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: Ronald Lindsay Brown

Motion: May 31, 2010, Toronto, Ontario

Hearing on the Merits: June 22, 2010, London, Ontario
Panel Decision: December 8, 2010

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Brigitte Geisler	Industry Representative
Christopher Marrese	Industry Representative

Appearances:

Shelly Feld	)	For the Mutual Fund Dealers Association of Canada
Ronald Lindsay Brown	)	Attended Personally (Motion only)

I. INTRODUCTION

1. By Notice of Hearing, dated the 14th day of May, 2008, the following Allegations were made against Ronald Lindsay Brown ("Respondent"):

(a) **Allegation #1**: Between May 2, 2002 and May 19, 2006, the Respondent engaged in securities related business that was not carried on for the account of the Member or through the facilities of the Member by selling units of the Atrium Limited Partnership ("ALP"), the Villabar Properties (2003) Limited Partnership ("VPLP2003"), the Lighthouse Pointe Limited Partnership ("LPLP") and the Villabar Properties (2005) Limited Partnership ("VPLP2005"), to clients and other individuals, contrary to MFDA Rule 1.1.1.

(b) **Allegation #2**: Between May 2, 2002 and May 19, 2006, the Respondent sold units of the VPLP2005 to Client RS in reliance on the accredited investor exemption contained in the Ontario Securities Commission Rule 45-501 and subsequently NI 45-106, when he knew or ought to have known that RS did not qualify for the exemption, contrary to MFDA Rule 2.1.1.

(c) **Allegation #3**: Between May 2, 2002 and May 19, 2006, the Respondent denied selling limited partnerships and receiving commissions for the sales of limited partnerships in response to Member inquiries, thereby misleading the Member and frustrating its efforts to ensure compliance with the MFDA By-laws, Rules, Policies and applicable securities legislation, contrary to MFDA Rules 1.1.2 and 2.1.1.

2. The original Notice of Hearing also contained an Allegation against Dylan Brown, the son of the Respondent.

II. HISTORY OF PROCEEDINGS

3. The First Appearance in this matter took place by teleconference, before the Hearing Panel, on June 23, 2008.

4. At the First Appearance, both the Respondent and his son were represented by counsel. It was agreed that, *inter alia*, the Respondent was properly served with the Notice of Hearing.

5. On June 23, 2008, the Hearing Panel established a procedural schedule, which included a provision that the Hearing on the Merits was to take place from November 26 through to November 28, 2008.

6. On October 15, 2008, Dylan Brown entered into a Settlement Agreement with the Staff of the MFDA. This Settlement Agreement was accepted by the Hearing Panel on November 18, 2008.

7. On November 18, 2008, on consent of the parties, the date for the Hearing on the Merits in respect of the Allegations against the Respondent was changed to February 5 – 6 and 11 – 13, 2009.

8. On January 9, 2009, the Respondent resigned as an Approved Person of a Member of the MFDA.

9. Also, on January 9, 2009, the Respondent brought a Motion, in writing, requesting that all additional steps to be taken in respect of this proceeding, including the hearing of the matter on the merits, be adjourned, *sine die*, until all appeals had been exhausted in the matter between Stephen Taub v. Investment Dealers Association of Canada and the Ontario Securities Commission ("Taub case"). Staff consented to this Order, which was made by the Hearing Panel on January 15, 2009.

10. The Ontario Court of Appeal issued a Decision in the Taub case on August 28, 2009. At the end of October of 2009, Mr. Taub decided not to seek Leave to Appeal to the Supreme Court of Canada. Staff informed the Respondent, in November of 2009, that this disciplinary proceeding would be resumed and, subsequently, scheduled an appearance before the Hearing Panel, by teleconference, on February 23, 2010.

11. The Respondent informed MFDA Staff, prior to February 23, 2010, that he did not intend to participate in the teleconference on this date. He did not do so.

