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: Ellen Grace Batac, Hazel Gaminde, Dandy Macareag, Cesar Martin and Lilibeth Ocampo

Heard: July 17, 18, 19, and 20, 2012 in Toronto, Ontario
Reasons for Decision: March 22, 2013

DECISION AND REASONS (Misconduct)

Hearing Panel of the Central Regional Council:

Kathleen J. Kelly	Chair
Guenther Kleberg	Industry Representative
Nick Pallotta	Industry Representative

Appearances:

H. C. Clement Wai	)	Enforcement Counsel, Mutual Fund Dealers
	)	Association of Canada (the "MFDA")
John Gallimore	)	MFDA Investigator
Amy Ohler	)	Counsel for Ellen Grace Batac, Respondent
Hazel Gaminde	)	Respondent
Dandy Macareag	)	Respondent
Cesar Martin	)	Respondent
Lilibeth Ocampo	)	Respondent

1. By Notice of Hearing dated December 22, 2011, the Mutual Fund Dealers Association of Canada (the "MFDA") issued a formal Notice, pursuant to sections 20 and 24 of MFDA By-law No. 1, that a disciplinary proceeding had been commenced against Ellen Grace Batac, Hazel Gaminde, Dandy Macareag, Cesar Martin and Lilibeth Ocampo (the "Respondents").

2. The MFDA alleged the following violations of the By-laws, Rules or Policies of the MFDA:

> **Allegation #1:** From at least September 2005 to 2008, the Respondents engaged in securities related business that was not carried on for the account and through the facilities of the Member by selling or facilitating the sale of investments in a hedge fund to members of the public, contrary to MFDA Rules 1.1.1(a) and 2.1.1 and the Member's policies and procedures.
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> **Allegation #2:** From at least September 2005 to 2008, the Respondents had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling or facilitating the sale of a hedge fund to members of the public, contrary to MFDA Rules 1.2.1(d)[1] and 2.1.1 and the Member's policies and procedures.
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> **Allegation #3:** Commencing in 2009, Ellen Grace Batac ("Batac"), Dandy Macareag ("Macareag"), Cesar Martin ("Martin"), and Lilibeth Ocampo ("Ocampo") have failed or refused to provide documents and information to MFDA Staff and/or to attend an interview requested by MFDA Staff during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.[2]

3. In addition to containing the Allegations against the five Respondents, the Notice of Hearing also contained the particulars in support of the allegations. The particulars were expanded on by Mr. Gallimore, the MFDA Investigator assigned to this matter, in his Affidavit, filed as an Exhibit at the Hearing, as well as in his sworn testimony during the Hearing.

4. The Respondents were served with a copy of the Notice of Hearing in accordance with

[1] MFDA Rule 1.2.1(d) has since been renumbered as MFDA Rule 1.2.1(c).
[2] The MFDA advises that Respondent Gaminde attended an interview with MFDA Staff on November 3, 2009 and has otherwise cooperated with MFDA Staff's investigation.

Rules 4.2(1)(b) and 4.2(1)(c) of the MFDA *Rules of Procedure.* The first appearance in the hearing process took place by teleconference before a hearing panel of the Central Regional Council of the MFDA (the "Hearing Panel" or "Panel") on February 23, 2012.

5. At the first appearance, MFDA Staff, and Hazel Gaminde, Dandy Macareag, Cesar Martin and Lilibeth Ocampo made submissions to the Hearing Panel with respect to scheduling and other procedural matters. Respondent Ellen Grace Batac, did not participate at the first appearance.

6. The Hearing Panel ordered that the hearing of this matter, on its merits, would take place before the Hearing Panel on July 17-20, 2012, commencing at 10:00 a.m. (Eastern) each day, at the MFDA offices located at 121 King Street West, Suite 1000, Toronto, Ontario.

7. All Respondents, with the exception of Batac, attended the Hearing in person. Respondent Macareag was unable to attend in person in the fourth day of the Hearing and he was allowed to make closing submissions in writing. Batac attended through her counsel, the other Respondents were not represented.

8. At the opening of the Hearing, Batac's counsel advised that, per her Written Reply to the Allegations, Batac consented to a finding that all of the allegations were established as against her; and that she also did not contest the statement of facts as set out in the particulars section of the Notice of Hearing. Accordingly, Batac would not be attending the Hearing.

9. As early as May 2010, Batac, through her first lawyer, Scott Fenton, wrote to MFDA Investigator Mr. Gallimore, advising that to obviate the need of a formal investigation and Hearing Batac would consent to all of the allegations against her. Counsel for Batac at the Hearing advised that Batac had not changed her position and would not be attending the Hearing in person.

10. After the Panel heard the evidence of the MFDA, and the other four Respondents, the Panel was of the opinion that Batac's presence and participation was required. At the request of counsel for the MFDA, the Panel issued a Summons requiring Batac to attend. Batac's counsel accepted service of the Summons and assured the Panel that she would attempt to meet with her

client and have her client attend the next day. On the fourth and last day of the Hearing on the merits, Batac's counsel advised that she was unable to meet with her client or to receive instructions from her.

11. At the end of the evidence portion of the Hearing on the merits, and following the receipt of any written submissions that Mr. Macareag may wish to make, the Panel was asked to provide a written decision, with reasons, on the issue of misconduct. The Hearing would then resume with the parties being given the opportunity to make submissions with respect to any penalties that may be sought and assessed.

