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: Richard Bangyay

Heard: June 24, 2013 in Toronto, Ontario
Reasons for Decision: July 22, 2013

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Honourable P. T. Galligan, Q.C.	Chair
Robert C. White	Industry Representative
Ron Willis	Industry Representative

Appearances:

David Halasz	)	Counsel, Mutual Fund Dealers Association of Canada ("MFDA")
Richard Bangyay	)	Did not appear either in person or by counsel

1. By Notice of Hearing dated October 11, 2012, MFDA made the following allegations of misconduct against the respondent Richard Bangyay:

> **Allegation #1**: In 2008, the Respondent engaged in personal financial dealings with client AA by soliciting and accepting from her $100,000 as a loan to invest in the Respondent's company, which the Respondent has failed to repay or otherwise account for, contrary to MFDA Rules 2.1.4 and 2.1.1.
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> **Allegation #2**: Between 2006 and May 30, 2008, the Respondent had and continued in other gainful occupations that were not disclosed to and approved by the Member by:
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> (a) establishing and raising capital for a company he owned and operated that purportedly provided investment management and other services; and
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> (b) facilitating contributions in the total amount of $19,500 from client AA in a charitable investment scheme;
>
> contrary to MFDA Rules 1.2.1(d) and 2.1.1.
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> **Allegation #3**: Between 2006 and May 30, 2008, the Respondent failed to comply with the Member's policies and procedures with respect to conflicts of interest with clients and engaging in undisclosed business activities in relation to the conduct described in Allegations #1 and #2, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.
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> **Allegation #4**: Commencing October 21, 2011, the Respondent failed or refused to provide documents and information requested by MFDA Staff during the course of an investigation, which information he undertook and agreed to provide during an interview with MFDA Staff, contrary to s. 22.1 of MFDA By-law No. 1.

2. The first appearance in this proceeding took place by telephone conference call on December 17, 2012. At that time the Respondent appeared by legal counsel. On consent, the first appearance was adjourned to January 17, 2013. When the first appearance resumed via telephone conference on January 17, 2013, the Respondent appeared in person. At that time, on consent, we

made an order which included the following provisions:

(a) that the Respondent deliver the Reply, required by Rule 8 of the *Rules of Procedure*, on or before February 8, 2013; and
(b) that the hearing on the merits take place on June 24 and 25, 2013.

3. The Respondent did not file a Reply on or before February 8, 2013 or at all. He did not appear when the hearing began on June 24, 2013. In the exercise of the discretion conferred by Rule 13.5 we decided to proceed with the hearing without further notice to and in the absence of the Respondent.

4. Enforcement Counsel then presented evidence and made submissions with respect to liability. Thereafter we withdrew, consulted together, considered the evidence which had been presented to us and counsel's submissions. We decided that the violations specified in Allegation #1, Allegation #2(a), Allegation #3 and Allegation #4 had been established. We decided that the violation specified in Allegation #2(b) had not been established to the requisite degree of proof. We reconvened the hearing and announced our decision.

5. Enforcement Counsel then made submissions respecting penalty. Again we withdrew, consulted together and considered the submissions made and the circumstances of the case. We concurred with Enforcement Counsel's recommendation and decided that the appropriate penalty was a permanent prohibition, a fine of $250,000 and $10,000 costs. We reconvened the hearing and announced our decision on penalty. We then made an order giving effect to our decisions on liability and penalty.

6. We stated that reasons would be delivered later. These are those reasons.

Procedural Matters

7. Because the Respondent did not deliver a Reply pursuant to Rule 8.4(1)(c) we were entitled to accept as proven the facts alleged in the Notice of Hearing. Enforcement Counsel, however, elected to present evidence. He advised us that he had two witnesses who were both present and who were prepared to testify. Those witnesses were Daniela Capozzolo who is a

senior investigator in the Enforcement Department of MFDA. The other was AA. She was a former client of the Respondent. Nevertheless, he sought leave to present their evidence by way of affidavits. Rule 13.4 provides:

> The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

8. The Respondent's absence negated his right to have the witnesses attend for cross-examination. If he was not there he could not cross-examine them. Accordingly we ordered that Enforcement Counsel could prove MFDA's case by affidavit. Two affidavits of Ms. Capozzolo were filed as exhibits 3 and 4. The affidavit of AA was filed as exhibit 5.

