



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: Scott C. Armstrong

Heard: July 6, 7 and 8, 2011; August 23, 2011 in Saint John, New Brunswick
Decision and Reasons: September 2, 2011

DECISION AND REASONS
(Rescinded and Replaced, [February 1, 2017](#))

Hearing Panel of the Atlantic Regional Council:

The Hon. D. Merlin Nunn, Q.C.
Ann C. Etter
Robert G. Malcolm

Chair
Industry Representative
Industry Representative

Appearances:

Charles Toth)	For the Mutual Fund Dealers Association of Canada
)	
Scott C. Armstrong)	For himself, the Respondent
)	

THE ALLEGATIONS

1. By Notice of Hearing, dated January 19, 2011, the following Allegations were made against Scott C. Armstrong (the “Respondent”):

- a) **Allegation # 1:** Between about 2007 and 2008, the Respondent facilitated an investment by client AL in the amount of \$40,000 in a corporation, Armstrong Financial Services Inc. (“Armstrong Financial”), in which the Respondent had a direct or indirect interest, in a manner which preferred his own interests over those of client AL and which failed to deal with client AL fairly, honestly and in good faith, contrary to MFDA Rules 2.1.4 and 2.1.1.
- b) **Allegation # 2:** Between about 2007 and 2008, the Respondent induced client AL to sign an agreement whereby client AL released any claim to ownership of shares of Armstrong Financial and resigned as an officer or director of Armstrong Financial in exchange for the Respondent promising to pay client AL \$62,000, which the Respondent subsequently failed to do, thereby preferring his own interests over those of client AL and failing to deal fairly, honestly and in good faith with client AL, contrary to MFDA Rules 2.1.4 and 2.1.1.
- c) **Allegation #3:** Between 2007 and 2008, the Respondent engaged in personal financial dealings with client AL by signing a promissory note in the amount of \$62,000 payable by him to client AL in satisfaction of debts owed primarily by Armstrong Financial and Gateway Capital Growth Inc. (“Gateway”) to client AL and thereafter failing to pay client AL in accordance with the terms of the promissory note, contrary to MFDA Rules 2.1.4 and 2.1.1.

SERVICE

2. The Notice of Hearing was served upon Scott C. Armstrong by Bryan Murray, a process server, on January 31, 2011, as set forth in his Affidavit of Service dated and sworn to on the 3rd day of February.

3. The Notice of Hearing provided that the First Appearance was to take place by teleconference before the Hearing Panel on March 25, 2011 at 10:00 a.m. (Atlantic).

4. Scott C. Armstrong took part in that teleconference without counsel. By that time Armstrong had filed a Reply and it was clear that he was denying all allegations against him and a full hearing was required. Hearing dates were set as July 6, 7, and 8, 2011, with the agreement of all parties, including the Respondent.

5. No issue arose here with regard to service nor are there any issues relating to the Rules of Procedure with the exception of a problem which arose on the third day of hearings when the Respondent advised counsel for the MFDA that he wished to call a number of witnesses though he had not complied with the requirements of Rules 21.1(1) and (2) regarding notice and timeliness. However, Mr. Toth agreed to the Respondent's request provided he comply with the Rule 21 requirements in advance of the adjourned dates the Panel set for further hearings.

THE JULY 6, 7, and 8 HEARINGS

6. The Panel was presented with 3 large volumes of documents plus 11 other documentary exhibits to which witnesses called by Mr. Toth on behalf of MFDA spoke. Those witnesses were:

- a) AL, the Respondent's client
- b) Daniela Capozzolo, Senior MFDA Investigator
- c) Ross Anstis, former Compliance Officer at Armstrong Financial and Gateway
- d) Kathy Curwin, former Compliance Officer at Gateway

7. At the conclusion of the testimony of Kathy Curwin on July 6 and, in order to comply with the Respondent's request regarding calling new witnesses, which were determined to be 6 in numbers, the Panel adjourned the matter to August 22, setting that whole week, August 22 to and including August 26 as the parties requested, as additional Hearing days.

