



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: Russell Brower-Berkhoven

Heard: August 28, 2012 in Calgary, Alberta
Reasons for Decision: September 24, 2012

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

The Hon. Mary M. Hetherington	Chair
M. Elaine Bradley	Industry Representative
Nada Israeli	Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of
)	Canada
Russell Brower-Berkhoven)	Did not appear, nor was he represented by
)	Counsel

1. In accordance with s. 20 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (MFDA), its Corporate Secretary signed a Notice of Hearing with respect to Russell Brower-Berkhoven on the 2nd of December, 2011.

2. On the 9th of January, 2012, the Hearing Panel directed substituted service of this Notice of Hearing. On the 5th of March, 2012, the Hearing Panel found that Mr. Brower-Berkhoven had been served with the Notice of Hearing in accordance with Rules 4.2(1)d and 4.8(1) of the MFDA Rules of Procedure. However, Mr. Brower-Berkhoven did not contact staff and did not appear at the Hearing on the 28th of August, 2012.

Allegations

3. The Notice of Hearing sets out the allegations made by the MFDA against Mr. Brower-Berkhoven as Respondent. They are as follows:

Allegation #1: Between August 14, 2006 and November 24, 2009, the Respondent led LM, an individual, to believe that:

- a) the Respondent had opened an account for LM at the Member;
- b) the Respondent was dealing with LM in LM's capacity as a client of the Member; and
- c) the Respondent was processing transactions for LM in an account at the Member in accordance with LM's instructions;

When, in fact:

- a) the Respondent had not opened an account for LM;
- b) the Member was not aware of LM and was not supervising the Respondent's dealings with LM; and
- c) the Respondent was not processing any securities related business on LM's behalf through the accounts and facilities of the Member;

thereby engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.

Allegation #2: Between July 15, 2006 and November 24, 2009, the Respondent solicited

and accepted \$40,000 from LM purportedly to invest on LM's behalf in Phoenix Financial Services, a company owned or controlled by the Respondent, and failed to repay or otherwise account for \$35,000 of the monies, contrary to MFDA 2.1.1.

Allegation #3: Between July 15, 2006 and December 29, 2006 and then again from November 23, 2007 to November 24, 2009, the Respondent 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 securities in Phoenix Financial Services, a company owned or controlled by the Respondent, to LM, RC and HC outside the Member, contrary to MFDA Rules 1.1.1(a) and 2.1.1.

Allegation #4: Between July 15, 2006 and December 29, 2006 and then again from November 23, 2007 to November 24, 2009, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling or facilitating the sale of securities in Phoenix Financial Services, a company owned or controlled by the Respondent, to LM, RC and HC, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation #5: Commencing November 27, 2009, the Respondent has failed or refused to provide documents, information, and attend for an interview requested by the MFDA for the purpose of investigating the Respondent's conduct, contrary to s. 22.1 of MFDA By-law No. 1.

Facts

4. Section 20.2 of By-law No. 1 provides that a person summoned before a Hearing Panel pursuant to a Notice of Hearing shall file a reply. Section 20.4 of the By-law reads as follows:

20.4 Failure to Reply or Attend

If a Member or person summoned before a hearing of a Hearing Panel by way of Notice of Hearing fails to:

- (a) serve a reply in accordance with Section 20.2; or
- (b) attend at the hearing specified in the Notice of Hearing, notwithstanding that a reply may have been served;

the Hearing Panel may proceed with the hearing of the matter on the date and at the time and place set out in the Notice of Hearing (or on any subsequent date, at any time and place), without further notice to and in the absence of the Member or person, and the Hearing Panel may accept the facts alleged by the Corporation in the Notice of Hearing as having been proven by the Corporation and may impose any of the penalties described in Section 24.1.

Mr. Brower-Berkhoven did not file a reply. He did not attend at the hearing specified in the Notice of Hearing, or at any subsequent hearing with respect to this matter. For this reason alone, the Hearing Panel could accept the facts alleged in the Notice of Hearing.

