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: W.H. Stuart Mutuals Ltd., Marilyn Dianne Stuart and Walter Howard Stuart

Heard: April 29, 2016 in Toronto, Ontario
Decision and Reasons (Penalty): May 16, 2016

DECISION AND REASONS
(Penalty)

Hearing Panel of the Central Regional Council:

Mark J. Sandler	Chair
Kenneth P. Mann	Industry Representative
Vasant Pachapurkar	Industry Representative

Appearances:

Shelly Feld Paul Blasiak	)	Counsel for the Mutual Fund Dealers Association of Canada
No one appearing for the Respondents	)	

Introduction

1. On November 27, 2014, the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Hearing respecting three Respondents: W.H. Stuart Mutuals Ltd. ("W.H. Stuart" or "the Member"), Marilyn Dianne Stuart ("Dianne Stuart" or "Ms. Stuart") and Walter Howard Stuart ("Howard Stuart" or "Mr. Stuart"). The Notice contained the following allegations:

Allegation #1: Between March 26, 2003 and May 2013, Dianne Stuart and W.H. Stuart solicited and accepted approximately $6 million from more than 180 clients purportedly to be invested on their behalf (the "Note Program"), which monies they failed to repay or otherwise account for.

Allegation #2: Between March 26, 2003 and May 2013, Dianne Stuart and W.H. Stuart actively concealed the activity in Allegations #1 and #3 from others at W.H. Stuart, external auditors, the MFDA and other regulators.

Allegation #3: Between March 26, 2003 and May 2013, in addition to failing to repay or otherwise account for the monies invested in the Note Program described in Allegation #1, Dianne Stuart and W.H. Stuart misappropriated or have otherwise failed to account for more than $800,000 of investments and monies from over 30 clients.

Allegation #4: Dianne Stuart and W.H. Stuart failed to comply with interim orders of a Hearing Panel of the MFDA with respect to the matters in Allegations #1 and #3 above.

Allegation #5: Between March 26, 2003 and May, 2013, in the course of sustaining the Note Program described in Allegation #1, Dianne Stuart and W.H. Stuart failed to file accurate and complete financial reports, maintain minimum capital, segregate cash and property of W.H. Stuart clients, implement adequate internal controls or maintain accurate financial records.

Allegation #6: Commencing November 21, 2012, Howard Stuart failed to cooperate during the course of an investigation by failing to attend an interview requested by Staff to provide a statement and give information about the matters under investigation.

2. On February 16, 2016, the hearing into the merits of these allegations took place. In our Decision and Reasons dated April 25, 2016, we found that all of the allegations had been proven.

3. The hearing proceeded in the absence of the Respondents. In our earlier Reasons, we concluded that the Respondents had chosen not to participate in these proceedings, and set out our jurisdiction to proceed in their absence, and why it was appropriate to do so.

4. We set April 29, 2016 for submissions as to penalty. The Respondents again had the full opportunity to participate at the penalty phase of the hearing, but chose not to do so. It remained appropriate to consider the issue of penalty in their absence.

5. At the penalty hearing, Enforcement Counsel relied upon the evidence already placed before the Hearing Panel, together with written and oral submissions. Counsel also drew our attention to two prior decisions of the Alberta Securities Commission pertaining to all of the same Respondents.

6. At the conclusion of the penalty hearing, we ordered that effective immediately:

(a) the Membership of W.H. Stuart in the MFDA is terminated;
(b) Dianne Stuart is permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA;
(c) Howard Stuart is permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA;
(d) The Respondents Dianne Stuart and Howard Stuart are jointly and severally required to pay costs of the MFDA totaling $50,000.

7. We also indicated that we intended to impose a fine or fines on both Dianne Stuart and Howard Stuart, but not on W.H. Stuart in light of its status as a bankrupt company with no ability to pay or any prospect whatsoever that it will ever be in a position to do so. The Trustee in Bankruptcy confirmed that no funds were available for distribution to pay liabilities owed to ordinary unsecured creditors of W.H. Stuart. W.H. Stuart has been inactive and the subject of a suspension order for some time. Absent these circumstances, we would have undoubtedly imposed a multi-million dollar fine on W.H. Stuart to reflect the scope, duration and seriousness of its misconduct, the sophisticated, calculated deceit by at least one of its directing minds, and the large losses incurred as a result of that misconduct.