8. By Email dated August 19, Marco Wynnyckyj of MFDA notified the Panel that only one day would be needed and, to give the parties time to prepare, the best day would be August 23. The Respondent agreed to that date.

THE AUGUST 23 HEARING

9. Mr. Toth commenced the proceedings by presenting to the Panel an Agreed Statement of Facts signed by both the MFDA and the Respondent on August 19, 2011.

10. The Agreed Statement of Facts contains more than the facts giving rise to the allegations. It contains admissions on the part of the Respondent that the facts therein constitute misconduct on his part for which he may be penalized pursuant to s. 24.1 of MFDA By-law No. 1. It sets the minimum appropriate penalty including a suspension, fine and costs.

11. At the August 23 Hearing the Respondent repeated his agreement to the whole of the Agreed Statement of Facts indicating, as did Mr. Toth, that the only issue before the Panel was the time span the Panel would set for the payment of the fine.

12. Paragraph 10 of the Statement of Agreed Facts indicates that the submissions on appropriate penalty are based only on the agreed facts in Part IV of the Statement and for this purpose all other filed documents and prior testimony should be disregarded.

13. In view of this agreement there is no reason for the Panel to set forth or refer to the earlier testimony and documentation or otherwise deal with the evidence provided in the July Hearings.

14. However, this decision would be of little or no significance if the facts upon which the penalties are based are not revealed and, in the Panel's view, the most appropriate way to accomplish this in the usual circumstances here is to set forth the whole of the Agreed Statement of Facts.

AGREED STATEMENT OF FACTS

I. INTRODUCTION

15. By Notice of Hearing dated January 19, 2011, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced a disciplinary proceeding against Scott C. Armstrong (the "Respondent") pursuant to ss. 20 and 24 of MFDA By-law No. 1.

16. The Notice of Hearing set out the following allegations:

- a) **Allegation # 1:** Between about 2007 and 2008, the Respondent facilitated an investment by client AL in the amount of \$40,000 in a corporation, Armstrong Financial Services Inc. (“Armstrong Financial”), in which the Respondent had a direct or indirect interest, in a manner which preferred his own interests over those of client AL and which failed to deal with client AL fairly, honestly and in good faith, contrary to MFDA Rules 2.1.4 and 2.1.1.
- b) **Allegation # 2:** Between about 2007 and 2008, the Respondent induced client AL to sign an agreement whereby client AL released any claim to ownership of shares of Armstrong Financial and resigned as an officer or director of Armstrong Financial in exchange for the Respondent promising to pay client AL \$62,000, which the Respondent subsequently failed to do, thereby preferring his own interests over those of client AL and failing to deal fairly, honestly and in good faith with client AL, contrary to MFDA Rules 2.1.4 and 2.1.1.
- c) **Allegation #3:** Between 2007 and 2008, the Respondent engaged in personal financial dealings with client AL by signing a promissory note in the amount of \$62,000 payable by him to client AL in satisfaction of debts owed primarily by Armstrong Financial and Gateway Capital Growth Inc. (“Gateway”) to client AL and thereafter failing to pay client AL in accordance with the terms of the promissory note, contrary to MFDA Rules 2.1.4 and 2.1.1.

17. The hearing on the merits was conducted July 6, 7 and 8, 2011 in Saint John, New Brunswick before a hearing panel (the “Hearing Panel”) of the Atlantic Regional Council of the MFDA. The Hearing Panel heard the evidence of four witnesses: client AL; Daniella Capozzolo, MFDA Investigator; Ross Anstis, former Compliance Officer at Armstrong Financial and Gateway; and Kathy Curwin, former Compliance Officer at Gateway. The hearing on the merits was adjourned and scheduled to continue from August 22 to 26, 2011. Prior to the hearing on the merits resuming, the Respondent agreed to enter into this Agreed Statement of Facts on the terms described below.

II. IN PUBLIC/IN CAMERA

18. The Respondent and Staff of MFDA (“Staff”) agree that this matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

19. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of the MFDA By-law No. 1.