5. However, these facts are supported by the evidence of Alan Currie, an investigator for the MFDA. Mr. Currie swore an affidavit on the 3rd of August, 2012, which was marked as an exhibit during the hearing. Much of Mr. Currie's evidence was hearsay. However, s. 1.6(1) of the MFDA Rules of Procedure permits the admission of hearsay evidence. The relevant part of that rule reads as follows:

1.6(1) . . . a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.

The Hearing Panel is satisfied that it can rely on Mr. Currie's evidence, and that it supports the facts set out in the Notice of Hearing.

6. The Notice of Hearing is marked as Exhibit A to this decision. The facts on which the MFDA relies are set out in it under the heading "Particulars". The Hearing Panel accepts those facts for the reasons set out above.

7. In summary, from March 1, 2004 to November 15, 2006, Mr. Brower-Berkhoven was registered in the Province of British Columbia as a mutual fund salesman with Dundee Private Investors Inc.

8. In July of 2006 LM was not a client of Dundee. On the 15th of that month LM subscribed for 40 units of a "participating/convertible debenture" in Phoenix Financial Services, a company owned or controlled by Mr. Brower-Berkhoven. The cost of each unit was \$1,000. LM provided Mr. Brower-Berkhoven with a bank draft dated July 28, 2006, made payable to Phoenix in the

amount of \$40,000.

9. On the 14th of August, 2006, Mr. Brower-Berkhoven and LM signed a Dundee New Client Application Form (NCAF), so that an account could be opened for LM at Dundee. The NCAF sets out that at the time when it was completed, LM was 59 years of age. He was retired with an annual income of \$12,000. His net worth was estimated to be \$50,000. Clearly he was not a sophisticated investor.

10. Although Mr. Brower-Berkhoven did not submit the NCAF to Dundee, he led LM to believe that he had done so. LM thought that he was a client of Dundee, and that Mr. Brower-Berkhoven represented Dundee in his dealings with LM.

11. Mr. Brower-Berkhoven did not advise Dundee that he had sold an investment in Phoenix to LM or to anyone. Phoenix was not approved for sale by any of Dundee's salespersons.

12. Mr. Brower-Berkhoven was registered as a mutual fund salesperson with Sterling Mutuals Inc. during the following periods:

- a) from November 15, 2006 to December 29, 2006; and
- b) from November 23, 2007 until November 24, 2009.

13. At all material times RC was a client of Dundee. On the 26th of March, 2007, when Mr. Brower-Berkhoven was not registered in the securities industry, RC and his father HC each purchased from him 10,000 shares in Phoenix. They paid for these shares with cheques made payable to Phoenix, each in the amount of \$10,000. In July or August of 2008, when Mr. Brower-Berkhoven was again registered with Sterling, they each received a "dividend" of \$1,400. Each of them then purchased an additional 1,500 shares in Phoenix for \$1,500. There is nothing in the evidence before the Hearing Panel to indicate that they have received any further accounting for these investments.

14. Mr. Brower-Berkhoven did not disclose to Sterling that he had sold investments in Phoenix to RC and HC. Sterling did not approve Phoenix for sale by its salespersons.

15. In April of 2009 LM requested and received a refund of \$5,000 on his investment in Phoenix. This refund came directly from Phoenix.

16. In September of 2009 LM complained to Dundee that Mr. Brower-Berkhoven had stolen \$35,000 of his “investment money”.

17. As a result of the events described above, on the 24th of November 2009, Sterling terminated Mr. Brower-Berkhoven.

18. Following an investigation, in May of 2010 Dundee paid LM \$35,000. It has attempted without success to recover this sum from Mr. Brower-Berkhoven.

19. Mr. Brower-Berkhoven has not cooperated in any way with the investigation of the MFDA into the complaints of LM, RC and HC.