12. On February 23, 2010, oral submissions were made by Staff, with respect to scheduling the continuation of this proceeding. On March 5, 2010, the Hearing Panel issued an Order, reserving May 31, 2010 for the hearing of any Motions or for attendances before the Hearing Panel for any other purpose, if required, to address any matters which the parties wished to raise prior to the Hearing on the Merits.

13. On March 5, 2010, the Hearing Panel also ordered that the Hearing on the Merits was to take place on June 22, 2010.

III. RESPONDENT'S MAY 31, 2010 MOTION

14. On May 31, 2010, the Respondent brought a Motion before the Hearing Panel seeking certain findings and requesting certain Orders. These were summarized by the Respondent in his Amended Motion, dated April 5, 2010, as follows:

> "1. Allegations made by the MFDA against the Respondent are statute-barred by *The Limitations Act* (Ontario).
>
> 2. That MFDA Counsel violated due process and are bent on *malicious prosecution,* as suggested by the Respondent's counsel, to "make an example" of the Respondent.
>
> 3. Staff counsel of the MFDA, by reason of their capriciousness, by their disrespect for Charter rights and overall fundamental justice in their discriminatory decisions as to who should be disciplined, by their lack of timeliness, by their complete disregard for the Recognition Order, by their lack of completeness in their investigations, and by their deceitfulness and lack of transparency in their dealings with the Respondent's counsel, were unfit to make allegations against the Respondent and should desist from further abusive conduct against the Respondent.
>
> 4. For the reasons contained herein the allegations against the Respondent should be vacated.
>
> 5. Since the rules of the MFDA are silent on the issue of the MFDA's payment of costs and therefore do not prohibit the payment of costs, MFDA staff Counsel should be directed to seek a settlement agreement with the Respondent containing a payment of $80,000 in costs to the Respondent (that amount being approximate post summer 2006 legal expenses); and should apologize in writing to the Respondent for the abuses as mentioned above.

6. That any reference to the Respondent in its "cases" published on its website be removed."

15. Both parties filed a considerable volume of material with respect to the Motion. It was fully orally argued on May 31, 2010. At the conclusion of the oral argument, the Hearing Panel retired to consider the Motion. After deliberation, the Hearing Panel advised the parties that the Motion was dismissed. Brief reasons for its Decision were delivered. The parties were advised that further Reasons would follow. These are those Reasons.

16. The Respondent's Notice of Motion consisted of 32 paragraphs, commencing with either the word "Whereas" or the words "And Whereas". Many of the paragraphs contained statements of purported facts. No Affidavit was filed attesting to these facts. As the commencement of the oral argument on the Motion, the Respondent filed a booklet containing 19 exhibits.

17. In reply, Staff filed a Responding Record, in compliance with Rules 6.7 and 6.8 of the MFDA Rules of Procedure. This consisted of a "Response of Staff", setting out its position with respect to the various allegations and assertions made by the Respondent, along with an Affidavit of Ian Smith ("Smith Affidavit"), a Senior Investigator with the MFDA. Mr. Smith's Affidavit was supported by 15 exhibits. Staff also made lengthy written submissions and filed a 2 Volume Book of Authorities.

A. Statute of Limitations

18. The Respondent sought a finding by the Hearing Panel that the Allegations made against him by the MFDA are statute-barred by the *Ontario Limitations Act*.

19. His written submission, in support of this contention, was as follows:

> "WHEREAS the allegations against the Respondent are statute-barred in Ontario by *The Limitations Act*, 2002, since MFDA Enforcement knew or ought to have known no later than May 5, 2006 and perhaps sometime much sooner of the alleged outside business activities of the Respondent but made no allegations against the Respondent until May 14, 2008, a period of time longer than the two years in which to make allegations provided by The Act;"

20. The position of MFDA Staff, in response, was that the *Ontario Limitations Act* is not applicable to MFDA disciplinary proceedings.

21. Section 2 of the *Limitations Act*, 2002, S.O. 2002, c.24, Schedule B ("*Limitations Act*") states that: "(1) This Act applies to claims pursued in court proceedings."

22. The word "claim" is defined in section 1 of the *Limitations Act* as follows: "In this Act "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission."