The Facts

8. It is unnecessary for us to repeat the detailed findings of fact contained in our earlier Decision and Reasons. However, we will briefly allude to several of those findings to explain the penalty imposed on each Respondent.

Discipline History

9. In 1999, W.H. Stuart, Dianne Stuart and Howard Stuart were all respondents in proceedings before the Alberta Securities Commission (the "ASC"). At that time, W.H. Stuart was registered as a mutual fund dealer in Alberta, though its head office (then and more recently) was in Toronto. Howard Stuart was the President and Chief Executive Officer of the dealer, and Dianne Stuart was its Secretary-Treasurer and Compliance Officer.

10. The allegations before the ASC related to the sale of limited partnership units to purchasers in Alberta without a prospectus. Pursuant to Alberta securities legislation, individuals had to purchase a minimum of $97,000 worth of these units to qualify for certain prospectus and registration exemptions. Of significance, the threshold under British Columbia securities legislation was $25,000. The ASC concluded that Dianne Stuart orchestrated a scheme to have subscription documents completed with false information to make it appear as if the sales had been facilitated by a sales agent in W.H. Stuart's Kelowna, British Columbia office. In fact, the

Alberta investors had never met this sales agent. Indeed, the address of the Kelowna office of W.H. Stuart was filled in as each investor's address. Prior to the hearing, Dianne Stuart had provided conflicting versions of the events in an effort to avoid responsibility. Given Dianne Stuart's position with W.H. Stuart at the time and the finding that she deliberately attempted to circumvent Alberta law, the ASC regarded her actions to fall within the most serious category of violations.

11. The ASC also concluded that the registered salespersons of W.H. Stuart, a mutual fund dealer, sold exempt securities without the requisite approval of the ASC. As well, some sales were made through employees who were only registered to sell life insurance.

12. The ASC ordered that Ms. Stuart resign any positions she held as a director or officer, or both, of any issuer/registrant, and prohibited her from becoming or acting as a director or officer, or both, of any issuer/registrant.

13. The ASC held that W.H Stuart was responsible for the violations because the unlawful sales were made through its employees, facilitated by Ms. Stuart. It delegated its compliance responsibility to Ms. Stuart. the ASC fined W.H. Stuart $150,000 and ordered, as a condition of W.H. Stuart's registration, that Dianne Stuart not be employed by W.H. Stuart in any capacity, except with the prior written consent of the ASC's Executive Director.

14. All three respondents acknowledged their responsibility for the regulatory violations. Mr. Stuart's responsibility stemmed from his position as President and Chief Executive Officer of W.H. Stuart. The ASC concluded, however, that there was no evidence showing any involvement by him in the plan to circumvent Alberta law. He was fined $25,000. All of the respondents were ordered to pay the costs of the investigation and hearing.

15. In 2011, W.H. Stuart entered into a Settlement Agreement with the MFDA in which it admitted that prior to February 28, 2009, it failed to establish, implement, maintain and adhere to adequate policies and procedures to ensure that adequate trade supervision was being conducted and that evidence of trade supervision was being maintained. It also admitted that between

February 12, 2009 and September 28, 2009, it breached early warning restrictions that were applicable to it by paying a bonus to Howard Stuart and by making a direct or indirect payment to a related party, Stuart Insurance, without the MFDA's prior written consent. W.H. Stuart was fined $45,000 and ordered to pay a modest costs award.

16. The prior disciplinary record, particularly in Alberta, is significant. It shows that Dianne Stuart engaged in a prior deliberate (albeit far less sophisticated) scheme to circumvent the law. Like her misconduct in Ontario, she was responsible for the creation and use of false documents to facilitate the scheme. Unlicensed or unapproved personnel, again like the current case, sold the investment product in issue.

17. The disciplinary record also shows that serious regulatory violations took place under Howard Stuart's watch as President and Chief Executive Officer. Equally important, notwithstanding the ASC's finding as to Ms. Stuart's level of culpability, he continued to allow her to function in a similar capacity in Ontario. The ASC's order prohibiting Ms. Stuart from continuing to serve as a director or officer of an issuer/registrant and prohibiting W.H. Stuart from employing her in any capacity without the ASC's approval may only have extended to these Respondents' dealings in Alberta (we do not profess to be interpreting the ASC's order or its jurisdiction), but her continued role as a directing mind of W.H. Stuart in Ontario, most particularly as the person most responsible for compliance, signals, at best, an indifference to the findings of the ASC and to regulation more generally.