Decision of Hearing Panel as to Allegations

20. It is not necessary for the Hearing Panel to deal at length with the allegations. Mr. Brower-Berkhoven clearly contravened the MFDA Rules and the By-law referred to in them.

Decision of Hearing Panel as to Penalty

21. Mr. Halasz referred the Hearing Panel to decisions of other Hearing Panels in similar cases. He also referred the Hearing Panel to the MFDA Penalty Guidelines. These Guidelines set out “. . . the general principles which should be considered in penalty decisions in all disciplinary cases.” They also deal with case types that commonly arise. With respect to each of these case types, the Guidelines set out specific factors which should be considered in addition to the general principles. Further they set out types and ranges of penalties appropriate to the case type. Where a disciplinary proceeding involves a case type that is not described in the Guidelines, it is suggested that guidance can be obtained by comparison with a case type that is described in the Guidelines.

22. The Hearing Panel has considered carefully the provisions of the MFDA Penalty

Guidelines. Having done so, it is of the view that the following penalties are appropriate in this case:

- A permanent prohibition from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member;
- A direction that Mr. Brower-Berkhoven pay a fine of \$150,000 for:
 - failing to conduct himself in accordance with the standard of conduct set out in Rule 2.1.1, as alleged in Allegations #1, #2, #3 and #4;
 - engaging in securities related business that was not carried on for the account and through the facilities of the Member contrary to Rule 1.1.1, as alleged in Allegation #3; and
 - engaging in a gainful occupation that was not disclosed to and approved by the Member, contrary to Rule 1.2.1(d), as alleged in Allegation #4;
- A direction that Mr. Brower-Berkhoven pay a fine of \$50,000 for failing to cooperate with the MFDA investigation, contrary to s. 22.1 of MFDA By-law No. 1, as alleged in Allegation #5; and
- A direction that Mr. Brower-Berkhoven pay to the MFDA costs in the amount of \$7,500.

23. In coming to this conclusion, the Hearing Panel has taken into consideration the following facts:

- In July and August of 2006, when Mr. Brower-Berkhoven was dealing with LM, he was a mutual fund salesperson with Dundee. LM knew this and relied on him as a representative of Dundee.
- Mr. Brower-Berkhoven did not submit LM's NCAF to Dundee. However, he led LM to believe that he was a client of Dundee.
- In August of 2006, if not before, Mr. Brower-Berkhoven knew that LM had few

assets and a very modest income. He must have known that LM had little knowledge of investments. In spite of these facts, or because of them, he took advantage of LM in persuading him to invest in Phoenix, a company he owned or controlled.

- Ultimately, Phoenix benefited from LM's investment in the amount of \$35,000.
- During the time that Mr. Brower-Berkhoven was registered as a mutual fund salesperson with Sterling, RC and HC each paid Phoenix \$1,500 for shares in that company. They have not received any accounting for this payment. Phoenix therefore benefitted from this transaction in the amount of \$3,000.
- Mr. Brower-Berkhoven did not disclose his dealings with LM, RC or HC to either Dundee or Sterling.
- Mr. Brower-Berkhoven has failed to cooperate in any way with the investigation conducted by the MFDA. As a result, the MFDA has not been able to determine the full nature and extent of his misconduct.

24. In addition, Mr. Halasz asked the Hearing Panel to take into consideration that Mr. Brower-Berkhoven had been warned about infractions of MFDA's Rules and By-laws. It is necessary to set out the circumstances under which he was warned, and the nature of the warning.

25. During 1998 and 1999 Mr. Brower-Berkhoven was registered as a mutual fund salesperson in the Province of British Columbia. At some time during those years he accepted \$20,000 in cash from a former mutual fund client for investment purposes. In return he provided the former client with his promissory notes, and put the money into investments other than mutual funds.