20. Subject to the determination of the Hearing Panel, Staff submits and the Respondent does not oppose that, at a minimum, the appropriate penalty to impose on the Respondent is:

- a) a permanent prohibition on the Respondent’s authority to conduct securities related business in any capacity over which the MFDA has jurisdiction, which will be reduced to a 5 year suspension if client AL is repaid the sum of \$51,500 by the Respondent on or before a date to be determined by the Hearing Panel; and
- b) a fine in the amount of \$51,500, which will be reduced to a fine in the amount of \$10,000 if client AL is repaid the sum of \$51,500 by the Respondent on or before the date set by the Hearing Panel in subparagraph (a) above.

21. Subject to the determination of the Hearing Panel, Staff submits and the Respondent does not oppose that the Respondent shall pay costs in the amount of \$5,000.

22. Staff and the Respondent jointly request that the Hearing Panel determine, on the basis of this Agreed Statement of Facts, the appropriate date by which the Respondent shall be required to repay client AL the sum of \$51,500 as described in paragraph 6 above.

23. The Respondent claims to be impecunious and unable to pay, at the present time, any amount towards either a fine or costs. The Respondent is currently an undischarged bankrupt.

IV. AGREED FACTS

24. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV and no other facts or documents, including the prior testimony and documents entered into evidence during the hearing on the merits (except to the extent that any such prior testimony and documents are referred to again in this Agreed Statement of Facts). In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent. If the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

25. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

26. From May 1999 to December 2008, the Respondent was registered in New Brunswick as a mutual fund salesperson with Gateway, formerly known as Armstrong Financial.

27. On December 22, 2008, Gateway suspended the Respondent as a result of the events described below. The Respondent subsequently resigned from Gateway on December 30, 2008. The Respondent claims that he did not receive notice of his suspension from Gateway prior to resigning from it.

28. The Respondent is not currently registered in the securities industry in any capacity. The Respondent states that he is currently unemployed.

29. Armstrong Financial became a member of the MFDA on April 12, 2002. On November 29, 2008, Armstrong Financial changed its name to Gateway. On January 28, 2010, Gateway filed a notice of intention to resign its membership with the MFDA.¹

Client AL Invests in Armstrong Financial

30. At all material times prior to August, 2008, the Respondent was a controlling mind and authorized signing officer of Armstrong Financial and managed its day-to-day operations.

31. Client AL is a retired school principal. At all material times, client AL was a client of Armstrong Financial and the Respondent was the mutual fund salesperson responsible for serving his account.

32. In 2007, the Respondent became aware that 7 of the 11 existing shareholders of Armstrong Financial wanted to redeem their shareholdings and either sell or shut down Armstrong Financial. The seven existing shareholders represented approximately 405 of the 460 outstanding shares of Armstrong Financial.

33. The Respondent approached client AL and recommended that client AL and the Respondent purchase ownership of Armstrong Financial.²

34. On or about August 1, 2007, the Respondent attended a special meeting of Armstrong Financial's shareholders. During the meeting, the Respondent requested and received permission from the shareholders for client AL and himself to raise capital to purchase the company.

35. The Respondent subsequently advised client AL that an agreement (hereinafter referred to as the "Share Purchase Agreement") had been reached with the existing shareholders of Armstrong Financial. There is no evidence that the Share Purchase Agreement was ever reduced

¹ In accordance with s. 13 of MFDA By-law No. 1, Gateway's application to resign its membership with the MFDA remains pending subject to the completion of unresolved enforcement matters.

² At that time, client AL owned 10 shares of Armstrong Financial. The Respondent did not own any shares of Armstrong Financial.

to writing or signed by the parties involved. Client AL relied on the Respondent for information concerning the status and negotiation of the Share Purchase Agreement. Under the terms of the Share Purchase Agreement:

- a) Armstrong Financial would buy back the shares held by 7 of the 11 existing shareholders of Armstrong Financial, representing approximately 405 of the 460 outstanding shares of the company;
- b) client AL would purchase 300 shares issued by Armstrong Financial at a price of \$40,000;
- c) the Respondent would purchase 330 shares issued by Armstrong Financial at a price of \$50,000; and
- d) client AL would become the President of Armstrong Financial.