18. We also find Ms. Stuart's status in Ontario, including her registration as an Approved Person, an officer and director and the Ultimate Designated Person is troubling for another reason. Although there is no evidence before us as to how and why Ms. Stuart received regulatory approval to serve in her various roles in Ontario, one would have thought that the ASC findings vis-à-vis Dianne Stuart would have presented a significant roadblock to her ability to carry on in Ontario, and thus, be well situated to commit the serious misconduct described in our earlier Reasons. In fairness, Enforcement Counsel was not in a position to comment on what had transpired years earlier in this regard, though he expressed his understanding that reciprocity

and cooperation between regulators across Canada has improved significantly over the years. We certainly hope so.

Dianne Stuart

19. Ms. Stuart's conduct falls at the most serious end of the spectrum of wrongdoing. She was a prime architect of a sophisticated, lengthy scheme involving deliberate dishonesty, and resulting in millions of dollars of losses. The scheme involved, among other things, misrepresentations, forged or "doctored" transactional and financial records, misappropriations and failures to account. More than 180 clients were drawn into the Note Program alone. It is not surprising, given the efforts to disguise or conceal the nature of the Note Program, or its very existence, that the misconduct remained undetected by regulators for an extended period of time.

20. Ms. Stuart's disciplinary record reinforces her level of culpability and the need for the severest penalty to protect the public, generally deter like-minded individuals and restore confidence in the profession and the markets as a whole. On our findings, it was inevitable that we order that she be permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA.

21. A fine is appropriate as well. It should reflect, among other things, the seriousness of her misconduct and the losses incurred as a result of that conduct. It should send a strong message to the public and to those who might be inclined to follow in Ms. Stuart's footsteps. We do not know the precise losses incurred – indeed, it is reasonable to infer that they are understated in the evidence before us. In considering losses, we are mindful that they have been incurred by individuals who, for a variety of reasons, may not be eligible for full or any compensation. As well, monies paid out in compensation by the MFDA Investor Protection Corporation also constitute losses resulting from her misconduct. Those payouts have been borne by the industry as a whole.

22. The MFDA Investor Protection Corporation paid out over $6 million in compensation relating to the Note Program, and $826,638.99 relating to misappropriations or failures to

account unconnected to the Note Program. Based on the totality of the circumstances, we order that Ms. Stuart pay a fine of $7 million dollars. For reasons reflected below, we also order Mr. Stuart to pay a fine in the amount of $1 million. They are jointly and severally liable up to the amount of $1 million. Thereafter, the liability rests with Ms. Stuart alone. We also order that, to the extent to which Enforcement Counsel is satisfied that either or both Respondents have made restitution (voluntary or compelled) in any related legal proceeding to those who have incurred losses, including the MFDA Investor Protection Corporation, these fines shall be reduced accordingly, and equally as between the two Respondents. The Chair of this Hearing Panel is delegated the authority to address any dispute in this regard, should it arise.

23. In light of the financial difficulties that prompted the misconduct, and the absence of any enforcement mechanism available to the MFDA, there may be very limited expectation that fines of this magnitude will be paid by the individual Respondents. However, unlike W. H. Stuart's situation, there is no real evidence before us as to the assets and liabilities of the individual Respondents or any future prospect or lack thereof of payment. In our view, the principles that inform penalty support the imposition of these large fines here.

Howard Stuart

24. We found that Howard Stuart failed to cooperate with the MFDA. The MFDA made no other formal allegation against him. Nor did it ask that we make findings against him in relation to the activities set out in Allegations #1-5. As well, we are mindful of the implications for procedural fairness that flow from the fact that the allegation against Mr. Stuart, which he received notice of, was confined in this way.