26. In December of 2006 the former client referred to above complained to the MFDA of his dealings with Mr. Brower-Berkhoven. By letter dated the 15th of October 2007, the MFDA advised Mr. Brower-Berkhoven that such conduct might be in breach of then current MFDA requirements. In particular, the letter referred to the requirements of Rule 2.1.1 (a), (b) and (c),

which have not changed since the letter was written. Rule 2.1.1 is referred to in 4 of the 5 allegations in this case.

27. The following paragraph was included in the letter:

We will maintain a copy of this letter in your file and should the conduct persist or any other information or evidence come to the attention of the MFDA, then we may take this warning letter into account in determining whether to initiate formal disciplinary proceedings in the future and in assessing the severity of the penalty that might be sought.

The Hearing Panel has taken this warning into consideration, but has noted that it was given to Mr. Brower-Berkhoven after LM invested in Phoenix.

28. The Hearing Panel regards the contraventions by Mr. Brower-Berkhoven of the Rules and By-laws of the MFDA to be very serious. However, it is satisfied that the penalties described above are such as to deter Mr. Brower-Berkhoven and to deter others from contravening these Rules and By-laws. It is satisfied that they are sufficient to protect the investing public.

DATED this 24th day of September, 2012.

“Mary M. Hetherington”

The Hon. Mary M. Hetherington,
Chair

“M. Elaine Bradley”

M. Elaine Bradley,
Industry Representative

“Nada Israeli”

Nada Israeli,
Industry Representative



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**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
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Re: Russell Brower-Berkhoven

NOTICE OF HEARING

NOTICE is hereby given that a first appearance will take place by teleconference before a hearing panel (the “Hearing Panel”) of the Prairie Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) in the hearing room located in the MFDA offices at 800 – 6th Avenue SW, Suite 850, Calgary, Alberta on January 9, 2012 at 10:00 a.m. (Mountain), or as soon thereafter as the hearing can be held, concerning a disciplinary proceeding commenced by the MFDA against Russell Brower-Berkhoven (the “Respondent”).

DATED this 2nd day of December, 2011.

“Jason D. Bennett”

Jason D. Bennett
Corporate Secretary

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
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M5H 3T9
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NOTICE is further given that the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between August 14, 2006 and November 24, 2009, the Respondent led LM, an individual, to believe that:

- d) the Respondent had opened an account for LM at the Member;
- e) the Respondent was dealing with LM in LM's capacity as a client of the Member; and
- f) the Respondent was processing transactions for LM in an account at the Member in accordance with LM's instructions;

When, in fact:

- d) the Respondent had not opened an account for LM;
- e) the Member was not aware of LM and was not supervising the Respondent's dealings with LM; and
- f) the Respondent was not processing any securities related business on LM's behalf through the accounts and facilities of the Member;

thereby engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.

Allegation #2: Between July 15, 2006 and November 24, 2009, the Respondent solicited and accepted \$40,000 from LM purportedly to invest on LM's behalf in Phoenix Financial Services, a company owned or controlled by the Respondent, and failed to repay or otherwise account for \$35,000 of the monies, contrary to MFDA 2.1.1.

Allegation #3: Between July 15, 2006 and December 29, 2006 and then again from November 23, 2007 to November 24, 2009, the Respondent 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 securities in Phoenix Financial Services, a company owned or controlled by the Respondent, to LM, RC and HC outside the Member, contrary to MFDA Rules 1.1.1(a) and 2.1.1.

Allegation #4: Between July 15, 2006 and December 29, 2006 and then again from November 23, 2007 to November 24, 2009, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling or facilitating the sale of securities in Phoenix Financial Services, a company owned or controlled by the Respondent, to LM, RC and HC, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation #5: Commencing November 27, 2009, the Respondent has failed or refused to provide documents, information, and attend for an interview requested by the MFDA for the purpose of investigating the Respondent's conduct, contrary to s. 22.1 of MFDA By-law No. 1.