REGISTRATION HISTORY OF THE RESPONDENTS[3]

12. From February 2002 to November 2006, Ellen Grace Batac ("Batac") was licensed to sell insurance with WFG Securities of Canada Inc. ("WFG"). On March 15, 2007, Batac became registered in Ontario as a mutual fund salesperson with W.H. Stuart Mutuals Ltd. ("WH Stuart"). On October 24, 2008, Batac resigned from WH Stuart and is not currently registered in the securities industry in any capacity.

13. From January of 2005 to March of 2008, Hazel Gaminde ("Gaminde") was registered in Ontario as a mutual fund salesperson with WFG. On April 2, 2008 Gaminde became registered as a mutual fund salesperson with WH Stuart. On December 15, 2008, Gaminde resigned from WH Stuart and is not currently registered in the securities industry in any capacity.

14. On February 22, 2007, Dandy Macareag ("Macareag") was registered in Ontario as a mutual fund salesperson with WFG. On September 30, 2008, Macareag resigned from WFG and is not currently registered in the securities industry any capacity.

15. From February 2005 to March 2008, Cesar Martin ("Martin") was registered in Ontario as a mutual fund salesperson with WFG. On April 7, 2008, Martin became registered as a mutual fund salesperson with WH Stuart. In July 2009, Martin resigned from WH Stuart and is not currently registered in the securities industry any capacity.

[3] The Panel acknowledges that it has borrowed heavily from the Notice of Hearing, with regard to the Background and Particulars of the Allegations.

16. From October 2005 to November 2006, Lilibeth Ocampo ("Ocampo") was registered in Ontario as a mutual fund salesperson with WFG. On January 23, 2007, Ocampo became registered as a mutual fund salesperson with WH Stuart. On December 15, 2008 Ocampo resigned from WH Stuart and is not currently registered in the securities industry in any capacity.

17. WFG became a Member of the MFDA on April 12, 2002; and, WH Stuart became a Member of the MFDA on March 4, 2003.

Background: Havaway and Knight Fox

18. The Notice of Hearing outlines in detail the basis for the allegations against each of the five Respondents. Mr. Gallimore gave evidence that the lack of cooperation from Batac significantly impaired his ability, as the Investigator, to carry out his functions to the full extent possible.

19. During the material time (2005 to 2009), Batac owned or controlled a network of companies, each containing the word "Havaway" in its name. The companies were incorporated primarily in Canada and the United States, with one company incorporated in the Philippines. The Havaway companies purportedly carried on business selling or facilitating the sale of a hedge fund managed by Knight Fox Holdings Inc. ("Knight Fox", as described in greater detail below).

20. It appears that the names of the companies in the Havaway group were used interchangeably in communications and dealings with investors. Transaction statements in relation to trading in the Knight Fox hedge fund were produced on various company letterheads and witnesses interviewed by MFDA Staff were frequently unable to specify which Havaway company they had been dealing with. Accordingly, except where a specific Havaway company is referred to by its full name, the term "Havaway" will be used generically to refer to one or more of the Havaway companies that purportedly sold investments to members of the public.

21. Knight Fox was incorporated in Georgia, U.S.A. on June 13, 2005. Knight Fox purportedly carried on business managing a hedge fund that offered investors the opportunity to engage in foreign exchange ("forex") trading. The Knight Fox hedge fund

purportedly invested 20% of its assets in forex investments and the remaining 80% in fixed income. Knight Fox claimed that its hedge fund generated a return of 20% per quarter.

22. Like the Havaway group of companies, it appears that the term "Knight Fox" was used in the name of two or more related companies, such as Knight Fox Capital Investments, which also had dealings with Havaway. Accordingly, except where a specific Knight Fox company is referred to by its full name, the term "Knight Fox" will be used generically to refer to one or more of the companies that comprised the "Knight Fox" group of companies that had dealings with Havaway.

23. The Panel heard evidence that the Respondents' failure to cooperate, prevented MFDA Staff from being able to determine the nature and extent of the relationship, if any, between Havaway and Knight Fox.

ADMISSIONS, EVIDENCE, AND GENERAL FINDINGS

24. Batac, by admitting to the allegations against her, admits that she recruited Gaminde, Macareag, Martin and Ocampo to act as "account managers" for Havaway (collectively the "Account Managers"). The Account Managers that are relevant in this matter are Gaminde, Macareag, Martin and Ocampo and the term "Respondents" include the four Account Managers and Batac.

25. By not challenging the evidence of Mr. Gallimore or through their own evidence, the Account Managers admitted that they sold, or facilitated the sale of, the Knight Fox hedge fund to members of the public. They also admitted that all such investments were processed outside the accounts and facilities of WFG and WH Stuart, contrary to their respective policies and procedures. However, the Account Managers claim that they had valid reasons for their actions, and that they, therefore, did not breach any By-laws, Rules, Policies or Procedures of the MFDA, or WFG, and/or WH Stuart.

26. The method that Batac used, to introduce the Account Managers to Havaway, was by first having the Account Managers invest their own monies in the Knight Fox hedge fund. For reasons known only to Batac, she required the Account Managers to sign a non-disclosure

agreement prior to discussing Havaway and Knight Fox with them. Batac further informed the Account Managers that the non-disclosure agreement prevented them from disclosing to, or discussing with WFG (and later WH Stuart), their involvement with Havaway and Knight Fox.

