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CASE SUMMARY # 201026
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MFDA Case Summary

Enforcement

This case summary was prepared by Staff of the MFDA.

Hearing Panel Approves Settlement with M. Hershberg Capital Limited

Nature of Proceeding

A Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) has approved a Settlement Agreement between the MFDA and M. Hershberg Capital Limited (“Hershberg Capital”), now a former Member of the MFDA.

By-Laws, Rules, Policies Violated

The Hearing Panel considered the Settlement Agreement at a settlement hearing held on October 17, 2011 in Toronto, Ontario. In the Settlement Agreement, Hershberg Capital admitted that:

- i. from July 2004 to October 2008, it failed to ensure that trades in the accounts of clients were consistent with the clients’ documented KYC information in that purchase transactions of “medium/high” and “high” risk investments were made in accounts of clients who had a risk tolerance of “medium” recorded on their KYC forms, contrary to MFDA Rules 2.2.1 and 2.5.1;
- ii. from July 2004 to May 2009, it engaged in discretionary trading in that trades were executed in client accounts:
 - a. pursuant to limited trading authorizations but absent evidence of specific client instructions; and
 - b. several days after receiving client instructions for trades, contrary to MFDA Rules 2.3.2, 5.1(b), and 2.1.1; and
- iii. from July 2004 to May 2009, it conducted trades for multiple family members’ accounts when the Respondent had received trade instructions from only one person in the family who did not have trading authority over the other accounts, contrary to MFDA Rule 2.1.1.

MFDA Rule 2.1.1 states:

Standard of Conduct

Each Member and each Approved Person of a Member shall:

- (a) deal fairly, honestly and in good faith with its clients;
- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
- (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

MFDA Rule 2.2.1 states:

Know-Your-Client

Each Member and Approved Person shall use due diligence:

- (a) to learn the essential facts relative to each client and to each order or account accepted;
- (b) to ensure that the acceptance of any order for any account is within the bounds of good business practice; and
- (c) to ensure that each order accepted or recommendation made for any account of a client is suitable for the client and in keeping with the client's investment objectives; and
- (d) to ensure that, notwithstanding the provisions of paragraph (c), where a transaction proposed by a client is not suitable for the client and in keeping with the client's investment objectives, the Member has so advised the client before execution thereof.

MFDA Rule 2.3.2 states:

Limited Trading Authorization

A Member or Approved Person may accept a limited trading authorization from a client for the express purpose of facilitating trade execution. In such circumstances a form of limited trading authorization as prescribed by the Corporation must be completed and approved by the compliance officer or branch manager, and retained in the client's file.

MFDA Rule 2.5.1 states:

Minimum Standards Of Supervision

2.5.1 *Member Responsibilities.* Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.

MFDA Rule 5.1(b) states:

Requirement for Records

5.1 Every Member shall keep such books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and the transactions that it executes on behalf of others and shall keep such other books, records and documents as may be otherwise required by the Corporation. Such books and records shall contain as a minimum the following:

- (b) an adequate record of each order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. Such record shall show:

- (i) the terms and conditions of the order or instructions and of any modification or cancellation thereof;
- (ii) the account for which entered or received;
- (iii) the time of entry or receipt, the price at which executed and, to the extent feasible, the time of execution or cancellation; and
- (iv) evidence that the client was informed of all fees and charges in accordance with Rule 2.4.4.

Penalty

Under the terms of the Settlement Agreement, Hershberg Capital agreed to the following penalties:

- i. Fine in the amount of \$10,000, pursuant to s. 24.1.2(b) of By-law No. 1; and
- ii. Costs in the amount of \$2,500, pursuant to s. 24.2 of By-law No. 1.

Summary of Facts

Hershberg Capital became a Member of the MFDA in March 2002. Hershberg Capital was the subject of MFDA compliance examinations in August 2004 and October 2008, at which time Staff identified deficiencies, including those admitted to in the settlement herein.

In April 2011, Hershberg Capital, of its own volition, gave notice to the MFDA of its intention to resign from MFDA membership, and Hershberg Capital then ceased operations as a mutual fund dealer. The resignation was effective December 19, 2011, i.e. after the settlement hearing.

The Hearing Panel determined that it was in the public interest to accept the Settlement Agreement, noting that although the fine agreed upon was “on the low side”, it was adequate having regard to the fact that Hershberg Capital had ceased operations, could not therefore benefit from the assistance of a monitor, and further:

- there was no evidence that Hershberg Capital had received any benefit from its improper activities or that it had any ulterior motive in carrying them out;
- there were no outstanding client complaints made to Hershberg Capital or to the MFDA; and
- there were no other open or outstanding MFDA enforcement files regarding Hershberg Capital.

For greater detail, see the Settlement Agreement, accepted on October 17, 2011, and the Reasons for Decision, dated November 8, 2011, posted on the MFDA’s website in the “Enforcement” section under “Completed Cases”.