PARTICULARS

NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:

Registration History

1. The Respondent was registered in the province of British Columbia as a mutual fund salesperson with Sterling Mutuals Inc. ("Sterling") during the following two periods:
 - a) from November 15, 2006 to December 29, 2006; and
 - b) from November 23, 2007 until November 24, 2009, at which time the Respondent was terminated as a result of the events described herein.¹
2. Prior to Sterling, the Respondent was registered as a mutual fund salesperson with Dundee Private Investors Inc. ("Dundee") from March 1, 2004 until November 15, 2006.
3. Prior to Dundee, the Respondent was registered as a mutual fund salesperson with three other mutual fund dealers beginning on July 15, 1999.
4. Sterling became a Member of the MFDA on March 8, 2002. Dundee became a Member of the MFDA on February 8, 2002.

Background

Phoenix Financial Services

5. Phoenix Financial Services Ltd. ("Phoenix Financial") was a company owned or controlled by the Respondent. The Respondent sought and obtained approval from Dundee to

¹ The Respondent was not registered in the securities industry in any capacity during the intervening period from December 30, 2006 to November 22, 2007.

use Phoenix Financial as trade name and further sought and disclosed to Dundee that he was going to provide income tax preparation, bookkeeping and government filing services to clients and other individuals through Phoenix Financial.

6. As set out below, unbeknownst to either Sterling or Dundee, the Respondent facilitated the purchase of investments in Phoenix Financial by at least three individuals: LM, RC, and HC.²

LM

7. At all material times, LM was an individual who lived in Edmonton, Alberta.

8. In July 2006, LM was not a client of Dundee.

9. On or about July 15, 2006, LM signed a document entitled “Subscription Agreement – Phoenix Financial Services – 12% Participating Convertible Debenture” (the “Subscription Agreement”) which the Respondent presented to him for the purchase investing in Phoenix Financial.

10. Under the terms of the Subscription Agreement, LM:

- a) subscribed for 40 units in Phoenix Financial at a price of \$1000/per unit;
- b) acknowledged and certified that he had received and read a document entitled “Private Placement Offering Memorandum for Phoenix Financial Services – Participating/Convertible Debentures” (the “Offering Memorandum”); and
- c) represented and warranted that he qualified as an “accredited investor” or as a “sophisticated investor”.

11. The Respondent provided LM with a copy of the Offering Memorandum, which provided, among other things, that:

- a) Phoenix Financial was a “diversified financial services and investment business”; and

² As described in greater detail below, the initial investments of \$10,000 each made by RC and HC in Phoenix Financial occurred during the period between the Respondent’s two registration periods with Sterling. See also paragraph 1.

- b) the proceeds generated by the sale of the debentures was going to be used by Phoenix Financial to finance marketing and expansion for a revenue stream derived from numerous businesses, including tax preparation, financial services and business consulting, and equity participation in construction and food services/distribution companies.
12. The Offering Memorandum identified Phoenix Financial as the issuer of the debentures, and listed Phoenix Financial's contact information as the Respondent's phone number, email, and address.
13. On or about July 28, 2006, LM provided the Respondent with a bank draft in the amount of \$40,000 payable to Phoenix Financial in accordance with the terms of the Subscription Agreement.
14. On or about August 14, 2006, the Respondent and LM signed a Dundee New Client Application Form ("NCAF") in order to open an account for LM at Dundee.
15. The NCAF identified the Respondent as the representative on the account. LM was an unsophisticated investor who was then almost 60 years old and whose source of income was a disability pension. LM relied on the Respondent for investment advice. The NCAF contained the following information for LM:
- a) LM's estimated net worth was \$50,000;
 - b) LM was retired with an annual income of \$12,000; and
 - c) LM had limited investing knowledge.
16. Unbeknownst to LM, the Respondent never submitted the NCAF to Dundee. As a result, contrary to LM's expectations, Dundee never opened an account for LM.
17. On or about August 14, 2006, in response to a request by the Respondent, LM also provided the Respondent with a signed letter of direction wherein LM authorized all payments owed to him by "650295 BC Ltd. [doing business as] Phoenix Financial Services" to be paid directly to his "Dundee account".