27. Between September 2005 and October 2008, Batac and the Account Managers sold or facilitated the sale of investments in the Knight Fox hedge fund to members of the public through Havaway.

28. Account Managers were entitled to a sales commission or fee of 5% to 8% of the amounts invested, as well as trailer fees of 5% per year payable every three months.

29. The Account Managers personally made the following investments in Knight Fox through Havaway:

a) Martin: December 2006 – $10,000 and April 2007 - $15,000;
b) Gaminde: August 4, 2006 - $10,000; August 11, 2006 - $10,000; December 21, 2006 - $5000; November 1, 2007 - $25,000 and March 7, 2008 - $25,000;
c) Macareag: April 2008 - $25,000 USD; and
d) Ocampo: August 2006 - $5,000 and October 2006 - $5,000.

30. All of the investors, who invested through Havaway, were also required to sign a non-disclosure agreement prior to receiving detailed information about Havaway or Knight Fox. The investors signed a subscription agreement at the time of their investment and thereafter received quarterly investment statements purportedly informing them of the progress of their investment.

31. The Account Managers sold the investments to investors on the following terms:

a) The monies would be invested in a hedge fund managed by Knight Fox;
b) The hedge fund invested in 20% “forex” investments and 80% in fixed income assets and would provide a guaranteed return of 20% per quarter;
c) The principal amount of the investment would be refunded within 45 days of any request; and
d) The interest accrued on the principal amount would be received within five to ten

banking days after any request.

32. None of the Respondents informed WFG and/or WH Stuart that they were involved with Havaway or Knight Fox. When subsequently questioned they denied involvement in either Havaway or Knight Fox. The Respondents gave evidence that the non-disclosure agreement prevented them from disclosing anything about their respective agreements with Havaway; and, that is why they could not cooperate with the MFDA and the investigation carried out by the MFDA.

33. The Panel finds that neither WFG nor WH Stuart were aware of, or approved, Havaway and Knight Fox as outside business activities for the Respondents.

34. The Panel finds that neither WFG nor WH Stuart were aware of, or approved, the sale of investments in Havaway or Knight Fox by any of its Approved Persons, including the Respondents.

35. The Panel finds that the policies and procedures of both WFG and WH Stuart prohibited an Approved Person from:

- selling or facilitating sales of a security that was not approved by them; as well as,
- engaging in any outside business activities without their prior written approval.

36. It was accepted as fact that in July 2008, the Ontario Securities Commission ("OSC") forwarded an anonymous complaint that it had received to the MFDA for review and investigation. The complaint alleged that Martin appeared to be involved in, or was running, a Ponzi scheme promoting a foreign exchange hedge fund investment product that promised investors a return of 6% per month. The anonymous complaint further alleged that Martin was encouraging prospective investors to mortgage their homes and invest the mortgage proceeds in the hedge fund investment. MFDA Staff commenced an investigation.

37. In advance of the Hearing, each of the four Account Managers admitted to MFDA Staff that they worked for Havaway and sold or facilitated the sale of investments in Knight Fox through Havaway to members of the public. However, they each denied any wrongdoing.

38. The Panel accepts, that as a consequence of the full or partial failure of Batac, Macareag, Martin and Ocampo to cooperate with MFDA Staff's investigation (described in Allegation #3 above), MFDA Staff has been unable to confirm the total amounts of commissions and fees received by the Respondents from Havaway. MFDA Staff has however, received banking records for the period September 2007 to October 2008 that show that at a minimum the following payments were made to the Respondents' respective TD Canada Trust accounts from Havaway:

a) Martin: $98,430;
b) Macareag: $110,430;
c) Ocampo: $217,962;
d) Gaminde: $24,300; and
e) Batac: $600,000 USD plus $55,000 CDN.

39. The documents, which were accepted as exhibits and tendered as evidence, reveal that in or around August 2008, the Account Managers began to receive emails and memos from Havaway regarding delays in the settlement period for client redemptions. Some of the emails were signed by Batac and others were sent from Batac's email address. As well, the sales commissions payable to the Account Managers were reduced and eventually stopped altogether.

40. By October 2008, redemptions and sales commissions were no longer being paid out by Havaway. However, Havaway continued to send emails stating that redemptions were going to be delayed and restricted due to the decline in the markets and numerous redemption requests from November 2008 through to early 2009.

41. In May 2009, a class action lawsuit was commenced by an investor, RT, on behalf of himself and the class members against Havaway, Knight Fox, and the Respondents, among others. The claim alleged, among other things, that the defendants had failed to account for the monies that investors had provided to them. The plaintiffs obtained default judgment against the defendants on November 14, 2011, and were awarded, among other things, compensatory damages in the amount of $5.6 million and punitive damages in the amount of $1 million.

42. In June 2009, the Account Managers commenced a lawsuit against Batac and other individuals, alleging that they were contracted by Havaway to be personal placement managers responsible, among other things, for making presentations to prospective investors for which they would receive sales commissions of 5% to 10% on the amounts invested. The Account Managers further alleged that a total of $19 million was invested in or through Havaway by them and the other investors.

THE ALLEGATIONS – SUMMARY FINDINGS

Allegation #1: Securities related business outside the Member

43. The Panel finds that by engaging in the conduct described above, and elaborated on more below under the names of each of the Respondents, the Respondents engaged in securities related business that was not carried on for the account, and through the facilities of, the Member(s), by selling or facilitating the sale of investments in Havaway or Knight Fox to members of the public, contrary to MFDA Rules 1.1.1(a) and 2.1.1 and the Member's policies and procedures.