23. In our view, an MFDA Hearing Panel is not a Court.

24. The securities regulatory framework in Ontario involves the Ontario Securities Commission ("OSC"), which was created by and is governed by a statute enacted by the Ontario Legislature [namely, the *Securities Act* (Ontario)], and the non-statutory self-regulatory organizations ("SRO"), which are private voluntary associations.

25. By section 21.1(1) of the *Securities Act* (Ontario), R.S.O. 1990, c.S.5, as amended ("*Securities Act*"), the OSC may, upon the application of an SRO, recognize that entity as an SRO if the OSC is satisfied that to do so would be in the public interest.

26. By section 21.1(2) of the *Securities Act*, that recognition is made in writing and is subject to such terms and conditions as the OSC may impose.

27. Section 21.1(3) provides that the SRO "shall regulate the operations and standards of practice and business conduct of the members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices."

28. However, the OSC has overreaching authority as, by section 21.1(4) of the *Securities Act*, it has the power to make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized SRO if it is satisfied that to do so would be in the public interest.

29. The MFDA is one of only two SRO's recognized by the OSC under section 21.1 of the *Securities Act.*

30. Section 8(A) of the MFDA Recognition Order provides as follows:

> **"8. – Discipline of Members and Approved Persons**
> (A) The MFDA shall, as a matter of contract, have the right to and shall appropriately discipline its members and their Approved Persons for violations of the rules of the MFDA and shall cooperate with the Commission in the enforcement of applicable securities legislation relating to the operations, standards of practice and business conduct of the members and Approved Persons, without prejudice to any action that may be taken by the Commission under securities legislation."

31. The Members of the MFDA are mutual fund dealers. Section 2.1 of OSC Rule 31-506 provides that: "From and after July 2, 2002, a mutual fund dealer shall be a member of the MFDA."

32. "Approved Persons", such as the Respondent, are not "Members" of the MFDA. However, they are required to be registered with the securities regulatory authority in the jurisdiction in which they do business. In Ontario, the regulatory authority is the OSC.

33. As a requirement of registration, Approved Persons agree to submit to and be bound by the by-laws, rules and policies of the MFDA.

34. We agree with the Hearing Panel of the Ontario District Council of the Investment Dealers Association in Derivative Services Inc. (Re), [1999] I.D.A.C.D. No 29, when it stated that: "an internal disciplinary body of a voluntary association created by contract is not a "court"."

35. In our view, MFDA disciplinary proceedings are not Court proceedings. They are intended to address regulatory contraventions referenced in sections 24.1.1 and 24.1.2 of MFDA By-law No. 1 and do not assert "claims to remedy an injury, loss or damage that occurred as a result of an act or omission." Accordingly, the *Limitations Act* does not apply to MFDA proceedings.

36. We are, further, buttressed in this view by section 129.1 of the *Securities Act*, which provides that: **"**Except where otherwise provided in this Act, no proceeding under this Act shall be commenced later than six years from the date of the occurrence of the last event on which the proceeding is based."

37. The proceedings in question were commenced well within this six-year limitation period.

38. Finally, section 19 and Schedule "B" of the *Limitations Act* confirm that section 129.1 of the *Securities Act* applies in the event of a conflict.

39. In its argument, Staff referred to and sought to distinguish the case of Global Securities Corporation, [2007] I.D.A.C.D. No. 42 ("Global Securities"), where a Hearing Panel of the Pacific District of the I.D.A. determined that section 3(5) of the *British Columbia Limitations Act* ("*B.C. Act*") was applicable to proceedings commenced by the I.D.A.

40. In our view, this Decision has no application to the case before us as the relevant wording of the *Ontario Limitations Act* is clearly distinguishable from the wording of the *B.C. Act.*

41. Accordingly, the Respondent's contention that the Allegations made by the MFDA against him are statute-barred by the *Limitations Act*, is dismissed.