18. 650295 B.C. Ltd. is a company registered in the province of British Columbia since July 2, 2002. The Respondent was an original shareholder in the corporation, and held positions of director (until July 10, 2006) and officer (until July 2, 2006).³

19. 650295 BC Ltd. was not a company known to Dundee and was not approved as an outside business activity for the Respondent.

20. The Respondent never disclosed to Dundee that he had sold LM (or anyone else) an investment in Phoenix Financial. The Phoenix Financial investment was unknown to and not approved by Dundee for sale by its Approved Persons, including the Respondent. The sale of the Phoenix Financial investment to LM was not carried on for the account or through the facilities of Dundee.

21. From August 14, 2006 until the subject matter of this proceeding came to light in September 2009, the Respondent led LM to believe that:

- a) LM had an account at Dundee;
- b) LM was a client of Dundee and the Respondent was dealing with LM in LM's capacity as a client of Dundee; and that
- c) the Respondent was processing transactions in LM's account in accordance with LM's instructions.

22. As described in paragraph #1 above, on November 23, 2007 the Respondent transferred from Dundee to Sterling.

23. In or about April 2009, LM requested that the Respondent provide a partial refund of his investment in the amount of \$5,000, which the Respondent provided by way of a cheque from Phoenix Financial payable to LM dated April 9, 2007.

³ A D. Brower became a director of 650295 B.C. Ltd. on December 21, 2007. Since the Respondent did not cooperate with Staff's investigation, Staff was unable to determine the nature of the relationship between the Respondent, Phoenix Financial, 650295 B.C. Ltd. and D. Brower.

24. By email dated September 22, 2009, LM complained to Dundee that the Respondent had “stolen \$35,000 of my investment money”.

25. Dundee immediately commenced a review of LM’s complaint, including requesting documents and information from LM concerning the account he believed he had at Dundee. Dundee was not aware of the Respondent’s dealings with LM. Dundee’s investigation determined that there was no evidence that any monies or transactions had been processed through the accounts and facilities of Dundee on behalf of LM.

26. On September 25, 2009, Dundee reported the subject matter of LM’s complaint to the MFDA by way of the MFDA’s electronic METS reporting system, in accordance with the requirements of MFDA Policy No. 6.

27. On November 4, 2009, Dundee contacted the Respondent, who was by then at Sterling, to question him regarding LM’s complaint.

28. On November 20, 2009, Dundee informed Sterling of LM’s complaint and provided Sterling with information Dundee had gathered during the course of its investigation.

29. On November 24, 2009, Sterling terminated the Respondent and filed a METS report.

30. On May 6, 2010, following the conclusion of its investigation and attempts to obtain additional information from the Respondent, Dundee paid LM \$35,000 as compensation for the outstanding balance owing on his original “investment” in Phoenix Financial. Thereafter, Dundee has attempted, unsuccessfully, to recover the amount it paid to LM from the Respondent.

RC and HC

31. At all material times, RC was a client of Dundee who lived in Victoria, British Columbia. HC, who also lived in Victoria, British Columbia, is RC’s son, and was not a client of Dundee.

32. On October 30, 2010, RC advised Staff that on March 26, 2007, during the period when

the Respondent was not registered in the securities industry,⁴ he and HC each provided separate cheques in the amount of \$10,000 to the Respondent made payable to Phoenix Financial in order to purchase an investment in Phoenix Financial.

33. RC further advised Staff that in July or August 2008, during the period that the Respondent had again become registered with Sterling, the Respondent provided a dividend payment to RC and HC in the amount of approximately \$1,400.

34. RC further advised Staff that, at the same time that the Respondent presented RC and HC with the dividend in July or August 2007, RC and HC purchased a further 1500 shares in Phoenix Financial using the proceeds of the dividend payment (\$1,400) plus a further contribution of approximately \$100, for a total investment of \$1,500.

