

February 16, 2023

Canadian Securities Administrators
Attention: Mr. S. Magdison, Chair

Ban on the use of NDA's in complaint cases

As you are aware, investment dealers require victims of financial assault to sign an NDA as a condition for investor compensation. Some even contain non-disparagement clauses which is the ultimate in silencing the investor voice. Financial institutions proceed in the dark by foisting NDA's on helpless claimants.

By their very nature, NDA's restrict our liberties, our humanity — why accept them as an unfortunate but unavoidable fact of life? Why is the financial services industry's first instinct to justify or rationalize non-disclosures as necessary? The CSA should not permit powerful institutions and corporations to rely on a legal technique to hide evidence, enshrine lies and banish the truth in a modern democracy backed by a robust Constitution.

We find NDA's to be unfair, harmful to retail investor complainants and not in the Public interest. Our concerns are as follows:

- NDA's are bad for regulation as they bury wrongdoing
- The gagging prevents victims from warning others , including even family members
- NDA's have pernicious effects because they are designed to prevent collaboration by claimants, thereby reflecting a "divide and conquer" strategy. And it often works. This means that claimants are forced to endure the emotional stresses and transaction costs of dispute resolution procedures on their own behalf without economies of scale by spreading those costs over a group of claimants. This is grossly unfair.
- The gagging requirement of NDA's precludes public exposure which relieves financial institutions of the scrutiny they deserve. Sunlight is the best disinfectant.
- Those who sign NDA's have no idea of the constraints, the duration of the gagging or the consequences of breaching the Agreement. As a result, they live in constant fear, which can impair mental and physical health. In effect, the gagging causes complainants to be victimized a second time.

It is not easy for a retail investor to refuse to sign an NDA because it may deprive the claimant of the mediocre proceeds of flawed industry complaint handling processes. Legal representation is often not realistic and civil litigation out of reach for most Canadians.

The people most harmed by NDA's are retail investors, seniors, vulnerable investors, people of modest means and people of color.

Kenmar Associates

On February 10, the Canadian Bar Association adopted a set of principles designed to limit the harmful effects NDA's have on Canadians.

<https://www.canadianlawyermag.com/resources/practice-management/cba-adopts-resolutions-on-ndas-and-intersectional-judicial-data-collection-at-annual-meeting/373623> This has direct relevance to our request.

The use of an NDA in financial services is just as distasteful as uses in the church, rape cases, amateur sports and in the entertainment industry.

For all the above stated reasons, we categorize the use of NDA's as a major socio-economic issue.

The routine use of non-disclosure agreements in financial services without any consideration of the public or community's best interests undermines the very idea of an open and accountable society. Their proliferation has achieved only one thing: an erosion of trust in the financial services industry. We respectfully request the CSA to ban the use of NDA's in complaint cases.

Until a ban is enacted we also request that the CSA prepare a plain language guide for investors detailing any rights complainants have to inform regulators, police or Human Rights commissions and informing investors what NDA's are, when they might arise, what the consequences of not signing them are and the consequences of not complying with them .

Please feel free to contact us if further information is required.

Sincerely,

Ken Kivenko, President
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