Allegation #2: Unauthorized dual occupation

44. The Panel accepts the submissions of the MFDA and finds that the conduct described above, and for the reasons described more fully below, constituted securities related business. As a consequence, the Panel also finds that the Respondents had, and continued in, another gainful occupation that was not disclosed to, and approved by, the Member(s) by selling or facilitating the sale of investments in Havaway or Knight Fox to members of the public, contrary to MFDA Rules 1.2.1(d) and 2.1.1 and the Member's policies and procedures.

Allegation #3: Failure to Cooperate

45. As described in greater detail below, the Panel finds that all of the Respondents except Gaminde, failed in full (Batac) or in part (Martin, Macareag and Ocampo) to cooperate with MFDA Staff's investigation of this matter.

THE LAW

46. Staff of the MFDA made submissions on the relevance and application of particular legislation, regulations, rules and previously decided decisions (collectively the "law"). The Respondents did not challenge the law, as submitted by the MFDA, however they each made submissions about why their conduct should be exempted from the application of the law.

Securities Related Business (Rule 1.1.1)

47. MFDA Rule 1.1.1 states, in part, that no Approved Person shall, directly or indirectly, engage in any securities related business unless it is carried on for the account of the Member, through the facilities of the Member, and in accordance with the By-laws and Rules.

48. MFDA Member Regulation Notice – Outside Business Activities (MR-0040) dated May 20, 2005 gives examples of situations and clarifies "the obligations of Members and Approved Persons regarding outside business activities."

49. MFDA By-law No. 1 defines "Securities Related Business" as:

> …any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities for the purposes of applicable securities legislation in any jurisdiction in Canada, including for greater certainty, securities sold pursuant to exemptions under applicable securities legislation.

50. Sub-section 1(1) ("Definitions") of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, (the "Act") defines a "security" and provides that a security includes:

> (a) any document, instrument or writing commonly known as a security, …
> (e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription, …
> (n) any investment contract, …

whether any of the foregoing relate to an issuer or proposed issuer.

51. The Act does not define an investment contract, however the Supreme Court of Canada, in *Pacific Coast Coin Exchange* v. *Ontario Securities Commission*[4], defined it as being an investment of money, in a common enterprise, with profits to come from the efforts of others. The elements of an investment contract that constitute a security are therefore:

a) an investment of money;
b) with an intention or expectation of income or profit from its employment in the investment;
c) in a common enterprise, where the investors' fortunes are interwoven and dependent upon the efforts of those seeking to raise money for the investment or of third parties; and
d) where the efforts made by those other than the investor are the significant ones with respect to the effect on the failure or success of the enterprise.

52. The MFDA urges the Panel to accept that by offering Havaway to investors, the Respondents were no different than the Respondents in the matter *R* v. *MP Global Financial Ltd., and Joe Feng Deng.*[5] In that case, the investments (MP Global Debentures) were used to fund currency trading and included a rate of return to be paid, as well as the ability to redeem the investments. The rates of return ranged from 1% to 4% per month. The OSC found the investments satisfied the criteria of an investment contract and as such were a "security" under the Act.

53. In *Laverdiere*[6]*,* a decision of a hearing panel of the MFDA Pacific Regional Council, the rule on securities related business was described as "fundamental to the regulatory mandate of the MFDA". The policy rationale underlying the prohibition on off-book business is that when transactions are carried out off a Member's books, the Member loses its ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor. As such, the Rule protects both investors and Members.

[4] *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. pages 128 – 132.
[5] *R v. MP Global Financial Ltd., and Joe Feng Deng*, (2011), 34 OSCB 8897.
[6] *Laverdiere* (Re), Decision of the MFDA Pacific Regional Council dated May 12, 2010.

54. Finally, in *Larson*[7], another decision of an MFDA hearing panel, it was found that Approved Persons who facilitate investments by clients in products or companies unknown to and unapproved by the Member, or who act as an intermediary between clients and the perpetrators of an investment scheme, are engaged in securities related business outside of the Member and have breached Rule 1.1.1.

55. While MFDA discipline panels are not obliged to follow previous decisions of other MFDA panels or securities commissions, those decisions are both helpful and instructive in that they assist panels to make consistent or similar decisions where the facts or issues are similar.

Dual Occupation (Rule 1.2.1(c))

56. Rule 1.2.1(c) of the MFDA Rules and Outside Business Activities (MR-0040) provide that an Approved Person may have and continue in another gainful occupation, provided that, among other things, it is permitted/not prohibited by securities legislation; approved (both actually and procedurally) by the Member; is not conduct unbecoming; and clear disclosure is made to clients that the activity is not Member business or responsibility.

57. MFDA counsel correctly submits that MFDA panels have consistently held that undisclosed outside business activities and dual occupations may not only be to the detriment of clients, but also in conflict with the Approved Person's employment with the Member. Such violations have been regarded by MFDA panels as serious.

58. By engaging in gainful occupation outside the business of the Member without advising the Member or obtaining the approval of the Member, the Approved Person effectively prohibits the Member from ensuring that applicable securities legislation and the Member's internal procedures are being complied with, and prevents an assessment of whether the MFDA, its Members or the mutual fund industry are being brought into disrepute. It also prevents a Member from ensuring that clients and the general public are aware that the outside business activity is not the business or responsibility of the Member and that any actual or potential conflicts are

[7] *Larson (Re)*, 2009 LNCMFDA 30, Decision of the Prairie Regional Council dated October 14, 2009 at para. 59.

dealt with appropriately[8].