35. In August or September 2010, RC contacted the Respondent to inquire why RC and HC had not received any further dividends from their investment in Phoenix Financial. The Respondent advised RC that he had financial difficulties, but that he was “doing better” and would pay all dividends to date.

36. To Staff’s knowledge, the Respondent has not repaid or accounted for the amounts owing to RC or HC in respect of their investments in Phoenix Financial.⁵

37. Phoenix Financial was not a trade name that Sterling had approved for use by the Respondent.

38. The Respondent never disclosed to Sterling that he had sold investments in Phoenix Financial to RC and HC.

39. The Phoenix Financial investment was unknown to and not approved by Sterling for sale by its Approved Persons, including the Respondent. The Phoenix Financial investment was not carried on for the account of or through the facilities of Sterling.

⁴ See note 1 above.

⁵ RC and HC have not responded to Staff’s request for additional information and documents concerning their investments in Phoenix Financial.

Allegation #1: Standard of conduct

40. As described above, between August 14, 2006 and November 24, 2009, the Respondent led LM to believe that:

- a) the Respondent had opened an account for LM at the Member;
- b) the Respondent was dealing with LM in LM's capacity as a client of the Member; and
- c) the Respondent was processing transactions for LM in an account at the Member in accordance with LM's instructions;

When, in fact:

- a) the Respondent had not opened an account for LM;
- b) the Member was not aware of LM and was not supervising the Respondent's dealings with LM; and
- c) the Respondent was not processing any securities related business on LM's behalf through the accounts and facilities of the Member;

thereby engaging in conduct unbecoming an Approved Person, contrary to MFDA Rule 2.1.1.

Allegation #2: Standard of conduct

41. As described above, between July 15, 2006 and November 24, 2009, the Respondent solicited and accepted \$40,000 from LM purportedly to invest on LM's behalf in Phoenix Financial Services, a company owned or controlled by the Respondent, and failed to repay or otherwise account for \$35,000 of the monies, contrary to MFDA 2.1.1.

Allegation #3: Securities related business outside the Member

42. As described above, between July 15, 2006 and December 29, 2006 and then again from November 23, 2007 to November 24, 2009, the Respondent 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 securities in Phoenix Financial Services, a company owned or

controlled by the Respondent, to LM, RC and HC outside the Member, contrary to MFDA Rules 1.1.1(a) and 2.1.1.

Allegation #4: Unapproved outside business activity

43. In the event the conduct described above in relation to Allegation 33 did not constitute securities related business, then between July 15, 2006 and December 29, 2006 and again from November 23, 2007 to November 24, 2009, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling or facilitating the sale of securities in Phoenix Financial Services, a company owned or controlled by the Respondent, to LM, RC and HC, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation #5: Failure to Cooperate

44. As is set out in chart below, the Respondent has failed to cooperate with Staff’s investigation into the matters alleged herein, notwithstanding that Staff has made a number of attempts to contact the Respondent in order to obtain documents and information.

Date	Content of Letter	Method of delivery	Outcome
November 27, 2009	Staff letter requesting signed statement of facts – due date Dec 11/09	Registered and Regular mail	Registered mail- refused by recipient. regular not returned
December 22, 2009	Staff fail to cooperate letter	Registered and Regular mail	Registered - refused by recipient. regular not returned
January 11, 2010	Staff fail to cooperate letter – duplicate	Registered mail	Recipient not located
February 10, 2010	Staff letter requesting signed statement of facts	Registered and Regular mail	Registered – recipient not located; regular not returned
February 19, 2010	Staff letter advising of investigation escalation	Registered and Regular mail	Registered refused by recipient; regular – return to sender
July 14, 2010	Staff letter requesting attendance at interview	Registered and regular mail	Registered – recipient not located; regular - return to sender

November 22, 2010	Staff letter requesting statement & interview and advise of failure to cooperate	Personal Service	The Respondent was served on December 8, 2010
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45. The Respondent has failed or refused to respond to Staff's letters. As a result, Staff has been unable to determine the full nature and extent of the Respondent's misconduct, including whether other clients and individuals (i.e. individuals who were not clients of either Dundee or Sterling and in respect of whom neither Dundee nor Sterling would have any reasonable means for identifying them in the absence of the Respondent's cooperation) may have provided monies directly to the Respondent to invest on their behalf.

