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: Michael Robert Breuer

Heard: July 28-29, 2014 in Vancouver, British Columbia
Decision and Reasons (Misconduct): November 13, 2014

DECISION AND REASONS
(Misconduct)

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill	Chair
Sharon Moskalyk	Industry Representative
Cecilia Wong	Industry Representative

Appearances:

Faye Emmanuel	)	Enforcement Counsel, Mutual Fund Dealers Association of Canada
Michael Robert Breuer	)	Not in attendance or represented by Counsel

BACKGROUND

1. By a Notice of Hearing (the "Notice of Hearing") dated December 10, 2013, the Mutual Fund Dealers Association of Canada ("MFDA" or the "Association") commenced disciplinary proceedings against Michael Robert Breuer ("Breuer" or the "Respondent").

2. On or about January 16, 2014, the Respondent submitted a Reply, being four (4) pages, in which he responded to Allegations #1-4 of the Notice of Hearing. The Respondent admitted a number of the material facts as set forth in Allegations #1-#4 and responded to various points in the Allegations. For example, with respect to Allegation #1 he stated "I do fully admit to entering into an agreement and signing the letter with client ES. It was a huge error on my part, one that I deeply regret and apologize for…". (Reply page 1).

3. On or about May 27, 2014, the MFDA filed an *Amended* Notice of Hearing which added Allegations 5 and 6, referring to allegations of misconduct by the Respondent with respect to clients GL and ML. Further, that commencing July 19, 2013, the Respondent failed or refused to provide documentation and information, and attend an interview requested by the MFDA during the course of an investigation. The Respondent did not file an Amended Reply in response to the *Amended* Notice of Hearing.

JULY 28 and 29, 2014 HEARING

4. On May 27, 2014, the Hearing Panel directed that the hearing of this matter on the merits would take place July 28th to 30th, 2014, commencing at 10:00 a.m. in Vancouver, B.C. As scheduled, a hearing on the merits convened on July 28, 2014. The Respondent was given notice but did not appear personally or through counsel.

5. Rule 7.3 of the MFDA Rules of Procedure states:

> "7.3 Failure to Attend a Hearing

(1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:

(a) proceed with the Hearing without further notice to and in the absence of the Respondent; and

(b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in section 24.1 and 24.2 respectively of MFDA Bylaw No. 1."

6. As previously noted, the Respondent did not fulfill the requirements of Rule 8 by filing a Reply to the *Amended* Notice of Hearing, and thus the Hearing Panel does not have any response from the Respondent to the new allegations contained in the *Amended* Notice of Hearing. Rule 8.3 states:

"8.3 Acceptance of Facts and Conclusions

(1) A Hearing Panel may accept as proven any facts alleged or conclusions drawn by the Corporation in the Notice of Hearing that the Respondent does not specifically deny in the Reply in accordance with Rule 8.2(1)(a)(ii) and (iii)."

7. Rule 8.4 entitled **Effect of Failure to Deliver a Proper Reply**, provides:

"Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:

(a) proceed with the hearing without further notice to and in the absence of the Respondent:

(b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-Law No.1;

(c) order that the Respondent pay costs, at any stage of the proceeding regardless of the outcome of the proceeding and in addition to any other penalties and costs imposed on the Respondent, in an amount which reflects the extent to which, in the Hearing Panel's discretion, the hearing will be or has been unnecessarily prolonged or complicated by the failure of the Respondent to deliver a proper Reply;

(d) prohibit, restrict, or place terms on the right of the Respondent to call witnesses or present evidence at the hearing."

8. The Hearing Panel proceeded with the hearing and pursuant to Rules 7.3 and 8.4 has determined that it is appropriate to accept the facts alleged and conclusions drawn by the MFDA in the *Amended* Notice of Hearing as proven. Notwithstanding Rules 7.3 and 8.4, Enforcement Counsel called two witnesses; firstly, Ms. Indira Nadarajan, Manager of Investigations for the Pacific Region for the MFDA. Ms. Nadarajan has a BA, and a law degree, and has taken the Canadian Securities Course and the Conduct and Practices Course. She has worked for the MFDA since 2002 starting as an investigator, was promoted to senior investigator in 2006, and promoted to Manager of Investigations in 2008. Enforcement Counsel also called ES, a long-time client of the Respondent, whose involvement was central to a number of the Allegations.