Background

9. The Respondent was registered as a mutual fund salesperson with Interglobe Financial Services Inc. ("Interglobe") from July 20, 2005 to May 30, 2008. Prior to Interglobe, the Respondent was registered as a mutual fund salesperson with the following mutual fund dealers:

(a) WFG Securities of Canada Inc. from April 2005 to July 2005;
(b) HS Financial Services Inc. from January 2004 to April 2005; and
(c) Investia Financial Services Inc. from January 2001 to January 2004.

10. Interglobe terminated the Respondent on May 30, 2008 for reasons unrelated to the events herein giving rise to these proceedings.

11. Interglobe is registered as a mutual fund dealer and became a Member of the MFDA on March 8, 2002.

12. AA is elderly. She retired after working for almost 50 years as a clerk and secretary. She relies on Canada Pension Plan, Old Age Security and a pension from her years at Canada Post to pay her living expenses. She has savings of approximately $30,000 in an RRIF. She owns a home which, as a result of her dealing with the Respondent, is mortgaged to the hilt.

13. Because the Respondent did not deliver a Reply, and did not appear and testify at the hearing, we did not have his direct evidence on the issues in this case. However he did participate in two interviews with MFDA Staff. Transcripts of those interviews are found at tabs 5 and 6 of exhibit 3. We reviewed those transcripts in an effort to ascertain what his position was in respect to the issues in the case.

14. In 2004, AA met the Respondent and she became a mutual fund client of his. He took her account with him when he transferred to Interglobe. Between 2004 and 2008 she met the Respondent a few times each year to discuss the investment account which he managed for her. She trusted him implicitly. He was intimately acquainted with her financial situation.

Liability

15. We propose to discuss the four allegations separately. For ease of reference we will repeat the allegations.

16. **Allegation #1:** In 2008, the Respondent engaged in personal financial dealings with client AA by soliciting and accepting from her $100,000 as a loan to invest in the Respondent's company, which the Respondent has failed to repay or otherwise account for, contrary to MFDA Rules 2.1.4 and 2.1.1.

17. On March 4, 2008, the Respondent incorporated Bangyay Capital Management Inc. He was the sole shareholder and was the directing mind of the corporation. We will refer to the purpose of the corporation again when we deal with Allegation #2(a). For present purposes there can be no doubt that, by the time the Respondent discussed the corporation's purpose with AA, it was intended to carry on a factoring and bridge financing business. He needed significant seed or start-up capital for that business.

18. He acknowledged, in one of his interviews, that he tried to get start-up capital from a number of persons including Interglobe clients. One of those clients was AA. Eventually she provided him with $100,000 pursuant to a document dated June 1, 2008 by which Bangyay Capital Management Inc. agreed to repay her "investment" on May 30, 2009 together with interest paid monthly. Apart from a few payments, which would not come close to paying the

interest, that debt remains unpaid.

19. AA actually gave him the money a few days after June 1, 2008.

20. As we noted above, the Respondent ceased to be an employee of Interglobe on May 30, 2008. It appears, from his interviews, that the Respondent's position is that because AA gave him money pursuant to a written document dated June 1, 2008, when he was no longer an employee of Interglobe, she was no longer a client of his and the rules respecting dealing with clients were inapplicable to him.

21. While this transaction was papered by a document dated June 1, 2008, the evidence demonstrates that the agreement by which she would give him money was reached while the Respondent was still an employee of Interglobe and while AA was still his client. We have decided that it is unnecessary to describe in detail how the Respondent arranged to obtain $100,000 from AA. An overview will suffice. The Respondent knew that AA did not have $100,000 to give to him. He also knew that she owed money. The key to the solution to his problem was that he also knew that she owned her own home and that it had sufficient value to support a mortgage large enough to retire her indebtedness and provide the $100,000 for her to give to him. He, therefore, suggested that she mortgage her home. He took her to a mortgage broker, with whom he was acquainted, who arranged for a mortgage. When funds were ready to be advanced, the Respondent took AA to the lender's lawyer for the execution of the necessary documentation. The result was that she got the $100,000 and gave it to him.

22. The mortgage commitment documents, which are part of exhibit 5, demonstrate, beyond doubt, that the agreement by AA to provide $100,000 to the Respondent had in fact been entered into by May 14, 2008 at the very latest. The agreement was made while the Respondent was employed by Interglobe and while AA was his client.

23. At the time the Respondent entered into his agreement to obtain $100,000 from AA he was bound by the following rules of the MFDA for Members and Approved Persons:

> 2.1.1 **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; …

…

2.1.4 **Conflicts of Interest**

(a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.