36. The Respondent led client AL to believe that following the completion of the Share Purchase Agreement, client AL and the Respondent would own approximately 630 of the 685³ shares of Armstrong Financial and would, as a consequence, together constitute the *de facto* owners and operators of Armstrong Financial.

37. On or about September 4, 2007, in furtherance of the Share Purchase Agreement, client AL delivered a cheque to the Respondent in the amount of \$40,000 payable to Armstrong Financial for the purchase of 300 shares of Armstrong Financial (the “Share Purchase Cheque”).

38. The Respondent arranged for the Share Purchase Cheque to be deposited into Armstrong Financial’s business account.

39. Following the deposit of the Share Purchase Cheque, the Respondent failed to take any or adequate steps or cause to ensure that Armstrong Financial issued shares to client AL in accordance with the terms of the Share Purchase Agreement. At no time did the Respondent provide or arrange for client AL to be provided with share certificates or evidence of his investment in Armstrong Financial.

³ 685 shares = 300 shares to be issued to client AL + 330 shares to be issued to the Respondent + 55 shares from the outstanding 460 shares originally issued by Armstrong Financial.

40. Notwithstanding the Respondent's representation that client AL would become the President of Armstrong Financial, client AL was not allowed to become, nor did he otherwise act, as its President. The Respondent remained in control of both the overall affairs and day-to-day operations of the Armstrong Financial.

41. The Respondent did not purchase any shares of Armstrong Financial as contemplated by the Share Purchase Agreement or otherwise invest \$50,000 in Armstrong Financial, nor did the Respondent inform client AL that he had not carried through on his obligations under the Share Purchase Agreement.

42. Between November 19, 2007 and March 1, 2008, Armstrong Financial redeemed the shares held by 7 of the 11 existing shareholders, as described in paragraph 18 above. During this period, Armstrong Financial issued cheques to these shareholders in the total amount of \$172,750. The cheques were co-signed by the Respondent on behalf of Armstrong Financial.⁴ The cheques were drawn on Armstrong Financial's business account, the same account into which client AL's \$40,000 cheque had been deposited by the Respondent.

43. During approximately the same period, the Respondent received payments (by cheque and direct deposit into his personal bank account) of at least \$50,000 from Armstrong Financial. The payments were described in the books and records of Armstrong Financial as "commission advances" (although the Respondent disputes this characterization). Where the payments were made by cheque, the cheques were co-signed by the Respondent on behalf of Armstrong Financial.⁵ The cheques were drawn on Armstrong Financial's business account, the same account into which client AL's \$40,000 cheque had been deposited by the Respondent.

44. Client AL was not aware that the Respondent had not invested \$50,000 in Armstrong Financial nor that the Respondent was receiving payments of at least \$50,000 from Armstrong Financial at around the same time.

⁴The cheques were also signed by Armstrong Financial's Branch Manager, ET.

⁵ The cheques were also signed by Armstrong Financial's Branch Manager, ET.

The Respondent Facilitates the Purchase of Armstrong Financial by LH

45. In early March 2008, Armstrong Financial was designated in (sic) early warning because it had failed to maintain sufficient risk adjusted capital (“RAC”) in accordance with MFDA Rule 3.4.2(a).

46. In order to rectify the RAC deficiency, the Respondent entered into a Uniform Subordinated Loan Agreement⁶ dated March 11, 2008 with Armstrong Financial and the MFDA (the “Subordinated Loan”), whereby the Respondent loaned the sum of \$66,000 to Armstrong Financial.

47. An individual, LH was the source (directly or indirectly) of the monies provided by the Respondent under the Subordinated Loan.

48. At about this time, the Respondent advised client AL that Armstrong Financial would soon become bankrupt unless the company was purchased by LH. LH was not known to client AL.