9. We found both Ms. Nadarajan and ES to be credible witnesses. Their evidence also proved all the facts alleged and the Particulars in the *Amended* Notice of Hearing.

10. Pursuant to Rule 7.3, it is appropriate at this point to set out the Allegations in the *Amended* Notice of Hearing, and the Particulars:

> **Allegation #1**: Between December 30, 2008 and June 30, 2010, the Respondent engaged in personal financial dealings with client ES by entering into an agreement with client ES whereby the Respondent personally guaranteed to compensate client ES for any shortfall in the value of client ES's account below $150,000, thereby giving rise to a conflict or potential conflict of interest between the Respondent and client ES which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1.
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> **Allegation #2**: Between June 28 and July 8, 2010, the Respondent engaged in unauthorized discretionary trading by processing two redemptions, totalling approximately $17,400, in client ES's account, and depositing the proceeds in client ES's bank account, all without the client's knowledge, instructions or approval, contrary to MFDA Rules 2.3.1(a) and 2.1.1.
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> **Allegation #3**: Between June 28 and July 8, 2010, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by using client ES's own monies to compensate her for losses sustained in her account, without her knowledge or approval, contrary to MFDA Rule 2.1.1.

Allegation #4: On or about July 2, 2010, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by changing the mailing address for statements sent by a mutual fund company to client ES from client ES's home address to the Respondent's branch office address, without the client's knowledge, instructions or approval, contrary to MFDA Rule 2.1.1.

Allegation #5: Between July 16, 2008 and September 28, 2011, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by misrepresenting to clients GL and ML that the principal amounts of the investments in their account were fully guaranteed, contrary to MFDA Rule 2.1.1.

Allegation #6: Commencing July 19, 2013, the Respondent has failed or refused to provide documents and information to, and to attend an interview requested by, the MFDA during the course of an investigation, contrary to s. 22.1 of MFDA By-Law No. 1 and MFDA Rule 2.1.1.

11. The Particulars in the *Amended* Notice of Hearing set out the following facts:

"**Registration History**

1. From May 1993 to December 31, 2008 and from February 4, 2009 to September 28, 2011[1], the Respondent was registered in British Columbia as a mutual fund salesperson with PFSL Investments Canada Ltd. ("PFSL") or "the Member").[2]

2. On September 28, 2011, PFSL terminated the Respondent as a result of the events described herein.

3. The Respondent was also a licensed life insurance agent with Primerica Life Insurance Co. of Canada from June 1, 2008 to July 31, 2012, at which time the license was terminated.

4. The Respondent is not currently registered in the securities industry or licensed in the insurance industry in any capacity.

5. At all material times, the Respondent carried on business from Pitt Meadows, British Columbia.

6. The Respondent was not registered between January 1 and February 3, 2009.

[1] The Respondent was not registered between January 1 and February 3, 2009.
[2] PFSL has been a Member of the MFDA since January 11, 2002.

7. PFSL has been a Member of the MFDA since January 11, 2002.

Allegation #1: Personal financial dealings with client ES

PFSL 's Policies and Procedures

6. At all material times, PFSL's policies and procedures stated that all written correspondence with clients had to be approved in writing by PFSL prior to being provided to the client. In addition, PFSL's policies and procedures expressly stated:

> "Do not imply or represent that an investor's capital will increase or that the purchase of equity mutual funds ensures a preservation capital or a protection against capital loss in value."

7. From 2001 - 2008, the Respondent completed an annual compliance checklist; and in 2009 and 2010 the Respondent completed an electronic attestation. On each checklist and attestation, the Respondent confirmed:

a. That he must read and comply with all the provisions set out in the PFSL Compliance Manual and other PFSL manuals;

b. That he must not and will not lead his clients to believe that a mutual fund investment is guaranteed; and

c. That he must and will not guarantee or project any mutual fund's future performance.

8. The Respondent executed documents with PFSL in May 1992 and June 2003 agreeing to comply with PFSL's policies, including that he would conduct business in an honest, ethical manner and that he would not enter into any contract or arrangements that would prevent PFSL from monitoring them.

9. On April 23, 2007, the Respondent executed a Registered Representative Agreement with PFSL agreeing to, amongst other things:

a. Comply with applicable legislation and regulation, including the rules and by-laws of any approved self-regulatory organization; and

b. Not entering into any contract or arrangements where PFSL or any securities regulatory authority would be unable to monitor it.