(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).

24. The evidence demonstrates that the Respondent took advantage of a vulnerable person who had placed her trust in him. He persuaded her to enter into a transaction whereby her indebtedness to others was increased by $100,000. However he provided her with no security for her loan to him. He put her in a position where her financial security was severely prejudiced. He did not suggest to her that she get independent legal advice. There was no doubt in our minds that his conduct clearly constituted a breach of MFDA Rule 2.1.1(a), (b) and (c).

25. Moreover he failed to disclose his obvious conflict of interest to Interglobe and failed to address his conflict of interest "influenced only by the best interests of the client". He dealt with the conflict of interest influenced only by his own best interests. He disregarded those of his client. It is probably an understatement to describe his conduct as egregious. He violated both MFDA Rules 2.1.4(a) and (b).

26. We concluded that the violation specified in Allegation #1 had been proven.

27. **Allegation #2(a):** Between 2006 and May 30, 2008, the Respondent had and continued in other gainful occupations that were not disclosed to and approved by the Member by:

(a) establishing and raising capital for a company he owned and operated that purportedly provided investment management and other services…contrary to MFDA Rules 1.2.1(d) and 2.1.1.

28. Member Rule 1.2.1(d) provides:

> (d) **Dual Occupations.** An Approved Person may have, and continue in, another gainful occupation, provided that:
>
> …
>
> (iii) *Member approval*. The Member for which the Approved Person carries on business either as an employee or agent is aware and approves of the Approved Person engaging in such other gainful occupation;

29. We have previously noted that on March 4, 2008 the Respondent incorporated Bangyay Capital Management Inc. He neither made Interglobe aware of that fact nor obtained its approval to engage in its business. We also noted previously that by the time he made his agreement with AA the business purpose of the corporation was to conduct a factoring and bridge financing business.

30. In his interviews, the Respondent suggested that he incorporated his company for the purpose of collecting commissions and insurance premiums in order to obtain certain tax advantages. Whatever his initial intentions may have been, while still employed by Interglobe the company was intended as a gainful occupation. He was thus required to disclose it to Interglobe and obtain its approval. We concluded that his failure to advise Interglobe of that business and obtain its approval constitutes a violation of the MFDA Rule cited in this allegation.

31. **Allegation #2(b):** Between 2006 and May 30, 2008, the Respondent had and continued in other gainful occupations that were not disclosed to and approved by the Member by…

(b) facilitating contributions in the total amount of $19,500 from client AA in a charitable investment scheme;

contrary to MFDA Rules 1.2.1(d) and 2.1.1.

32. During at least the year 2007 the Respondent recommended to AA that she contribute to a charity which was called Global Learning Gifting in order to obtain a tax benefit. She contributed a total of $18,500. Ultimately Canada Revenue Agency disallowed her contribution as a valid gift. She was reassessed to her detriment. The Respondent did not advise Interglobe that he had made that recommendation.

33. During the course of the hearing we were concerned whether the giving of some very limited tax advice, even if it turned out to be incorrect, would always constitute a violation of an Approved Person's obligation to clients. We decided that it was unnecessary to attempt to resolve that conundrum because we were unable to see any proof that the Respondent received any compensation or other benefit from the charity for directing donors to it.

34. Rule 1.2.1(d) regulates the engaging by an Approved Person in another "gainful occupation". At its very least the meaning which must be given to gainful occupation is that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it. The record in this case is devoid of any evidence that the Respondent was compensated by anyone for the advice which he gave to AA. Suspicion, even a healthy one, cannot replace evidence. We were left in doubt about whether, when the Respondent gave his advice to donate to this charity he was engaged in a gainful occupation. Accordingly we held that this allegation had not been proved to the requisite standard of proof.

35. **Allegation #3:** Between 2006 and May 30, 2008, the Respondent failed to comply with the Member's policies and procedures with respect to conflicts of interest with clients and engaging in undisclosed business activities in relation to the conduct described in Allegations #1 and #2, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

36. It is our intention to say very little about this allegation. It seems to be a catch basin charge. It includes conduct which was the basis of our findings of guilt under Allegations #1 and #2(a). This allegation comes perilously close to violating the common law rule which prohibits multiple convictions for the same wrongful act. In its decision of *Kienapple v. The Queen* (1974),

15 CCC (2nd) 524, the Supreme Court of Canada held that the common law rule continues in force.

37. In administrative law, the common law rules need not be applied with the same strictness as they are in criminal prosecutions. This allegation is slightly different in that it involves Member policies while the other two allegations do not. We do not think that it is necessary to review the evidence respecting the Member's policies and procedures and compare them with the provisions of the MFDA's Rules.