49. To facilitate the purchase of Armstrong Financial by LH, the Respondent requested that client AL sign an agreement stating that client AL released any claim to ownership of shares of Armstrong Financial and resigned as an officer and director of Armstrong Financial (the “Release”). The Respondent advised client AL that:

- a) his investment in Armstrong Financial would be repaid once LH purchased Armstrong Financial; and
- b) LH would not purchase Armstrong Financial unless client AL signed the Release.

50. Client AL refused to sign the Release until he received legal advice and received some form of payment for his investment in Armstrong Financial.

⁶ In the form required and prescribed by the MFDA.

51. At that time, the Respondent offered to sign a promissory note in the amount of \$62,000 payable by the Respondent personally to client AL, if client AL signed the Release. This amount represented the repayment of client AL's investment in Armstrong Financial and an earlier investment by client AL in a car repair shop which the Respondent had also facilitated.

52. As an inducement, the Respondent also offered to provide client AL with an immediate payment in the amount of \$10,000 against the balance due under the proposed promissory note, if client AL signed the Release.

53. The Respondent represented to client AL that he had sufficient assets to pay the full amount of the proposed promissory note. This representation was false, misleading or contained material omissions as the Respondent had insufficient assets to pay his then existing debts. In particular, the Respondent failed to inform client AL that he owed:

- a) at least \$70,000 to Armstrong Financial;
- b) at least \$66,000 to LH in respect of the Subordinated Loan; and
- c) at least \$386,000 to the Canada Revenue Agency in respect of unpaid income taxes.

The Respondents Signs a Promissory Note Payable to Client AL

54. On or about May 7, 2008, the Respondent signed a promissory note in the amount of \$62,000 payable by the Respondent to client AL (the "Promissory Note"). The Promissory Note was due to be paid in full by June 7, 2008.

55. The Respondent subsequently delivered a cheque dated May 7, 2008 in the amount of \$10,000 payable by Armstrong Financial to client AL (the "Released Cheque"). The Cheque was co-signed on behalf of Armstrong Financial by the Respondent.

56. At the time client AL received the Released Cheque, client AL signed the Release and provided it to the Respondent.

57. The Respondent did not make any further payments on account of the remainder (i.e. \$52,000) owing on the Promissory Note by June 7, 2008.

58. On June 9, 2008, client AL offered, through his counsel, to extend the due date for payment of the remainder owing on the Promissory Note from June 7, 2008 to June 17, 2008.

59. The Respondent did not pay the remainder of the Promissory Note by June 17, 2008.

60. On or about June 21, 2008, the Respondent provided a handwritten note to client AL which stated that the Respondent would pay the amount owed under the Promissory Note, as well as additional interest charges incurred by client AL⁷, by paying the following amounts to client AL:

- a) 10 percent of his bi-weekly earnings from Armstrong Financial; and
- b) the minimum interest payment due on client AL's line of credit.

61. With the exception of one payment in the amount of \$500, the Respondent did not make any further payments to client AL in accordance with this handwritten note or otherwise.

62. On or about August 20, 2008, LH purchased 665 of the 685 outstanding shares of Armstrong Financial for a total of \$66.50 or \$0.10 per share. Client AL was not paid any amounts following the purchase of Armstrong Financial by LH.

63. In September 2008, RA and ET, the Chief Compliance Officer and Branch Manager of Armstrong Financial respectively, sent a letter on behalf of Armstrong Financial to the MFDA requesting approval of a change in ownership of Armstrong Financial. The letter stated that client AL no longer wanted to be an owner of Armstrong Financial because he wished to pursue other endeavors and could not allocate the time required by Armstrong Financial.

⁷ As a result of the Respondent's failure to repay the Promissory Note, client AL was unable to repay his line of credit and was, therefore, incurring ongoing interest charges.

64. The information set out in the letter to the MFDA was false, misleading or contained material omissions. The Respondent provided this information to RA and ET when he was aware that it would be provided to the MFDA in support of the request to approve a change in ownership of Armstrong Financial.

65. On about October 20, 2008, client AL commenced a civil action in the Court of Queen's Bench of New Brunswick against the Respondent claiming the sum of \$51,500 (i.e. the unpaid portion of the Promissory Note).