The December 30, 2008 agreement with client ES

10. ES had been a client of PFSL since 1993. The Respondent was the mutual fund salesperson responsible for servicing her accounts. During the material time giving rise to these allegations, client ES had a total of six different accounts with PFSL.

11. On or about August 3, 2006, client ES opened a non-registered account at PFSL (one of the aforementioned six accounts she had at PFSL). The Respondent was the mutual fund salesperson responsible for the account. Client ES deposited $150,000 in the account and, relying on the Respondent's recommendation, instructed him to purchase two mutual funds for the account -a balanced income fund and a dividend income fund.

12. The source of funds for the monies deposited by client ES in the account was a home equity line of credit.

13. Between September and December 2008, client ES expressed her increasing concern to the Respondent about the declining value of her account and her desire to redeem her investments and withdraw the proceeds in order to mitigate her losses.

14. In September 2008, the Respondent persuaded client ES to continue with the strategy advising her to switch out of the two mutual funds she had purchased into a bond fund. The Respondent stated that the switch would reduce the risk that the value of the account would decline further.

15. By December 29, 2008, the value of the client ES's account had declined from its initial balance of $150,000 in August 2006 to approximately $90,250, representing an unrealized loss of approximately $59,750.

16. Notwithstanding client ES' s desire to sell her investments, the Respondent believed that the market was only undergoing a correction from which it would recover. The Respondent therefore recommended that client ES refrain from selling her investments. The Respondent managed to persuade client ES to agree to this course of action by, among other things, offering to personally make up any shortfall in the value of client ES's account below $150,000 as of June 30, 2010, 18 months hence.

17. The Respondent prepared and entered into a written agreement with client ES, dated December 30, 2008, with respect to his personal guarantee of her account (the "Agreement") which provided, among other things:

> "I, Michael Breuer, do hereby personally guarantee the value of at least $150,000 on or before June 30, 2010. If, on July 1, 2010, the value of the said account is less than $150,000, I will personally deposit into [ES's] TD account the difference."

18. According to the terms of the Agreement, the Respondent's guarantee was subject to the following provisions, among others:

a) the guarantee was only valid provided the Respondent remained as the advisor for the account;

b) any withdrawals from the account, beyond those client ES made at regular intervals to make payments on her home equity line of credit, would reduce the amount guaranteed; and

c) client ES could not invest in high risk or speculative investments.

19. A re-typed version of the Agreement was executed by client ES and the Respondent in or around November 2009. This version of the Agreement was notarized (at client ES's insistence) and contained a handwritten note, dated November 6, 2009, stating that the Respondent agreed that no back end load fees (i.e. deferred sales charges) would apply to investments purchased in the account.

20. At all material times, client ES understood and believed that under the terms of the Agreement, the Respondent was agreeing to personally reimburse her for any shortfall in the value of her account below $150,000 as of July 1, 2010, excluding any amounts (other than the regular amounts she withdrew to pay the interest owing on her home equity line of credit) she withdrew from the account.

21. The Respondent did not seek or obtain permission from PFSL prior to proposing and entering into the Agreement with client ES. There is no evidence that PFSL was aware of the existence of the Agreement.

22. By engaging in the conduct described above, the Respondent engaged in personal financial dealings with client ES which created a conflict or potential conflict of interest between the Respondent and client ES which the Respondent failed to address by the exercise of responsible

business judgment influenced only by the best interests of client ES, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegations #2, #3 and #4: Discretionary trading and change of client ES's mailing address

23. In June 2010, client ES notified the Respondent that she wanted to sell the investments in her account and withdraw the proceeds. Client ES informed the Respondent that, pursuant to the Agreement, she expected the Respondent to provide her with a money order equal to any shortfall in her account below $150,000 by June 30, 2010, and the Respondent agreed to do so.

24. In confirmation of their understanding and agreement, the Respondent and client ES executed a document, dated June 15, 2010, pursuant to which the Respondent agreed, among other things, to return the full amount of $150,000 to client ES' s bank account; that there would be no back-end load fees charged to her account; and that the monies would be in client ES's bank account by June 30, 2010.

25. On or about June 24, 2010, client ES met with the Respondent at his office. The Respondent presented her with a Redemption Request Form to redeem the investments in her account and a document giving the Respondent permission to deposit the redemption proceeds directly in client ES's bank account, both of which documents client ES signed.