59. Each Account Manager relied on the signing of a Non-Disclosure Agreement as a defence for failing to disclose the outside business activity to their Member. They each, with the exception of Gaminde, also used that defence, or excuse, for failing to cooperate more fully with the MFDA Investigator. Being Approved Persons, the Respondents are obliged to be truthful and honest in their dealings with their Members and their regulatory body, the MFDA. When Approved Persons enter into agreements, or sign documents, such as the non-disclosure agreement, that undermine and frustrate a Member's ability to supervise the Approved Person's professional activities, they are acting contrary to and are in breach of MFDA's By-laws and Rules. Such actions are not simply misconduct, they call into question the ability of the profession to govern itself and run the risk of jeopardizing the public's confidence in the mutual fund industry.

Standard of Conduct (Rule 2.1.1)

60. MFDA Rule 2.1.1 encompasses the most fundamental obligations of all registrants in the securities industry and it is designed to protect the public interest. This Rule obliges Approved Persons to deal fairly, honestly and in good faith with clients and observe high standards of ethics and conduct in the transaction of business.

61. By signing the non-disclosure agreements and by promoting and conducting business with investors in the manner that they did, the Respondents violated the standard of conduct required of industry participants.

Failure to Cooperate (Section 22 of By-law No. 1)

62. Pursuant to Section 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations of a Member, Approved Person and any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that Member's or person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA.

[8] *In The Matter of Earl Crackower*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200506, Hearing Panel Decision dated August 22, 2005 at p. 8.

63. Pursuant to Section 22.1, in carrying out this duty the MFDA is authorized to require a Member, Approved Person or any other person under its jurisdiction to:

a) submit a report in writing with regard to any matter involved in any such investigation;
b) produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
c) attend and give information respecting any such matters.

64. When an Approved Person does not cooperate with an MFDA investigation by failing to provide information, documents, a written report, or attend at an interview when requested to do so, that person is usually found to have shown serious misconduct, such that the actions, or lack thereof, constitute a failure to cooperate, contrary to s. 22.1 of MFDA By-law No. 1[9].

65. It is viewed as serious misconduct when an Approved Person fails to comply with a request made by Staff pursuant to s. 22.1 of By-law No. 1. This is because it sabotages the ability of the MFDA to perform its regulatory function of fully investigating a matter and determining all of the relevant facts, including the full extent and implications of the underlying events. The failure to provide information requested in an investigation undermines the integrity of the self-regulatory system and the effectiveness of its operation.

66. The Ontario Divisional Court in *Artinian* v. *College of Physicians and Surgeons of Ontario*[10] stated that, fundamentally, every professional has an obligation to co-operate with his self-governing body. That decision applies as much to persons in the investment industry as it does to physicians.

Batac

67. The History of the MFDA's compliance efforts with regard to Batac follows:

[9] *In the Matter of Kevin Desbois,* [2009] ("*Desbois*") Hearing Panel of the Central Regional Council, MFDA File No. 200822, Hearing Panel Decision dated March 16, 2009, at paras. 7-9.
[10] *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct.).

- On January 22, 2010, MFDA Staff wrote to Batac requesting information and documents related to Havaway, as well as her attendance for an interview.

- Between February 1, 2010 and April 16, 2010 MFDA Staff and Batac's counsel exchanged further communications with respect to Staff's request for information and Batac's attendance for an interview.

- On April 21, 2010, Staff received a letter from Batac's counsel advising that Batac would not "voluntarily cooperate with the MFDA investigation".

- On May 20, 2010, Staff received another letter from Batac's counsel advising that Batac:

  "…understands that it is likely that the MFDA will commence an investigation against her for failing to cooperate with the Investigation…that among the penalties which may be imposed, include a permanent prohibition on her ability to conduct securities related business in the future. I have received instructions from Ms. Batac that she would in fact consent to such an order thereby obviating the need for the MFDA to go to the time, trouble and expense of an investigation and/or contested hearing in this matter."

68. The Panel understands the difficulty and challenges that Batac's non-cooperation has placed upon the MFDA, in particular in its enforcement responsibilities and obligations. The Panel finds that the MFDA has established that despite numerous requests, Batac has failed to provide information and documents requested by MFDA Staff and has failed to attend at the offices of the MFDA for an interview.

69. As noted above, the Panel issued a Summons, requiring Batac to appear at the Hearing. Counsel for Batac advised the Panel that she had communicated the Order to her client and that she was awaiting instructions from Batac.

70. The Panel finds that the conduct of Batac with respect to her non-cooperation with the MFDA; her eventual consent to the allegations against her; and her breach of the Summons to

Appear at this Hearing, all establish a pattern of serious and significant continued non-cooperation, and breach of MFDA By-laws and Rules.

71. The Panel also heard evidence of how Batac's actions harmed the other Account Managers, who are Respondents in this disciplinary proceeding, as well as members of a class action brought on behalf of persons who invested in the investment club known as the "Havaway Investment Club".

