of the association;
 - v. investors could be entitled on their income tax return to claim losses from the association of up to approximately five times the amount of their original investment resulting in potentially significant tax savings; and
 - vi. the Canada Revenue Agency had audited the losses involved with the Synergy Strategy and had issued a notice of assessment to IBC validating the losses;
- b) in December 2007, the Respondent assisted client MG to make inquiries of other parties to confirm the legitimacy, terms and features of the Synergy Strategy;
- c) in December 2007, client MG advised the Respondent that he wished to invest \$10,000 in the Synergy Strategy; and
- d) on December 28, 2007, client MG executed a Transfer Agent Agreement with Synergy wherein the Respondent was noted as agent and whereby client MG agreed to have Synergy purchase on his behalf units in the businesses managed by IBC as described above; and
- e) on or about December 28, 2007, to obtain the monies client MG used to invest in the Synergy Strategy, client MG redeemed \$10,000 in mutual funds from an account held jointly with his spouse at PFSL by requesting in writing directly from AGF, the fund

company where the investments were held, that the amount be withdrawn and deposited into client MG's bank account.

Alberta Securities Commission Proceedings

12. By Amended Notice of Hearing dated October 1, 2009, the Alberta Securities Commission (the "ASC") commenced proceedings against Synergy, among others, alleging, among other things, that Synergy had engaged in an illegal distribution of securities in respect of the Synergy Strategy.

13. In a decision dated April 22, 2010, following a hearing on the merits, an ASC hearing panel concluded, among other things, that Synergy, among others, had engaged in an illegal distribution of securities in respect of the Synergy Strategy. By decision dated June 28, 2011, the Alberta Court of Appeal upheld the decision of the ASC hearing panel in respect of Synergy's distribution of the Synergy Strategy.

Ontario Securities Commission Proceedings

14. By Amended Statement of Allegations and Amended Notice of Hearing dated May 22, 2008, the Ontario Securities Commission (the "OSC") commenced proceedings against Synergy, its principals and IBC, among others, in relation to the promotion and distribution of another investment product. In a decision dated January 13, 2011, following a hearing on the merits, a panel of the OSC concluded, among other things, that Synergy, its principals and IBC had traded in securities without registration and had engaged in an illegal distribution of securities in respect of that product. In addition, the OSC hearing panel concluded that Synergy had engaged in conduct relating to securities that it knew or reasonably ought to have known was fraudulent.

Allegation #1 – Failure to Cooperate

15. By letter dated February 13, 2012, sent by registered and regular mail to the Respondent's last known address as reflected in the National Registration Database, Staff

requested that the Respondent provide documents and information in respect of his activities in relation to the Synergy Strategy (the “February Request”). The registered mail copy of the February Request was returned to Staff with the notation “moved”. The regular mail copy was not returned to Staff.

16. By letter dated April 16, 2012, sent by email, Staff again requested that the Respondent provide the documents and information itemized in the February Request (the “April Request”).

17. By email dated April 16, 2012, the Respondent advised Staff that he had told client MG about the Synergy Strategy but declined to provide or otherwise respond to any of the other items set out in the February Request and the April Request (the “Outstanding Items”).

18. By further email dated April 16, 2012, Staff requested that the Respondent produce the Outstanding Items no later than April 27, 2012. Staff reminded the Respondent of his obligation, pursuant to MFDA By-law No. 1, to produce the Outstanding Items. Staff received no response.

19. On or about May 31, 2012, Staff obtained the Respondent’s updated residential address from PFSL.

20. By letter dated June 1, 2012, sent by email and registered mail to the Respondent’s updated address, Staff again requested that the Respondent produce the Outstanding Items and also requested that the Respondent attend for an interview with Staff. Staff advised the Respondent that failure to cooperate with its investigation could result in the commencement of disciplinary proceedings. The registered mail copy of the letter was returned to Staff with the notation “refused”.