26. The Respondent processed the redemption in client ES' s account and, notwithstanding their agreement to the contrary, $5,060 in deferred sales charges (“DSC”), also known as back-end load fees, were deducted from the redemption proceeds. As a result, client ES received net redemption proceeds of $133,080. Client ES believed that under the terms of the Agreement, the Respondent was required to reimburse her a total of $16,920 (representing the shortfall between $150,000 and the net redemption proceeds of $133,080).

27. Unbeknownst to client ES, the Respondent created another Redemption Request Form, which he dated June 28, 2010, by photocopying client ES's signature from the June 24, 2010 Redemption Request Form on to a blank Redemption Request Form. The Respondent used this form to process a redemption in the amount of $16,700 (net) from one of client ES's other accounts at PFSL, in which she only held mutual funds purchased from Manulife Mutual Funds (the “Manulife account”), without client ES's knowledge, instructions or approval. The Respondent deposited these redemption proceeds in client ES's bank account.

28. On or about July 2, 2010, the Respondent contacted Manulife and arranged for the mailing address on the statements that Manulife sent to client ES to be changed from client ES's home address to the Respondent's branch office address, without client ES's knowledge, instructions or approval. The effect of this unauthorized change in mailing address was to delay client ES's discovery of the fact that the monies deposited to her bank account by the Respondent to compensate her for her losses had in fact been withdrawn from the Manulife account.

29. On July 8, 2010, while still unaware of the unauthorized redemption from the Manulife account, client ES contacted the Respondent and expressed her view that pursuant to the Agreement, the Respondent still owed her approximately $700. At the Respondent's request, client ES sent a fax to the Respondent authorizing him to deposit directly in her bank account the amount of money necessary to reach a total of $150,000.

30. On or about July 8, 2010, the Respondent processed another redemption in the amount of $668 from the Manulife account, without client ES' s knowledge, instructions or approval. In order to process this redemption and deposit the redemption proceeds to client ES's bank account, the Respondent attached, to an unsigned Redemption Request Form, the aforementioned note from client ES authorizing the Respondent to direct deposit to her bank account the amount of money necessary to reach a total of $150,000.

31. At all material times, client ES believed that the amounts that the Respondent had deposited to her bank account, totalling approximately $17,400, were paid out of the Respondent's own pocket pursuant to the terms of the Agreement. In fact, unbeknownst to client ES, the Respondent had used client ES's own monies, obtained by way of the unauthorized redemptions from the Manulife account, to fulfill the terms of his personal guarantee under the Agreement.

32. By engaging in the conduct described above, between June 28 and July 8, 2009 the Respondent engaged in unauthorized discretionary trading by processing two redemptions, totalling approximately $17,400, in client ES's account, and depositing the proceeds in client ES' s bank account, all without client ES' s knowledge, instructions or approval, contrary to MFDA Rules 2.3.l(a) and 2.1.1.

33. By engaging in the conduct described above, between June 28 and July 8, 2009, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by using client ES's own monies to

compensate her for losses sustained in her account, without her knowledge or approval, contrary to MFDA Rule 2.1.1.

34. By engaging in the conduct described above, on or about July 2, 2010, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business by changing the mailing address for statements sent by a mutual fund company to client ES from client ES's home address to the Respondent's branch office address, without client ES's knowledge, instructions or approval, contrary to MFDA Rule 2.1.1.

Allegation #5: Misrepresentation - GL and ML

35. GL and ML are husband and wife. They have been clients of PFSL since approximately 2001. The Respondent was the mutual fund salesperson responsible for servicing their account.

36. Between November 2, 2006 and June 20, 2008, GL and ML borrowed a total of $160,000 from their line of credit to purchase mutual funds in their non-registered account.[3]

37. Between November 2, 2006 and June 20, 2008, the Respondent verbally advised GL and ML that the principal amounts of their mutual fund investments (totalling $160,000) were guaranteed.

38. After June 20, 2008, GL and ML became concerned about the Respondent's verbal representations that the principal amount of their investments were guaranteed. On or around June 23, 2008, GL asked the Respondent to confirm his earlier guarantee in writing.

39. On or around July 16, 2008, the Respondent provided GL and ML with a letter (the "Letter") dated July 16, 2008 on letterhead bearing the name "Primerica"[4] which stated:

> "This letter is to assure the above mentioned holders of said account, that all monies deposited into this account will hold their value so that at such time of collapse (to pay back mortgage l.o.c.) 100% of the principal will be available."