38. In short there is some evidence to support this allegation. Accordingly we accepted that it had been established.

39. **Allegation #4:** Commencing October 21, 2011, the Respondent failed or refused to provide documents and information requested by MFDA Staff during the course of an investigation, which information he undertook and agreed to provide during an interview with MFDA Staff, contrary to s. 22.1 of MFDA By-law No. 1.

40. MFDA By-law No. 1 governs the obligation of Approved Persons to cooperate with investigations conducted by the Staff of MFDA. Section 22.1 of the By-law provides, in part as follows:

> 22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:
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> …
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> (b) to produce for inspection and provide copies of the books, records and accounts of each person relevant to the matters being investigated; and
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> (c) to attend and give information respecting any such matters;
>
> …

41. In compliance with his obligation pursuant to that provision, the Respondent participated in two interviews with MFDA Staff. The first interview was on September 27, 2011. The second

was on October 21, 2011. On both occasions the Respondent was accompanied by and represented by his lawyer.

42. During the interview which took place on October 21, 2011, the Respondent was asked to produce a number of documents for Staff to examine. He did not have those documents with him at the interview. However, in his lawyer's presence, he undertook to produce them. We list four of the undertakings which we think are highly relevant to this case:

- Provide copies of Mr. Bangyay's bank statements for account number 219665150 commencing at HSBC on January 1, 2008;
- Provide copies of Mr. Bangyay's bank statements account number 5067798 at RBC for 2006 and 2007;
- Provide copies of Bangyay Capital Management Inc.'s bank statements for account number 217727001 at HSBC commencing on March 30, 2008; and
- Identify the $10,000 payment LP made and deposited to Mr. Bangyay's RBC account – 5067798.

43. On October 27, 2011, Daniela Capozzolo wrote to the Respondent's lawyer confirming that the undertakings had been given and requesting that they be fulfilled by November 13, 2011. Receipt of that letter was acknowledged by the Respondent's lawyer and no challenge was made to its accuracy.

44. The undertakings were not fulfilled on November 13. On November 15, 2011, Ms. Capozzolo sent an email to the lawyer requesting the documents. The lawyer responded immediately by email advising that his client had been ill and added:

> I expect to see him again this week <u>to focus on those undertakings</u>.
>
> (Emphasis added)

45. When the undertakings were not fulfilled by November 21, 2011, Ms. Capozzolo again sent an email to the Respondent's lawyer requesting a response as soon as possible. No response to that email has ever been received. The documents which were undertaken to be produced have never been produced.

46. The documents sought by Staff were relevant to the investigation and were relevant to the issues in this hearing. The Respondent undertook to produce them and then failed to live up to

that undertaking. In our opinion his failure to do so constituted a breach of his duty to cooperate with the MFDA investigation. We found that the violation specified in Allegation #4 had been proven.

Penalty

47. There are two aspects to this case which have led us to view that the conduct of the Respondent was deserving of a very severe penalty. Those two aspects are conflict of interest and failure to cooperate. We will say something more about them. The other matters, other gainful occupation and failure to comply with the Member's policies, by themselves, would not call for substantial penalties. In the context however, of all of the circumstances of this case they suggest an Approved Person who paid little heed to his professional obligations.

Conflict of Interest

48. The Respondent violated his obligations respecting conflict of interest in two ways. First, he failed to act only in the best interests of his client. That led AA to being placed in her dire financial predicament. Second, he failed to disclose his proposed transaction to Interglobe.

49. The purpose of the requirement that an Approved Person disclose a potential conflict of interest to the Member is to enable the Member to take steps to protect the client from an abusive Approved Person. It is a fair assumption to make, in this case, that had the Respondent disclosed the proposed transaction to Interglobe before it was completed, AA would not have suffered her financial disaster.

50. The circumstances led us to the opinion that the Respondent is an unscrupulous scoundrel. He realized that AA did not have liquid assets from which she could give him $100,000. He realized, however, that by taking advantage of the value of her home she would have the wherewithal to do so. He then, to his benefit, set the necessary steps in motion. By failing to disclose the transaction to Interglobe he avoided the only protector which she might have had.