Martin[11]

72. The Panel heard evidence that as a result of an anonymous online tip to the OSC and the email complaint referred to above, on July 21, 2009 MFDA Staff arranged to conduct an unannounced inspection of a WH Stuart sub-branch office from which Martin worked. As it turned out, the WH Stuart sub-branch was located in the residence of Martin in Mississauga, Ontario (the "Sub-Branch").

73. It was the testimony of MFDA Investigator, Mr. Gallimore, that he and one other MFDA Staff attended at the address where the Sub-Branch was located. He testified that he made several requests to gain access to the Sub-Branch, so the inspection could be completed. However, Martin refused access. The MFDA then had a WH Stuart branch manager contact Martin to instruct him to allow MFDA Staff access to the Sub-Branch. Martin failed to follow the instructions of WH Stuart and did not permit MFDA Staff to access the Sub-Branch.

74. Undeterred, on July 31, 2009, Mr. Gallimore (MFDA Staff) testified that he contacted WH Stuart, once more, to arrange for an inspection of the Sub-Branch, however he was advised by WH Stuart that Martin resigned from WH Stuart on July 30, 2009.

75. Martin testified that the residence is owned by his mother-in-law and that she did not want strangers in her home. Martin did not appreciate that his residence was designated as a registered sub-branch, or that he could be subject to an unannounced inspection by the MFDA, his regulator. Nonetheless, he testified that he felt that he had to respect the wishes of the owner of the home, his mother-in-law, over the requests of his regulator. More is written about this

[11] The evidence of Martin, with respect to how he became involved with Batac, was generally mirrored by the evidence of the other Respondents, and thus will not be repeated for each of the Respondents.

issue under Allegation #3, below.

76. Mr. Gallimore testified that between December 1, 2009 and May 18, 2010, MFDA Staff and Martin's agent corresponded with respect to scheduling Martin's attendance at an interview with MFDA Staff; that MFDA Staff made a request for documentation relating to Martin's involvement with Havaway, including banking records that evidenced the receipt of sales commissions or fees from Havaway; and that MFDA Staff requested documents which included lists of investors in Havaway.

77. Mr. Gallimore testified that on July 9, 2010 and October 8, 2010, Martin attended interviews with MFDA Staff and undertook to provide MFDA Staff with, among other things, copies of all bank statements for bank accounts that evidenced the payments that he had received from Havaway.

78. Mr. Gallimore also testified that by letter dated October 14, 2010, MFDA Staff wrote to Martin requesting his response with respect to a client complaint. Martin did not respond to MFDA Staff.

79. Mr. Gallimore testified that despite numerous requests, Martin failed to respond to MFDA Staff's requests for documentation relating to his involvement with Havaway. Martin also failed to fulfill the undertakings he gave at his interview to provide copies of his banking records evidencing payments from Havaway.

80. With respect to Allegation #1, Martin testified that he did not think that he was selling a securities product, but rather that he was looking into the background of "forex", not hedge funds. He testified that because he was under that belief, and because he believed that forex had no unit value, he concluded, he was therefore not selling a security product.

81. With respect to Allegation #2, Martin testified that at the time he did not think that he was involved with any outside business activity during his involvement with WFG. However, when he reflected on the arrangement and that he was paid referral fees he came to the realization that it was outside business activity.

82. Martin testified about the activities of Batac and her father, Ernesto Batac, in using WFG offices to market Havaway products and to identify and recruit him and his associates at WFG to become "account managers" for Havaway. He testified that Ernesto Batac spoke openly, and "boastfully, showing his returns" to Martin and Martin's associates and colleagues at WFG, to entice them to invest in Havaway and to participate in the marketing of Havaway.

83. Martin testified that Ernesto Batac disclosed to others the fact that Martin was an investor and that he was making returns to entice them to invest, and to persuade them to have their families and friends invest, all of which would bring referral fees/commissions to the person (recruiter) bringing in new investors. Martin testified as to how Batac discreetly selected people from her mother's hierarchy, "and maybe the Respondents are a few of them", to join her (Batac's) business.

84. Martin testified that WFG operated as if it were a multi-level marketing company and that "we were all just trained to recruit" and "there were hundreds, if not thousands of recruits a month." He added that it was the volume not quality that created the promotions at WFG. He further testified that when he joined WFG, there was a 4-5 page agreement, however no one went over the document with him, and that he was given a copy of only the last page, as that page showed his credit card was being charged $125. For reasons, that will appear relevant later, Martin further testified that he studied for and independently[12] wrote and passed the exam to get his mutual fund license.

85. With regard to Allegation #3, as noted above Martin testified that he did not think that his residence was a sub-branch. Rather, he thought that when he originally signed the agreement with WH Stuart, he was simply designating his home as the place where he wanted his mail to be sent, not a place from which he would be conducting business. Martin did however, sign off on a branch audit report.

86. During cross-examination by Mr. Wai, Martin testified that he was not willfully denying MFDA Staff the opportunity to access his business records. In particular, he testified that all the paperwork relating to WFG business, vested in WFG and was left with WFG at its office when he resigned from WFG. He added that the paperwork with respect to Havaway was at the WFG

[12] One or more of the Respondents gave evidence of group exam-taking and the sharing of answers during the writing of the exam to obtain their mutual fund licenses.

office, but he later testified that the paperwork was at the Havaway office.

87. Martin then testified that Batac had him, and others like him, sign a non-disclosure agreement that prevented him, and others, from providing any documents or information regarding Havaway. He testified that he simply had nothing to disclose, because all documents and materials were kept at the Havaway office, but even if he did have any documents, he was prevented from disclosing them because of the non-disclosure agreement.