40. According to the terms of the Letter, the Respondent's guarantee was subject to the following conditions:

[3] The circumstances regarding GL and ML borrowing monies to purchase investments in their non-registered account with the Member, and related issues, are currently being investigated by the MFDA. As such, they are not detailed in this Notice of Hearing.

[4] PFSL is a wholly owned subsidiary of Primerica Financial Services (Canada) Ltd.

a) There be no more than 10% of the holdings withdrawn in any single given year;

b) Any amount above 10% will lower the guaranteed amount of the principal; and

c) The guarantee was only valid as long as the investments are not invested into anything speculative or high risk.

41. The Letter was signed by the Respondent, GL and ML.

42. Relying upon the Respondent's representations and the Letter, at all material times GL and ML understood and believed that PFSL was aware of the guarantee and the Letter and accordingly, had guaranteed the principle amount of their investments of $160,000.

43. The Respondent did not seek or obtain permission from PFSL to provide the guarantee or the Letter in respect of GL and ML' s account. There is no evidence that PFSL was aware of the Respondent's guarantee or the existence of the Letter.

44. As set out in paragraph 6 above, at all material times, PFSL's policies and procedures prohibited its Approved Persons from leading a client to believe that a mutual fund investment was guaranteed, and from providing a guarantee or projection as to the future performance of a mutual fund.

45. In or about December 2012, GL and ML discovered that their mutual fund investments had declined in value from $160,000 to approximately $40,000.

46. In or about early May 2013, GL and ML learned that the Respondent was no longer an Approved Person of PFSL.

47. By engaging in the conduct described above, the Respondent engaged in conduct unbecoming an Approved Person and failed to observe high standards of ethics and practice in the conduct of business, by misrepresenting to clients GL and ML that the principal amount of the investments in their account was guaranteed, contrary to MFDA Rule 2.1.1.

Allegation #6: Failure to cooperate

48. As set out in the chart below, the Respondent has failed or refused to cooperate with Staff's investigation into the matters concerning Allegation #5:

Date	Communication	Method of Delivery	Result
July 19, 2013	Staff requested the Respondent provide a written response concerning GL and ML's complaint. Deadline: August 12, 2013	Ordinary and registered mail	Respondent failed to respond. Registered mail unclaimed and returned to Staff. Ordinary mail not returned
August 28, 2013	Staff reiterated their request for a written response to GL and ML's complaint and advised the matter could be escalated to MFDA Investigations. Deadline: September 12, 2013	Ordinary and registered mail	Respondent failed to respond. Registered mail unclaimed and returned to Staff. Ordinary mail not returned.
November 11, 2013	Staff sent copies of the July 19 and August 28, 2013 letters to the Respondent's e-mail address.	e-mail	Respondent failed to respond. November 12, 2013 escalated to MFDA Investigations.
November 21, 2013	Staff outlined the Respondent's failures to respond to Staff and reiterated their request for the Respondent to respond to GL and ML's complaint and to attend an investigation interview between Dec 2-6, 2013. Staff advised the matter could be escalated to MFDA Enforcement. Deadline: November 27, 2013	Registered Mail Regular Mail Process Server	Registered mail unclaimed and returned to staff. Ordinary mail not returned Process Server successfully served the Respondent on November 21, 2013.
November 21, 2013	The Respondent states that he is unable to attend for an investigation interview between December 2-6, 2013, and will not be available until July 2014.	e-mail	
November 22, 2013	Staff reiterates the Respondent's obligations as a former Approved Person of the MFDA, and asks for his availability between December 2 and 6, 2013. Staff advises that if the Respondent does not schedule a time, Staff will schedule the interview for December 6, 2013.	e-mail	
November 30, 2013	The Respondent states he will not be available December 2-6, 2013	e-mail	
December 6, 2013	Respondent fails to attend investigation interview.		
December 27, 2013	Staff advises Respondent that he has failed to cooperate with their investigation and that the matter was escalated to MFDA Enforcement.	e-mail and regular mail	Regular mail not returned. No response from Respondent. February 25, 2014 – Escalation to MFDA Enforcement Staff.

49. To date, the Respondent has not provided Staff with a response to GL and ML's complaint and other requested information.