66. On or about December 1, 2008, the Respondent filed for bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

67. On December 3, 2008, client AL obtained Judgment from the Court of Queen's Bench of New Brunswick against the Respondent in the amount of \$51,500 and costs of \$629.10.⁸ Client AL as (sic) not received any payments on account of the Judgment.

Previous Discipline in the Securities Industry

68. In 1997, the Respondent was the subject of a previous disciplinary proceeding before a Tribunal of the Securities Administration, Department of Justice in New Brunswick. In this proceeding, the Tribunal found that, between 1994 and 1997 while the Respondent was a registered salesperson and subsequently a branch manager under the *Securities Act*, R.S.N.B. 1973, c. S-6, as amended, the Respondent:

- a) processed trades on behalf of certain individuals under his supervision when these individuals were not registered to trade in the securities they sold;
- b) made a materially false statement to the Office of the Administrator and the Examinations Branch of the Department of Justice when he indicated in completing a termination notice that the named salesperson left the employment

⁸ The Respondent did not defend the action and client AL obtained default judgment against the Respondent.

of a mutual fund dealer in good standing when in fact that salesperson had been dismissed for cause;

- c) knew or ought to have known that he was committing an offense contrary to the *Securities Act* when he participated in and encouraged others to violate trading provisions of the *Securities Act*; and
- d) breached fundamental standards of conduct applicable to all registrants under the *Securities Act* when he violated the trading provisions of the *Securities Act*.

69. The Tribunal imposed the following sanctions against the Respondent:

- a) a nine (9) month suspension of the Respondent's registration as a salesperson under the *Securities Act*;
- b) should the Respondent again seek registration as a mutual fund salesperson, he must re-file proof of successful completion within six (6) months previous to his application of an approved investment funds course;
- c) should the Respondent again seek registration as a full-service salesperson, he must re-file proof of successful completion within six (6) months previous to his application of the Conduct and Practices Handbook Examination;
- d) the Respondent will not be considered for any managerial position within the securities industry, including that of a branch manager, officer or director for three (3) years. Should the Respondent after that time seek registration or approval to act as a manager or an officer or director of a broker he must file proof of successful completion within six (6) months previous to the application of a branch manager or senior officer or director course; and
- e) regardless of the nature of the registration sought, registration will only be granted to the Respondent as a salesperson if his immediate supervisor undertakes in writing to the Administrator to be responsible for close supervision of the Respondent for a period of one (1) year subsequent to his registration.

Misconduct Admitted

70. The Respondent admits that, by engaging in the conduct described above in paragraphs 12 to 53, he:

- a) facilitated an investment by client AL in the amount of \$40,000 in Armstrong Financial, in which the Respondent had a direct or indirect interest, in a manner which preferred his own interests over those of client AL and which failed to deal with client AL fairly, honestly and in good faith contrary to MFDA Rules 2.1.4 and 2.1.1;
- b) induced client AL to sign an agreement whereby client AL released any claim to ownership of shares of Armstrong Financial and resigned as an officer or director of Armstrong Financial in exchange for the Respondent promising to pay client AL \$62,000, which the Respondent subsequently failed to do, thereby preferring his own interests over those of client AL and failing to deal fairly, honestly and in good faith with client AL, contrary to MFDA Rules 2.1.4 and 2.1.1; and
- c) engaged in personal financial dealings with client AL by signing a promissory note in the amount of \$62,000 payable by him to client AL in satisfaction of debts owed primarily by Armstrong Financial and Gateway to client AL and thereafter failing to pay client AL in accordance with the terms of the promissory note, contrary to MFDA Rules 2.1.4 and 2.1.1.

PANEL FINDINGS AND REASONS

71. As a preliminary matter the Panel is satisfied that the Respondent was an Approved Person as defined in MFDA By-law No. 1 and therefore, at all material times, was subject to the jurisdiction of the MFDA.

72. Also, the Respondent was served with proper Notices of Hearings pursuant to By-law 20.1 and, indeed, he personally attended each Hearing, representing himself.