25. On the other hand, we are obligated to consider the seriousness of his failure to cooperate in the context of the totality of the evidence. He was the President and Chief Executive Officer of W.H. Stuart at the material time and indeed, was its founder. He was instrumental in setting up a number of the related entities, including those used to facilitate the misconduct. He continued to receive payments from the company for an extended period of time. Whatever Mr. Stuart's

precise state of mind when these payments were being made, it is reasonable to infer, as we do, that these payments constituted ill-begotten gains.

26. Howard Stuart was undeniably aware of the financial hardships being experienced by W. H. Stuart and the need to generate funds to fuel the litigation involving the company. He has a prior disciplinary record in Alberta and was aware of the findings and order made by the ASC vis-à-vis Dianne Stuart. Nonetheless, he was prepared to allow Ms. Stuart to play a crucial role in the company, while he remained its President and Chief Executive Officer.

27. Although Mr. Stuart did not face the substantive allegations proven against Ms. Stuart and W.H. Stuart, this may be explained, at least in part, by his deliberate choice not to cooperate with the MFDA, and the MFDA's inability, as a result, to have a complete understanding of his role. Such a complete understanding could have come from his answers to questions – whether entirely truthful or not.

28. All of this to say, we must engage in a balancing exercise: both recognizing the actual allegation proven against Mr. Stuart and the need to ensure that there is little or no incentive for refusing to cooperate with an ongoing investigation.

29. In summary, in light of the context described above, we regard Mr. Stuart's failure to cooperate to be very serious. We see little or no extenuating or mitigating circumstances. There are a number of aggravating circumstances, including his prior disciplinary record in Alberta, W.H. Stuart's disciplinary record while he was President and Chief Executive Officer, and his preparedness to allow Ms. Stuart to play the role that she did in W.H. Stuart's Ontario activities. In our view, it is appropriate that Mr. Stuart be permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA. This may not be required in every failure to cooperate case, but we also observe that existing jurisprudence supports this disposition in a number of failure to cooperate cases.

30. We have already indicated that the appropriate fine for Mr. Stuart is $1 million. This recognizes that he is differently situated than Ms. Stuart, but that a number of aggravating factors make his failure to cooperate particularly serious. The permanent prohibition and large fine are intended to provide a disincentive to anyone who is inclined to fail to cooperate with one's regulator.

31. We were invited by Enforcement Counsel to consider whether the Stuarts' status as husband and wife should be a relevant consideration. Enforcement Counsel submitted that this made Mr. Stuart a beneficiary, in a joint household, of the monies unlawfully extracted from investors.

32. We prefer not to place any reliance on their status as husband and wife for several reasons. First, there was some evidence that they separated in 2007 and sometime later, divorced. Arguably, they were not in a common household for a significant part of the material time frame. Second, in our view, we must be careful not to attribute, in the absence of evidence, the wrongdoing of one spouse too readily to the other spouse – especially where the MFDA has not proceeded against Mr. Stuart on Allegations #1-5. What must also be self-evident from this analysis is that we have placed no reliance on Ms. Stuart's description of her ex-husband's role in the firm's activities. Her credibility is highly suspect, and has been found wanting on a number of points.

W.H. Stuart

33. W.H. Stuart has not been active and its membership in the MFDA has been suspended for some time. Given its corporate liability, its connection to the individual Respondents, and its current status, it is appropriate to terminate its membership in the MFDA.

34. We explained earlier in these Reasons why we see no rationale for imposing a fine or a costs award on W.H. Stuart. As we also explained earlier, had W.H. Stuart been differently situated, we would have had no hesitation in imposing a multi-million fine on it as well.

Enforcement Counsel did not object to our approach in the very particular circumstances of this case.

Order

35. Our formal order will capture the terms contained in paragraph 6 of our Reasons, together with the fines contained in paragraph 22 of our Reasons. In our view, a fine and costs order should normally be accompanied by a specified time for payment. Otherwise, there is uncertainty as to when the fine and costs are past due. Ms. Stuart and Mr. Stuart are to pay the fines and costs within 24 months of the release of these Reasons.

36. We are grateful to Enforcement Counsel and the affiants whose evidence was placed before us for their careful and fair presentation of the facts.

DATED this 16th day of May, 2016.

"Mark J. Sandler"

Mark J. Sandler
Chair

"Kenneth P. Mann"

Kenneth P. Mann
Industry Representative

"Vasant Pachapurkar"

Vasant Pachapurkar
Industry Representative

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