> 50. Due to the Respondent's failure to cooperate with the MFDA's investigation, Staff has not been able to determine the full nature and extent of the Respondent's conduct in relation to clients GL and ML, and possibly other clients.
>
> 51. Commencing July 19, 2013, by failing to comply with Staff's requests that he provide a written response concerning the matters under investigation, the Respondent has failed to cooperate with an MFDA investigation, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1."

12. As stated herein, this Panel accepts as proven the facts and violations alleged by the MFDA in the *Amended* Notice of Hearing. However, at the Hearing, Enforcement Counsel adduced evidence, through two witnesses and an affidavit, that proved the facts relating to the violations alleged in the *Amended* Notice of Hearing. As noted, the Panel received the evidence of Ms. Indira Nadarajan, Manager of Investigations for the Pacific Region for the MFDA. Ms. Nadarajan has extensive experience, and conducted the investigation into the conduct of the Respondent arising from allegations made to the Member. Ms. Nadarajan filed an extremely comprehensive affidavit (Exhibit 10) being some 85 paragraphs, with exhibits from A through ZZ. The Panel also accepted the evidence of ES.

ANALYSIS

13. In the six Allegations brought against the Respondent, the MFDA alleges violation of the Bylaws, Rules or Policies of the MFDA. Allegation #1 invokes MFDA Rules 2.1.4 and 2.1.1; Allegation #2 invokes, *inter alia*, Rule 2.3.1(a); Allegations #3 - #6 all invoke MFDA Rule 2.1.1; and Allegation #6 also invokes section 22.1 of MFDA Bylaw No. 1.

14. **MFDA Rule 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; and

(d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation."

15. **MFDA Rule 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).

(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c)."

16. MFDA Rule 2.3.1(a):

"Prohibition. No Member or Approved Person shall accept or act upon a general power of attorney or other similar authorization from a client in favour of the Member or Approved Person **or engage in any discretionary trading**."(emphasis added)

17. **MFDA Bylaw No. 1 – Section 22.1 – Investigatory Powers**:

"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:

(a) to submit a report in writing with regard to any matter involved in any such investigation;

(b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and

(c) to attend and give information respecting any such matters;

(d) to make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath."

FAILURE TO FOLLOW THE MEMBERS' POLICIES AND PROCEDURES

18. Throughout the time the Respondent was registered as an Approved Person with the Member (PFSL) the Members' Compliance Policies and Procedures Manual stated, amongst other things:

"(1) that all written correspondence with clients be approved in writing with the Member prior to being provided to the clients; copies of all correspondence to clients must be furnished to the Members' Compliance Department;

(2) that Approved Persons could not imply or represent that an investors capital will increase or otherwise be protected against capital loss in value, or guarantee or project in any manner the future performance of any mutual fund; and

(3) that Approved Persons could not engage in financial dealings with clients."

19. At all material times the Respondent was an experienced financial advisor (Approved Person) and the Respondent completed annual compliance checklists which declared, amongst other things:

> "(1) that he must read and comply with all provisions set out in the Members' Compliance and other manuals;
>
> (2) that he must not and will not guarantee or project any mutual fund's future performance;
>
> (3) that he must and will submit all mutual fund related transaction documentation directly to the Branch Manager on the same business day the transaction was closed, or the next business day;
>
> (4) that he must and will complete accurately and honestly all Account Applications and/or service forms;
>
> (5) that he must and will discuss with the client any applicable sales or redemption charges associated with the mutual fund transaction; and
>
> (6) that he has complied with all the declarations listed in the annual compliance checklist."

20. Further, in December, 2008, the Respondent executed a Registered Representative Agreement with the Member agreeing, *inter alia*, to:

> "(1) comply with securities legislation, including the rules and bylaws of any approved self-regulatory organization; and
>
> (2) not enter into any contract or arrangements with respect to such activities that prevents or impacts the Member or any securities regulatory authority from monitoring and enforcing compliance with the Registered Representative Agreement."

21. Further, in December, 2008, the Respondent executed an Agreement of Approved Person, agreeing to, amongst other things:

> "(1) to be bound by, and comply with the MFDA Rules as they are from time to time amended or supplemented; and

(2) that he is conversant with the MFDA Rules, and will keep fully informed about the MFDA Rules as they are amended or supplemented from time to time."