21. By letter dated June 20, 2012, served personally on the Respondent, Staff again requested that the Respondent produce the Outstanding Items and that the Respondent attend for an interview with Staff (the “June 20 Letter”). Staff provided the Respondent with available dates for the interview. Staff asked that the Respondent advise Staff of his availability for the interview by no later than July 4, 2012. Staff again advised the Respondent that failure to cooperate with

its investigation could result in the commencement of disciplinary proceedings. Staff further advised the Respondent that the penalties that could be imposed for such conduct included a permanent prohibition on the Respondent's authority to conduct securities related business for an MFDA Member.

22. On or about July 18, 2012, Staff attempted to contact the Respondent using a telephone number provided by PFSL. Staff left the Respondent a voicemail message advising him of the content of the June 20 Letter.

23. Despite Staff's multiple requests, to date, the Respondent has failed to produce the Outstanding Items and to attend for an interview with Staff. As a consequence, Staff has been unable to ascertain the full nature and extent of the Respondent's conduct in relation to the subject matter of its investigation.

24. By failing or refusing to provide documents and information to Staff and to attend for an interview with Staff as described above, the Respondent has failed to cooperate with an MFDA investigation, contrary to s. 22 of MFDA By-law No. 1.

NOTICE is further given that the Respondent shall be entitled to appear and be heard and be represented by counsel or agent at the hearing and to make submissions, present evidence and call, examine and cross-examine witnesses.

NOTICE is further given that MFDA By-laws provide that if, in the opinion of the Hearing Panel, the Respondent:

- has failed to carry out any agreement with the MFDA;
- has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or of any regulation or policy made pursuant thereto;

- has failed to comply with the provisions of any By-law, Rule or Policy of the MFDA;
- has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or
- is otherwise not qualified whether by integrity, solvency, training or experience,

the Hearing Panel has the power to impose any one or more of the following penalties:

- (a) a reprimand;
- (b) a fine not exceeding the greater of:
 - (i) \$5,000,000.00 per offence; and
 - (ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation;
- (c) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;
- (d) revocation of the authority of such person to conduct securities related business;
- (e) prohibition of the authority of the person to conduct securities related business in any capacity for any period of time;
- (f) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel;

NOTICE is further given that the Hearing Panel may, in its discretion, require that the Respondent pay the whole or any portion of the costs of the proceedings before the Hearing Panel and any investigation relating thereto.

NOTICE is further given that the Respondent must **serve a Reply** on Enforcement Counsel and **file a Reply** with the Corporate Secretary within twenty (20) days from the date of service of this Notice of Hearing.

A **Reply** shall be **served** upon Enforcement Counsel at:

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario
M5H 3T9
Attention: Michelle Pong
Fax: 416-361-9073
Email: mpong@mfd.ca

A **Reply** shall be **filed** by:

- (a) providing 4 copies of the **Reply** to the Corporate Secretary by personal delivery, mail or courier to:

The Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario
M5H 3T9
Attention: Office of the Corporate Secretary; or

- (b) transmitting 1 copy of the **Reply** to the Corporate Secretary by fax to fax number 416-361-9781, provided that the Reply does not exceed 16 pages, inclusive of the covering page, unless the Corporate Secretary permits otherwise; or
- (c) transmitting 1 electronic copy of the **Reply** to the Corporate Secretary by e-mail at CorporateSecretary@mfd.ca.

A **Reply** may either:

- (i) specifically deny (with a summary of the facts alleged and intended to be relied upon by the Respondent, and the conclusions drawn by the Respondent based on the alleged facts) any or all of the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing; or

- (ii) admit the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing and plead circumstances in mitigation of any penalty to be assessed.

NOTICE is further given that the Hearing Panel may accept as having been proven any facts alleged or conclusions drawn by the MFDA in the Notice of Hearing that are not specifically denied in the **Reply**.

NOTICE is further given that if the Respondent fails:

- (a) to **serve** and **file** a **Reply**; or
- (b) attend at the hearing specified in the Notice of Hearing, notwithstanding that a **Reply** may have been served,

the Hearing Panel may proceed with the hearing of the matter on the date and the time and place set out in the Notice of Hearing (or on any subsequent date, at any time and place), without any further notice to and in the absence of the Respondent, and the Hearing Panel may accept the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing as having been proven and may impose any of the penalties described in the By-laws.

END.

DM 336989 v2

DM 370162 v2