88. Then Martin testified that Gaminde had collected several documents on behalf of all Respondents, in respect of the criminal and civil actions, and that she provided them to the MFDA. However, other Havaway documents were moved by a Kervi Batac from the Havaway office to a storage facility which he did not have access to.

89. Martin also testified that he did not want to provide any documents to the MFDA because he was afraid that documents disclosed in a "public" forum, like this hearing, could be used against him in any civil action brought against him.

90. With respect to the four alternative reasons that Martin gave for not disclosing documents, the Panel finds that he willfully and deliberately ignored his obligations to his regulator. While, in his mind, Martin may think that he had valid reasons for not cooperating, he did not. If, at the time he was interviewed, he had expressed a desire to have an "off the record" or "in camera" discussion, the MFDA Investigator and he could have discussed the reasons for disclosure in that manner. Accordingly, the Panel finds that Martin did not have any valid reasons for not turning over documents, or for not cooperating, and that the MFDA has proved Allegation #3 as against Martin.

91. Martin testified that he received a 5% commission on the money invested for a client and that he had three referring agents. He testified he gave the applicable referring agent 3% of the 5% amount he was paid. He testified that he had approximately 30 clients who collectively invested approximately $1.1 to $1.2 million. He also testified that neither he nor any of his family members received all of their initial investments back.

92. The investments Martin sold to members of the public, as well as to his family members,

and friends, have been characterized as being in the nature of pyramid-style, and likely, "Ponzi" schemes.

93. There was no evidence provided by Martin that he even thought to address the issue of suitability of the investments for the purchasers. In his direct evidence, he stated that he "only looked for clients to feel comfortable and that because the contract with Havaway guaranteed a 20% return, there was no risk for investors". Martin's actions have seriously affected the confidence of the public, not to mention that of his family and friends, in relying on registered representatives. This issue will be more fully addressed in the decision following the penalty portion of the Hearing.

Macareag and Ocampo

94. The MFDA Investigator, Mr. Gallimore, testified that between December 1, 2009 and May 7, 2010, MFDA Staff and the agent for Macareag and Ocampo corresponded with respect to scheduling their attendance at an interview with MFDA Staff. MFDA Staff requested documentation relating to Macareag and Ocampo's involvement with Havaway; documents which included lists of investors in Havaway; and, banking records that evidenced the receipt of sales commissions and fees from Havaway.

95. Mr. Gallimore also testified that Macareag attended an interview with MFDA Staff on July 8, 2010 and Ocampo attended an interview with MFDA Staff on August 17, 2010. At the interviews, Macareag and Ocampo undertook to provide MFDA Staff with, among other things, copies of all bank statements which evidenced the amounts they had received from Havaway.

96. Mr. Gallimore testified that despite numerous requests, Macareag and Ocampo have failed to provide MFDA Staff with documentation relating to their involvement with Havaway and have failed to fulfill the undertakings given at their interviews.

97. In his direct evidence, Macareag testified with respect to Allegation #1 that he had done his own research and concluded that the Havaway product was not a "security"; that he made no direct sales of the Havaway products; that he did not get his license until February 2007, but then resigned from WFG in January 2008; and, that he did first refer members of his family, then

other clients to Batac. He testified that Batac, not he, closed the deals with these investors.

98. Under cross-examination, Macareag reversed himself, and admitted to referring people or selling products of Havaway while he had his mutual fund license with WFG. The Panel finds the answers given by Macareag, under cross-examination by Mr. Wai, are more compelling and reliable because they were focused, unrehearsed, and responded directly to the Allegations.

99. With respect to Allegation #2, Macareag testified that he only worked for Havaway after he left WFG and he therefore did not continue with WFG as a licensed mutual fund representative while representing the interests of Havaway.

100. Under cross-examination however, Macareag testified that he was selling Havaway products and receiving commissions and trailer fees while he was employed with WFG. However, Macareag testified that he "could not" disclose his activities with Havaway to WFG, because he signed a non-disclosure agreement with Batac. When questioned by a member of the Panel, Macareag admitted that:

- he had both received and read the Policies and Procedures of WFG;
- he had a professional responsibility to abide by the Policies and Procedures of WFG;
- he was required to be truthful, open, and forthright with WFG;
- he would be penalized by the regulators if he failed to abide by the Policies and Procedures of the Member (WFG); and
- he would be penalized by the regulators if he failed to abide by the By-laws and Rules of the MFDA.

101. The Panel has considered the explanation given by Macareag and, while he may have honestly believed that he could not disclose his activities with Batac and Havaway to WFG, he was obliged to do so under the terms governing his registration as a mutual fund representative.

102. On the third allegation, Macareag testified that in addition to his non-disclosure agreement with Havaway, he was so focused on the class action lawsuit, and the York Regional Police investigations, that he was not able to respond to the requests and demands of the MFDA. Macareag then added another reason for not cooperating: he "was petrified" by the fact that any

materials that he would provide would be used against him in the other matters, i.e. the class action lawsuit or other litigation.

103. While one can understand, and sympathize, with the multiple demands/challenges for Macareag's time and attention, as a registered sales representative he had a duty to respond to his regulator in a timely and truthful manner. He willfully disregarded requests, without explanation, that his regulator made for cooperation, documents, and other information. In addition, in his written Reply (February 2012) to these proceedings, he wrote that Gaminde had compiled and submitted existing documents from referring agents during her interview with the MFDA.

