THE MANITOBA
SECURITIES
COMMISSION

December 21, 2018

IN THE MATTER OF AN APPEAL TO THE MANITOBA SECURITIES COMMISSION OF THE DECISION OF THE HEARING PANEL OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA DATED AUGUST 13, 2018

- and -

IN THE MATTER OF: DAVID TOBAC ("Respondent")

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

MSC Panel:

Panel Chair:	Mr. J.T. McJannet, Q.C.
Member:	Mr. C.D. Burns

Appearances:

Mr. W. Gange	)	Counsel for David Tobac
Mr. S. Nazim	)	Counsel for the Mutual Fund Dealers Association of Canada
Mr. S. Gingera	)	Counsel to Commission Panel
David Tobac	)	In person

Mr. David Tobac ("Tobac") by his Counsel has filed with the Manitoba Securities Commission ("MSC") notice that he is appealing the decision ("Decision") of the Hearing Panel of the Mutual Fund Dealers Association of Canada (the "MFDA Panel") dated August 13, 2018 pursuant to Part IV.1 of The Manitoba Securities Act (the "Act"). Tobac's Counsel has represented that Section 31.1(4) gives to the MSC the jurisdiction to hear this appeal.

MFDA, by its Counsel, is a full participant in this appeal and, as such, recognizes that the MSC has jurisdiction to conduct the hearing of this appeal by a quorum (two) of its Commissioners (the "MSC Panel").

Tobac's appeal is that the Decision is:

a) Unreasonable;
b) The penalty imposed is excessive; and
c) Contrary to the law and the facts.

The MSC Panel has received:

a) Copy of the MFDA Panel Decision;
b) An Agreed Book of Documents which includes:
    i) Agreed Statement of Facts ("ASF");
    ii) Transcript of Proceedings held by the MFDA Panel on June 26, 2018;
c) Submission of Tobac's Counsel;
d) Submission of MFDA staff;
e) Reply submission of Tobac's Counsel; and

f) MFDA Staff Book of Authorities.

The MFDA Notice of Hearing to Tobac is dated March 15, 2018 and contains the following allegation:

> That on October 12, 2016 the Respondent processed a redemption in a client account based on the instructions from someone other than the client, contrary to MFDA Rules 2.1.1 and 2.3.1.

The ASF, dated the 24th day of April, 2018, is executed by Tobac and by a staff member of the MFDA: Shawn Devlin, Senior Vice-President.

In the ASF Tobac admits the Facts set out in paragraphs 6 to 24 of Part IV of the ASF and in paragraph 26 Tobac admits that he:

> "on October 12, 2016 ---- processed a redemption in a client account based on the instructions from someone other than the client, contrary to MFDA Rules 2.3.1 and 2.1.1."

As stated in paragraph 5 of the ASF:

> "Staff and the Respondent jointly request that the Hearing Panel (i.e.: the "MFDA Panel")* determine, on the basis of the Agreed Statement of Facts, the appropriate penalty to be imposed on the Respondent."
>
> * Wording added

The MFDA Panel was charged with the responsibility of determining one and only one issue, namely:

> "the appropriate penalty".

Tobac's Counsel submitted that the penalty imposed by the MFDA Panel was not reasonable. The penalty imposed was a fine of $20,000.00 and Tobac's Counsel argued that the penalty was 4 times the amount suggested by Guidelines of the MFDA. In reference to Guidelines of September 20, 2006, this MSC Panel considered and accepts the following:

> The MFDA Penalty Guidelines have been prepared to assist.
>
> The range is Guideline Only – are not mandatory the Guidelines suggest.
>
> The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding.

This MSC Panel notes and agrees with that general principle that the primary goal of securities legislation is the protection of the investing public --- to prevent future harm to the capital markets.

In essence the imposition of a sanction has a purpose to discourage the Respondent – Tobac (specific deterrence) and to discourage others from carrying on any similar activity (general deterrence).

In short this MSC Panel recognizes that help is forthcoming from the Guidelines but that other factors may be considered and which may cause any panel to partially or completely ignore the Guidelines provided always that such factors are properly identified and are reasonable in nature.

As stated by MFDA Counsel the

> "Standard of review of SRO is reasonableness"

We recognize that the standard of review of Self-Regulatory Organizations (SROs) is reasonableness. At the same time, we are of the opinion that a local panel and this MSC Panel in particular has a better degree of familiarity with local markets, local participants and the public interest.

We have reviewed the comments in reference to the Act and Ravindra Kumar Suppal in which the Commission makes reference to the Jory Capital case, and In Re: Northern Securities Inc. (2014) 37 OSCB 161 (Ontario Securities Commission), the quote in McLean v. British Columbia (Securities Commission) with reference to the Supreme Court of Canada case of Dunsmuir v. New Brunswick (2008) SCR 9 and the meaning of "reasonableness" and particularly wherein the Supreme Court of Canada states:

> "But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

We agree that the MFDA Panel has properly and correctly set forth the factors which should be considered by any Hearing Panel in the determination of an appropriate penalty (paragraphs 21 and 22 of the MFDA Reasons for Decision). The MFDA Hearing Panel, in our view, concerned itself more with reiterating the rules and what Tobac did or did not do as opposed to determining the appropriate penalty.

There can be no question that the MFDA Guidelines are not binding on any Hearing Panel nor that case law is not binding on any Hearing Panel, but it is incumbent on Hearing Panels to give due consideration to the Guidelines and the case law in arriving at a reasonable decision – in this case – solely about the penalty to be determined.

This MSC Panel is of the opinion that the MFDA Panel did not properly consider certain circumstances which if properly considered, could be taken as mitigating circumstances in arriving at an appropriate penalty – both specific and general in nature.