73. The August 23, 2011 Hearing was not a Settlement Hearing, but rather a regular hearing during which an Agreed Statement of Facts was presented. At the Hearing the Panel became satisfied that the agreement was fully accepted by both parties and, particularly, that it was voluntarily entered into by the Respondent.

74. As a result the Panel accepts as proven the facts contained in Part IV Paragraphs 12-53 inclusive. As well, the Panel has determined and found that these facts clearly constitute sufficient proof that the Respondent has breached MFDA Rules 2.1.4 and 2.1.1. as alleged in each of the Allegations against the Respondent, namely:

- a) the Respondent acted in such manner as to prefer his own interests over those of client AL, thereby failing to deal with client AL, fairly, honestly and in good faith;
- b) similarly acting, with regard to inducing client AL to act against his own interest with regard to repayment to client AL \$62,000 which the Respondent promised but failed to repay; and,
- c) engaging in personal financial dealings with client AL and providing client AL with a promissory note for \$62,000 and failing to pay same.

75. Normally, a Panel would set forth in greater detail its findings regarding these breaches of the MFDA Rules with some discussion of what types of activities constitute a breach of these rules. However, that is unnecessary here as the Agreed Statement of Facts goes beyond the facts indicated and contains an admission that the facts are correct and further that such facts constitute misconduct as provided in Rules 24.1 of the MFDA By-law No. 1 for which the Hearing Panel may impose a penalty. At the Hearing the Respondent orally confirmed his admissions in this regard.

76. The Panel accepts both the admission of the facts and the further admission that these facts constitute the misconduct alleged by MFDA in the three allegations regarding S.24.1 of MFDA By-law No. 1.

77. The effect of these admissions is that the Respondent no longer is defending against the alleged breaches and admits to all of the events and actions on his part which gave rise to the allegations and that his actions were improper under MFDA Rule 2.1.1 and 2.1.4 and subject to a penalty.

78. Mr. Toth presented an excellent brief to the Panel, supported by a Book of Authorities, covering the Rules of the By-laws involved in the Allegations and the activities covered by them

with corresponding obligations. Among other things he explained “conflict of interest” as it applied in this industry as well as the “standard of conduct” including the duty to deal fairly, honestly and in good faith with clients, and to observe high standards of ethics and conduct in the transaction of business.

79. Mr. Toth explained how the Respondent’s activities with regard to AL failed in many respects to meet those standards of MFDA By-law No. 1, Rule 2.1.1. and 2.1.4.

80. However, the Panel is of the view that since the issues of the Allegations are no longer in dispute and the breaches alleged are admitted to by the Respondent, it would be unwise to deal further with the Rules involved and, thereby, avoid possibly creating some precedent that could lead to future difficulties.

81. Suffice it to say, as indicated earlier, that the Panel accepts the agreed upon facts as proven and that the breaches of MFDA Rules alleged in each of the three Allegations have been proven as well.

PENALTY

82. This leads to the next issue, that of penalty and, again, there are agreed upon provisions regarding penalties in the Agreed Statement of Facts. Those are as follows:

“Subject to the determination of the Hearing Panel, Staff submits and the Respondent does not oppose that, at a minimum, the appropriate penalty to impose on the Respondent is:

- a) a permanent prohibition on the Respondent’s authority to conduct securities related business in any capacity over which the MFDA has jurisdiction, which will be reduced to a 5 year suspension if client AL is repaid the sum of \$51,500 by the Respondent on or before a date to be determined by the Hearing Panel; and
- b) a fine in the amount of \$51,500, which will be reduced to a fine in the amount of \$10,000 if client AL is repaid the sum of \$51,500 by the Respondent on or before the date set by the Hearing Panel in subparagraph (a) above.”

83. As Mr. Toth indicated in the Staff Brief that, while the Panel has relatively unfettered discretion regarding penalties, the parties in this case entered into the Agreed Statement of Facts on the basis that these suggested penalties would be a joint submission to the Panel. He submitted that the Panel should not interfere in the case of a joint submission unless the joint submission is seen to be manifestly unfit. The Panel agrees.