22. We note that at no time did the Respondent suggest that he was not fully conversant with the MFDA Rules, or the Registered Representative Agreement. On the evidence he was fully familiar with all of his duties and obligations pursuant to the RR Agreement and the MFDA Rules.

23. On the evidence adduced, it is clear that the Respondent was fully aware of the financial situation of his client, ES, as she had been a client of PFSL since 1993. We find that the Respondent knew that the deposit of $150,000 into the account of ES were funds that she had borrowed, secured on her home, and that she was required to make monthly interest payments.

24. Between September and December, 2008, client ES expressed her concern to the Respondent about the declining value of her account; she wished to redeem her investments and withdraw the proceeds in order to mitigate her losses. The Respondent persuaded ES to continue with the investment and switched from the mutual funds into a bond fund. By December 29, 2008 the value of ES's account had declined from its initial balance of $150,000 in August, 2006, to approximately $90,050, representing an unrealized loss of approximately $59,750.

25. ES had told the Respondent that she wished to sell her investments but the Respondent recommended that ES refrain from selling. The Respondent persuaded ES to hold the course and did so, by, amongst other things, offering to personally make up any short fall in the value of client ES's account below $150,000 as of June 30, 2010, namely 18 months hence. The Respondent prepared and entered into a written agreement with ES dated December 30, 2008 where he personally guaranteed her account to a value of at least $150,000 on or before June 30, 2010. He agreed to make up the difference if the account was less than $150,000. He knew that this conduct was in breach of the RR Agreement and the MFDA Rules.

26. A retyped version of the Guarantee Agreement was executed by client ES and the Respondent in or about November, 2009. This Agreement was notarized and contained a

handwritten note, dated November 6, 2009, stating that the Respondent agreed that no backend load fees (i.e. deferred sales charges) would apply to investments purchased in the account.

27. In breach of the Members' Policies and Procedures, the Respondent did not notify, or seek permission of the Member, prior to proposing or entering into the Agreement with client ES. There is no evidence that the Member was aware of the existence of the Respondent's Agreement with ES.

28. By engaging in the aforesaid conduct, the Respondent engaged in personal financial dealings with client ES which created a conflict or potential conflict of interest between the Respondent and Client ES which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interest of client ES, contrary to MFDA Rules 2.1.4 and 2.1.1.

ALLEGATIONS #2, #3 AND #4: DISCRETIONARY TRADING AND CHANGE OF CLIENT ES' MAILING ADDRESS

29. As can be seen by the facts set forth in the Particulars to the *Amended* Notice of Hearing, notwithstanding the Respondent's agreement not to charge deferred sales charges on or about June 24, 2010 the Respondent presented ES with a Redemption Request form to redeem her investments in her account, which the client signed. Notwithstanding the agreement to the contrary, $5,060 in deferred sales charges were deducted from the redemption proceeds. The net redemption proceeds were $133,080.

30. At this point we can only infer that the Respondent was in desperate straits, because unbeknownst to client ES, the Respondent created another Redemption Request Form, which he dated June 28, 2010, and photocopied client ES's signature from the June 24, 2010 redemption form onto a blank Redemption Request Form. The Respondent thereupon processed a redemption in the amount of $16,700 (net) from one of client ES's other accounts at the Member. This redemption was done secretly and without the client's knowledge, instructions or approval.

To continue his deception, the Respondent deposited these redemption proceeds in client ES' bank account.

31. The Respondent obviously knew that if client ES continued to receive her Manulife statements, in a short period of time the true facts (his deception) would be known to the client. Thus he illicitly arranged to change the mailing address on her Manulife statements from her home address to the Respondent's branch office address. All of this was done without the client's knowledge, instructions or approval, with the Respondent's clear intention to delay the client's discovery of the fact the monies deposited to her bank account by the Respondent to compensate her for her losses had in fact been withdrawn from her Manulife account.

32. As can be seen by the aforesaid findings of fact, the Respondent continued to deceive the client, and when she demanded approximately $700 which she felt he owed her, the Respondent processed another redemption from the client's Manulife account, without her knowledge or agreement, and deposited the funds to her account. Once again the Respondent was using the client's own funds, obtained surreptitiously, to fulfill his obligations under the Guarantee Agreement. Clearly the Respondent engaged in unauthorized discretionary trading by processing two redemptions, totalling approximately $17,400 in the client's account, and depositing the proceeds in the client's bank account, all without the client's knowledge, instructions or approval contrary to MFDA Rules 2.3.1(a) and 2.1.1.