46. By virtue of the foregoing conduct, the Respondent has failed to cooperate with an MFDA investigation, contrary to s.22.1 of MFDA By-law No. 1.

NOTICE is further given that the Respondent shall be entitled to appear and be heard and be represented by counsel or agent at the hearing and to make submissions, present evidence and call, examine and cross-examine witnesses.

NOTICE is further given that MFDA By-laws provide that if, in the opinion of the Hearing Panel, the Respondent:

- (a) has failed to carry out any agreement with the MFDA;
- (b) has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or of any regulation or policy made pursuant thereto;
- (c) has failed to comply with the provisions of any By-law, Rule or Policy of the MFDA;
- (d) has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or
- (e) is otherwise not qualified whether by integrity, solvency, training or experience,

the Hearing Panel has the power to impose any one or more of the following penalties:

- a) a reprimand;
- b) a fine not exceeding the greater of:

- i. \$5,000,000.00 per offence; and
 - ii. an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation.
- c) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;
 - d) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;
 - e) revocation of the authority of such person to conduct securities related business;
 - f) prohibition of the authority of the person to conduct securities related business in any capacity for any period of time;
 - g) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel.

NOTICE is further given that the Hearing Panel may, in its discretion, require that the Respondent pay the whole or any portion of the costs of the proceedings before the Hearing Panel and any investigation relating thereto.

NOTICE is further given that the Respondent must **serve a Reply** on Enforcement Counsel and **file a Reply** with the Corporate Secretary within twenty (20) days from the date of service of this Notice of Hearing.

A **Reply** shall be **served** upon Enforcement Counsel at:

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario
M5H 3T9
Attention: David Halasz, Enforcement Counsel
Facsimile: 416-361-9073
Email: dhalasz@mfd.ca

A **Reply** shall be **filed** by:

- a) providing 4 copies of the **Reply** to the Corporate Secretary by personal delivery, mail or courier to:

Mutual Fund Dealers Association of Canada
121 King Street West, Suite 1000
Toronto, Ontario

M5H 3T9

Attention: Office of the Corporate Secretary; or

- b) transmitting 1 copy of the **Reply** to the Corporate Secretary by fax to fax number 416-361-9781, provided that the Reply does not exceed 16 pages, inclusive of the covering page, unless the Corporate Secretary permits otherwise; or
- c) transmitting 1 electronic copy of the **Reply** to the Corporate Secretary by e-mail at CorporateSecretary@mfd.ca.

A **Reply** may either:

- i.) specifically deny (with a summary of the facts alleged and intended to be relied upon by the Respondent, and the conclusions drawn by the Respondent based on the alleged facts) any or all of the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing; or
- ii.) admit the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing and plead circumstances in mitigation of any penalty to be assessed.

NOTICE is further given that the Hearing Panel may accept as having been proven any facts alleged or conclusions drawn by the MFDA in the Notice of Hearing that are not specifically denied in the **Reply**.

NOTICE is further given that if the Respondent fails:

- a) to **serve and file a Reply**; or
- b) attend at the hearing specified in the Notice of Hearing, notwithstanding that a **Reply** may have been served,

the Hearing Panel may proceed with the hearing of the matter on the date and the time and place set out in the Notice of Hearing (or on any subsequent date, at any time and place), without any further notice to and in the absence of the Respondent, and the Hearing Panel may accept the facts alleged or the conclusions drawn by the MFDA in the Notice of Hearing as having been proven and may impose any of the penalties described in the By-laws.

End.

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