84. The Respondent indicated his concurrence with Mr. Toth regarding these penalties.

85. The Panel considered the following factors in determining whether the penalty suggested is appropriate:

- a) the seriousness of the allegations proved against the Respondent;
- b) the Respondent's past conduct, including prior sanctions;
- c) the Respondent's experience and level of activity in the capital markets;
- d) whether the Respondent recognizes the seriousness of the improper activity;
- e) the harm suffered by investors as a result of the Respondent's activities;
- f) the benefits received by the Respondent as a result of the improper activity; the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- g) the damage caused to the integrity of the capital markets;
- h) the need to deter not only those involved in the case being considered, but also others who participate in the capital markets, from engaging in similar improper activity;
- i) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- j) previous decisions made in similar circumstances.

86. In addition, the Panel considered the minimum penalties for an Approved Person recommended in the MFDA Penalty Guidelines:

- (i) **Standard of Conduct**: minimum fine of \$5000; write or rewrite an appropriate industry course; suspension; and permanent prohibition in egregious cases;

(ii) **Conflict of interest**: same as (i) above

87. In this matter the Respondent's breaches of the Rules related to one client only, AL. As a result of his misconduct he caused client AL to suffer a loss of \$51,500.

88. The Panel notes also that the proposed penalties are intended to provide an incentive for the Respondent to repay client AL the amount of his losses.

89. The Panel finds that the penalties set forth in the Agreed Statement of Facts are not inappropriate and accepts them as a joint recommendation. Therefore, the Panel assesses the penalty to the Respondent for his misconduct is that set forth in the Agreed Statement of Facts, namely:

- a) a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction, which will be reduced to a 5 year suspension if client AL is repaid the sum of \$51,500 by the Respondent on or before the date determined by the Hearing Panel; and
- b) a fine in the amount of \$51,500, which will be reduced to a fine in the amount of \$10,000 if client AL is repaid the sum of \$51,500 by the Respondent on or before the date set by the Hearing Panel in paragraph (1) above;
- c) costs in the amount of \$5,000.00.

90. The Panel considers these penalties to be significant and will act as deterrence to others in the industry. A permanent prohibition to conduct securities related business with an MFDA member is the most serious penalty permitted under the MFDA jurisdiction and is substantial even if reduced to five years as provided here. In addition, a fine of \$51,500 or of \$10,000 if client AL is repaid is significant. Both are reasonable and in proportion to the conduct of the Respondent in the circumstances here.

91. As is obvious from the terms of the penalty, there is one area of dispute not agreed upon and left to the discretion of the Panel, i.e. the date by which the fine is to be paid.

92. The MFDA suggest December 31, 2012.

93. The Respondent's position is at least five years.

94. The five years comes from the term indicated in the suspension penalty. Mr. Toth suggests that this time reduction and the possible reduced fine are intended as an incentive to encourage repaying client AL, noting that nothing was paid on Respondent's IOU to client AL in the past three years. He suggests fostering further delays is not desirable in this case and December 31, 2012 is generous.

95. The Respondent, on the other hand, advises the Panel that he has no job now and for the past three years, though he indicated that he has obtained a Bachelor of Administration in 2008 and a B.A. in 2010. He is 50 years old and his prospects are not good at present. He indicated that even if he obtained a job that allowed him to pay \$12,000 a year, it would take five years to repay the amount.

96. The Panel considered both positions and concluded that the penalty would not be diminished in significance nor would it create a bad precedent because of the unusual circumstances of this matter, if the Panel extended the time for payment of the fine by one year. Therefore, the date for repayment to client AL of the sum of \$51,500 is fixed by the Panel, and so decreed, as December 31, 2013, with the same date applying to the reduction of fine provision.

97. The Panel also fixes costs at \$5,000.00.

DATED this 2nd day of September, 2011.

"Merlin Nunn"

The Hon. D. Merlin Nunn, Q.C.,
Chair

"Ann Etter"

Ann C. Etter,
Industry Representative

Doc 267060

“Robert Malcolm”

Robert G. Malcolm,
Industry Representative