104. Gaminde was interviewed in November 2009 and Macareag in July 2010. There was no credible explanation given by Macareag as to why he did not tell the MFDA in July 2010 that he did not have any documents to provide as he had already given them to Gaminde for a common or joint book of documents.

105. Ocampo admitted to selling Havaway during her time at each of WFG and WH Stuart, but she denied that the Havaway product(s) was a "security" on the basis of her own research, and because, she testified, Gaminde had informed her that the OSC told Gaminde that Havaway was not a security. Ocampo testified that she was licensed as a mutual fund sales representative for the period relevant to this Hearing. As such, she would reasonably be expected to know, from her own professional development, including taking the licensing examination, how a security was defined for purposes of the MFDA By-laws and Rules. Had she *properly* qualified as a licensed mutual fund sales representative, she would have known that mutual fund licensees are under the jurisdiction of the MFDA and not the OSC, and that the Havaway product was a security.

106. In response to questions from the Panel, Ocampo testified about the (unconventional and unapproved) conditions of the exam-taking circumstances that she and others experienced to become licensed mutual fund sales representatives. The Panel is satisfied, on the evidence it heard, that the manner in which most of the Respondents obtained their respective mutual fund licenses explains, but only in part, how it was that they became involved with Batac and Havaway, and why it was that they did not appear to appreciate that they were in breach of MFDA By-laws and Rules.

107. With respect to Allegation #2, Ocampo admitted that she was engaged in an outside business activity. However, she testified that she did not tell either WFG or WH Stuart of her involvement in an outside business activity because of the non-disclosure agreement she was required to sign by Batac.

108. On Allegation #3, Ocampo gave three different, conflicting explanations for not providing the MFDA with the documents and records she undertook to provide following attending an interview with MFDA Staff:

(a) The documents were all with the class action lawyer;
(b) The documents were provided to paralegal Mr. Allison Gowling, and he did not forward them to the MFDA; and
(c) The documents were all provided to Gaminde, who was compiling a joint or common book of documents for all Respondents.

109. However, Ocampo, who was interviewed after Gaminde and after Gaminde provided the binder of apparently "common or group documents" to the MFDA, failed to advise, or otherwise explain, to the MFDA Investigator that she could not provide the requested information and documents. Accordingly, the Panel finds that the MFDA has proven Allegation #3 in regard to Ocampo.

Gaminde

110. Gaminde cooperated with MFDA Staff's investigation. Gaminde attended an interview requested by Staff in November 2009 and produced documents that were available. Accordingly, the MFDA is proceeding against Gaminde only on Allegations #1 and #2.

111. With regard to Allegation #1, Gaminde testified that she did not believe that the Havaway product was a security because when she asked the OSC that question she was told that it was not under the jurisdiction of the OSC. Gaminde interpreted that answer to mean the Havaway product was not a security. As with Ocampo, had Gaminde properly qualified as a licensed mutual fund sales representative, she would have known that mutual fund licensees are under the

jurisdiction of the MFDA and not the OSC, and that the Havaway product was a security.

112. With regard to Allegation #2, Gaminde testified that she was bound by the non-disclosure agreement that Batac had her sign and as a consequence she was prevented from disclosing the outside business activity to WFG. As with Allegation #1, had she been properly qualified as a licensed mutual fund sales representative, she would have known that mutual fund licensees are obliged to disclose such activity to the MFDA Member they are registered with.

113. Gaminde testified that Batac threatened her and other investors that they would not receive commissions, and that their respective investments would not be returned, if the non-disclosure agreement was not strictly adhered to and honoured by them.

Conclusion on the Merits

114. This Decision is only with respect to the merits of the alleged violations of MFDA By-laws, Rules and/or Policies. A decision on the penalties, sought by the MFDA, will be rendered following a hearing with respect to penalties.

115. As sought by the MFDA, the Panel finds that as a result of the failure of Batac, Martin, Macareag and Ocampo to cooperate either in full or in part with MFDA Staff's investigation, by failing or refusing to provide documents and information, and/or to attend an interview requested by MFDA Staff during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1, MFDA Staff has not been able to determine the full nature and extent of the Respondents' unauthorized outside business activities in relation to Havaway and Knight Fox.

116. In addition, MFDA Staff has been unable to determine the total number, and identities, of the investors in Havaway or Knight Fox or the amounts invested.

117. As a further consequence, MFDA Staff has been unable to determine the number of investors in Havaway or Knight Fox, if any, who may have been clients of either WFG or WH Stuart.

118. Respondents Gaminde, Macareag, Martin, and Ocampo appeared and participated in the

Hearing. Their participation was informative and of assistance to the Panel in understanding how the Havaway system worked. In addition, the Panel heard about the very negative repercussions their actions had on these Respondents, their families and friends who had trusted them.

119. The Respondents were all licensed as Approved Persons and held themselves out as such. They each breached their respective duties to the public, the Members they worked with, and their regulatory body, the MFDA. The Panel finds that the MFDA has proved the allegations as stated in the Notice of Hearing against each of the Respondents.

DATED this 22nd day of March, 2013.

"Kathleen J. Kelly"
Kathleen J. Kelly,
Chair

"Guenther Kleberg"
Guenther Kleberg,
Industry Representative

"Nick Pallotta"
Nick Pallotta,
Industry Representative

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