51. While they could not be the subject of a disciplinary process because they occurred after

the Respondent ceased to be employed by Interglobe, AA made two other loans to him. The significance of the evidence of the later loans is that it shows how subject she was to his influence. It underscores how vulnerable she was. He had no hesitation in taking advantage of that vulnerability not only once but three times.

Failure to Cooperate

52. Cooperation with an investigation is vital to MFDA's ability to discipline persons subject to its authority. This was recently commented upon by a MFDA hearing panel. The following appears in the decision in *Re David Allan Vitch*, [2011] MFDA File No. 201103:

> 54. Failure to cooperate with an investigation, even where, as here, the failure is not total, is a matter which goes to the very heart of MFDA's ability to attempt to protect investors, maintain capital market efficiency and ensure public confidence in the system. Over twenty years ago, the Ontario Divisional Court, in *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704, said:
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> > … every professional has an obligation to cooperate with his/her self-governing body.
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> 55. There can be no exceptions to that obligation. The fulfillment of that obligation is particularly important to the MFDA because it has no statutory power to search and seize or to compel the production of documents. Without the cooperation of Members and Approved Persons, the MFDA's ability to investigate and discipline its Members and Approved Persons is gravely fettered. While penalty guidelines are not binding upon a Hearing Panel, they can indicate how seriously the industry views certain types of misconduct. The guideline suggests a minimum fine of $50,000 for failure to cooperate and envisions the possibility of permanent prohibition of an Approved Person.
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> 56. This Hearing Panel cannot overstate the importance of cooperation with an investigation. We think that it is necessary that Members and Approved Persons understand that any failure to cooperate with an investigation will likely attract severe sanctions

53. The failure to cooperate is very serious in this case because Staff has found indications of significant dealings between the Respondent and clients other than AA. The extent, significance and gravity of those other dealings can only be determined by an examination of the documents which were requested from the Respondent and which he undertook to produce. His failure to produce them leads to a fair suspicion that they might have proven other breaches of MFDA

rules.

54. It is well recognized that the fundamental purpose of penalties is to protect the investing public. It is germane to refer to the decision of the Hearing Panel in *Re Tonnies*, [2005] MFDA File No. 200503:

> The courts, and other tribunals, have set out a number of factors to be taken into account in determining penalties to be imposed under provisions similar to s. 24 of Bylaw No. 1. In determining an appropriate penalty, the Supreme Court of Canada has indicated that tribunals must keep in mind the primary goal of securities regulation which is the protection of the investing public (see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.) The Court also has indicated that sanctions imposed in the securities regulatory context should be protective and preventative, intended to be exercised to prevent likely future harm to the capital markets (see *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission*), [2001] 2 S.C.R. 132).
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> The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in *Re Mithras Management Ltd. et al.* (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:
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> > … [T]he role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.
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> Several previous decisions of industry tribunals, including an MFDA tribunal (*Re Parkinson*, [2005] MFDA Case No. 200501), have found the following factors should be taken into account in determining the appropriate sanctions to impose:
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> (a) the protection of the investing public;
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> (b) the integrity of the securities market;
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> (c) specific and general deterrents;
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> (d) the protection of the governing body's membership; and

(e) the protection of the integrity of the governing body's enforcement processes.

55. Before we decided upon the penalty to be imposed upon the Respondent we tried to find any mitigating circumstances. We found none. Usually the fact that, as in this case, a respondent has no disciplinary history is considered a mitigating circumstance. If it could be, in this case, we gave it no weight in the light of his despicable conduct towards AA and his failure to cooperate with the MFDA's investigation.

56. To return to the fundamental purpose of penalty, the protection of the investing public, we decided that the public had to be protected in two ways. The first was the removal of this Respondent from the industry. The second was the imposition of a large fine which would serve as a warning to Approved Persons and to Members that taking advantage of a vulnerable client and failing to cooperate with an investigation would be treated severely. To that end, and in line with Enforcement Counsel's recommendation, we ordered a permanent prohibition and a fine of $250,000.

57. The amount claimed for costs was modest. We allowed them as claimed at $10,000.

DATED this 22nd day of July, 2013.

"Patrick T. Galligan"
The Hon. Patrick T. Galligan, Q.C.,
Chair

"Robert C. White"
Robert C. White,
Industry Representative

"Ron Willis"
Ron Willis,
Industry Representative

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