In this case in determining what these circumstances to be considered might be we are basically limited to those facts admitted in the ASF. In our view those facts in favour of mitigation are as follows:

a) Tobac admits all details of his actions;
b) Tobac admits that he is in breach of the provision of MFDA Rules 2.3.1 and 2.1.1.;
c) That upon being contacted by Client #2 with a specific request, it was he, Tobac, who initiated a change in such request to access the account of Client #1;

d) That upon being contacted by Client #1 Tobac immediately advised Investors Group (the "MFDA Member") that he had processed a redemption from the account of Client #1 without permission;

e) Tobac received no financial benefit from his misconduct;

f) Tobac has no history of misconduct.

The MFDA Counsel submits:

a) that Tobac committed "serious misconduct".

Tobac did not attempt to hide his misconduct from the Member;

b) that Tobac caused significant harm to Client #1.

there is no evidence whatsoever in that regard;

c) that the penalty imposed by the MFDA Panel is "within the range"

MFDA Counsel stated that the Guidelines do not impose any range that is binding on the MFDA Panel.

We certainly recognized the important regulatory role that the MFDA plays in Canada.

There is no question that the determination of appropriate penalties is at the discretion of the MFDA Panel but in this case we find that the MFDA Panel has not made any or significant findings that support the $20,000.00 penalty. The MFDA Panel seems to have concentrated its decision on Tobac's conduct and character not supported by the ASF. We do not find anything aggravating on Tobac's part. There is no evidence of manipulative, fraudulent or deceptive conduct by Tobac.

In fact, while MFDA staff argues that the MFDA Panel, in exercising its discretion, identified and applied some or all of 16 factors found in paragraphs 21 and 22 of the MFDA Reasons for Decision we are unable to reach any such conclusion.

In reference to the content of paragraph 34 of the MFDA Reasons for Decision, MFDA Counsel misinterprets such content. In our view, the MFDA Panel was referring to the argument that "the misconduct is not very serious" because it was not intentional, fraudulent or deceptive and was committed in good faith. It did not reject the statement itself that the misconduct was not intentional, fraudulent or deceptive and was committed "in good faith". It simply declined to lessen the seriousness of the misconduct itself because of the existence of such factors.

There is no question that it is the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.

The thrust of the provisions of paragraph 68 of the MFDA Reasons for Decision is that the MFDA Panel set a penalty sufficient to deter Tobac from any future misconduct and disabuse him from thinking he may ignore MFDA Rules or a member's policies and a warning to other persons and the investing public and that such misconduct has no place in the mutual fund industry.

This MSC Panel does not recognize any evidence of the so called "aggravating factors". Therefore, in our opinion, the mitigating factors are not outweighed.

We agreed that the penalty itself should be both a specific deterrent (to this Respondent) and a general deterrent to the general public particularly, to the members of the MFDA and Approved Persons.

In our view 4 of the cases cited may be used to assist this Panel in reaching its decision notwithstanding that their facts are not exactly the same as the facts in the matter before us.

a) Griffiths (MFDA File No. 0213290): Respondent made nine unauthorized trades (redemptions) covered up this fact by falsifying records. Tobac made one unauthorized trade (redemption).

b) Wray (MFDA File No. 201661): Respondent made an unauthorized trade (redemption) attempted to avoid/delay discovery by updating KYC details. Tobac made one unauthorized trade (redemption).

c) Stolarz (MFDA File No. 201642): Respondent made more than one unauthorized trade (withdrawals). Tobac made one unauthorized trade (redemption).

d) Wallace (MFDA File No. 201683): Respondent made three unauthorized trades. Tobac made one unauthorized trade (redemption).

Each case above records that there was no evidence of "bad faith", no financial gain and no disciplinary history. The same applies to Tobac.

However, each case referred to shows that the Respondents breached the rules as to unauthorized trading on more than one occasion and/or attempted some degree of cover-up of the facts. The penalty assessed in each case, for more than one breach of the rule combined with some degree of cover-up, is less than the $20,000.00 penalty in the matter before us -- two penalties are $15,000.00, two others are in the range of $10,000.00.

Reference is made by MFDA Counsel to the Respondent in the Griffith's case having paid $25,000.00 toward the client's loss and payment to the member of $12,892.00 and that the Hearing Panel considered these payments as mitigating factors -- assessing a lesser penalty of $10,000.00. With all due respect to the MFDA Panel it is our view that such payments should be a factor, but a minor factor, in determining a penalty to be assessed.

This Panel recognizes the role of the MFDA in regulating both its Members and Approved Persons. We question whether Tobac's conduct may have caused damage to the integrity of the capital markets. The MFDA Panel states throughout its decision that an Approved Person is not authorized to take the word of a spouse (or any third party) as consent to engage on trading on the other spouse's account. The very fact that Tobac has acknowledged his misconduct is in our view a clear understanding of his mistake, occasioned on one occasion only, but should not be taken to allow the MFDA Panel to conclude that he considers his mistake a trivial error nor that he acknowledges the client did not receive the benefit of the monies redeemed from her account.

Accordingly, this MSC Panel concludes that a fine of $10,000.00 is adequate to achieve specific adherence to the Respondent and the appropriate level of general deterrence to the general public including of course to Approved Persons.

The public interest is adequately served and enhanced by this penalty.

Finally, we congratulate and thank Counsel for their well-prepared Briefs. They were of assistance and appreciated.

"J.T. McJannet, Q.C."
J.T. McJannet, Q.C.
Panel Chair

"C.D. Burns"
C.D. Burns
Member