33. We find that the Respondent's conduct as described above between June 28 and July 8, 2009 constituted conduct unbecoming an Approved Person, and the Respondent failed to observe high standards of ethics and practice in the conduct of business by using client ES's own monies to compensate her for losses sustained in her account, all without her knowledge or approval, contrary to MFDA Rule 2.1.1. These activities by the Respondent were his conscious acts deliberately done in in an attempt to buy time, and/or put the client's suspicions to rest. The Respondent failed utterly to deal fairly, honestly and in good faith with client ES.

ALLEGATION #5 MISREPRESENTATION – CLIENT'S GL AND ML

34. Based upon the aforesaid findings of fact we have made, the Respondent advised GL and ML that the principal amounts of their mutual fund investments (totalling $160,000) were guaranteed. When the clients expressed concern about the Respondent's verbal representations, on or around July 16, 2008 the Respondent provided the clients with a letter which stated:

> "This letter is to assure the above-mentioned holds of said account, that all monies deposited into this account will hold their value so that at such time of collapse (to pay back Mortgage l.o.c.) 100% of the principal will be available."

35. At all material times the clients accepted the Respondent's guarantee, and also believed that the Member was aware of the Guarantee and thus that the Member had guaranteed the principle amount of their investment of $160,000. Again the Respondent did not seek or obtain permission from the Member to provide the Guarantee nor did he disclose the Guarantee or the existence of the letter to the Member.

36. In or about December, 2012, GL and ML discovered that their mutual fund investments had declined in value from $160,000 to approximately $40,000.

37. Based on clear and convincing evidence, the Respondent engaged in conduct unbecoming an Approved Person, and failed to observe high standards of ethics and practice in the conduct of business by allegedly guaranteeing to clients GL and ML that the principle amount of their investment would not fall below their initial capital contribution. The Respondent breached MFDA Rule 2.1.1.

ALLEGATION #6: FAILURE TO COOPERATE

38. As can be seen by paragraphs 48 – 51 of the Particulars, the Respondent failed or refused to cooperate with staff's investigation into the matters concerning Allegation #5, did not provide a response, and the Respondent failed to cooperate with the MFDA investigation, contrary to section 22.1 of MFDA Bylaw No. 1 and MFDA Rule 2.1.1.

39. In her submissions, Enforcement Counsel referred to a number of authorities in connection with Guarantee Agreements made between an Approved Person and his client, and discretionary trading: see *Re Mytting*, 2012 IIROC 45 at paras 32 and 34, and *Re Rounthwaite*, MFDA File No. 201123 at paras 7 and 8. While each case depends on its own particular facts, it is clear that discretionary trading is fundamentally wrong and is prohibited. As was stated in *Re Rounthwaite* discretionary trading is prohibited because:

> "(i) undermines the client's right and ability to make informed decisions about their financial affairs;
>
> (ii) subverts the ability of a Member to property supervise trading activity; and
>
> (iii) destroys the integrity of the audit trail."

40. In this industry it is critical that the Member be knowledgeable of all conduct by its Approved Persons. As was said in *Re Rounthwaite* "*facilitating the investment in investments which have not been approved by the Member deprives the Member of its opportunity to fulfill its obligation to supervise Approved Persons employed by it*".

SUMMARY

41. This Hearing Panel, based upon the evidence adduced, including the admissions of the Respondent in his written statement, has concluded that the MFDA has, by clear and convincing evidence, proven Allegations #1 to #6 as set forth in the *Amended* Notice of Hearing and paragraph 9 hereof. At the conclusion of the hearing, Enforcement Counsel advised the Hearing Panel that the MFDA did not wish to address penalty at that time. This Panel has not as yet, decided what, if any, penalty should be imposed upon the Respondent. We therefore request that the MFDA Manager of Hearings Administration consult with the parties and determine a convenient date for the holding of a Penalty Hearing. In order to expedite matters the Panel is prepared to convene a telephone conference call to effect this scheduling.

42. The Decision and Reasons (Misconduct) may be signed in counterpart.

DATED this 13th day of November, 2014.

"Stephen D. Gill"

Stephen D. Gill
Chair

"Sharon Moskalyk"

Sharon Moskalyk
Industry Representative

"Cecilia Wong"

Cecilia Wong
Industry Representative

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