B. The Canadian Charter of Rights and Freedom ("the Charter")

42. In his Notice of Motion, the Respondent alleged that the disciplinary proceedings against him, including the conduct of the MFDA and its Staff, were a contravention of sections 11 and 15 of the Charter

43. In response, Staff argued that the Charter does not apply to the MFDA and its proceedings pursuant to section 32(1) of the Charter. Alternatively, it argued that, even if the Hearing Panel did determine that the Charter applied, sections 11 and 15 would not be applicable to the Respondent's case.

44. Section 32(1) of the Charter states that:

"32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

45. Staff submitted that the Charter is not applicable to MFDA proceedings because:

(a) MFDA By-laws, Rules and Policies are not legislation enacted by Parliament or a provincial legislature;
(b) the MFDA is not a government entity and its authority is not delegated to it by a government agency; and
(c) the MFDA is an independent SRO that does not carry out or implement a specific governmental policy or program.

46. The issue of whether an SRO recognized under provincial securities legislation is subject to the Charter, was considered by the Nova Scotia Court of Appeal in Ripley v. Investment Dealers Assn. [1991] N.S.J. No. 452 NSSCAD. The Court unanimously found that the Charter had no application to the I.D.A.

47. A similar result was reached by a Hearing Panel of the Ontario District Council of the I.D.A. in Derivative Services Inc. (Re), *supra*, pps. 18 – 20.

48. In Taub v. Investment Dealers Association of Canada, [2009] O.J. No. 5032 (Ont. C.A.), at paragraph 49, the Ontario Court of Appeal confirmed earlier decisions that recognition of an SRO under the *Securities Act* does not transform its character or the contractual relationship with its members. Recognition does not transform the SRO into a government actor. It remains a voluntary organization whose regulatory duties are not derived from statute.

49. For the reasons set out in those Decisions, as well as in the Decisions referred to therein, we have unanimously concluded that the Charter does not apply to the MFDA or its proceedings.

C. The Recognition Order

50. In his Notice of Motion, the Respondent alleged that the MFDA was in breach of sections 7(A), (B) and (D), 8(A) and (C), 10(A)(i), (ii), (iii), (iv), (v) and (vi) of the MFDA Recognition Order and that Staff counsel of the MFDA showed "complete disregard for the Recognition Order.".

51. Section 7 of the Recognition Order deals with the requirement of the MFDA to enforce compliance by its Members and their Approved Persons, such as the Respondent, with the Rules of the MFDA.

52. Section 8 of the Recognition Order provides the MFDA with the power to discipline Approved Persons of Members. Section 10 sets out the purpose of the Rules which the MFDA is to establish.

53. These sections are some of the "terms and conditions", of recognition by the OSC, of the MFDA, as an SRO. What is clear , however, is that it is up to the OSC to determine whether the MFDA is complying with these terms and conditions. This is found in the Recognition Order where it states: "In the event that a term or condition is, in the view of the Commission, breached by the MFDA, the Commission shall give notice to the MFDA of its intention to revoke this Recognition and shall give the MFDA a reasonable opportunity to be heard prior to revoking this Recognition." (emphasis added)

54. Thus, it is clear to us that no person or entity, other than the OSC, has standing to enforce the terms and conditions of Recognition or jurisdiction to determine the extent of the MFDA's compliance with those terms and conditions.

D. Principles of Natural Justice and the Duty of Fairness

55. While, in our view, neither the Charter nor the Recognition Order are of assistance to the Respondent, it is clear that "principles of natural justice and the duty of fairness are part of every administrative proceeding." This was so stated by the Supreme Court of Canada in Blencoe v. British Columbia (Human Rights Commission) ("Blencoe"), [2002] 2 S.C.R. 307 at para. 102.

56. In its By-law No. 1 and Rules of Procedure, the MFDA has sought to establish a firm, fair and transparent enforcement process. There is no suggestion by the Respondent that any of the provisions of either the By-law or the Rules of Procedure have been breached by Staff.

57. There are, however, allegations by the Respondent of delays on the part of Staff. The Respondent alleges that MFDA Enforcement Department "knew or ought to have known no later than May 5, 2006 and perhaps sometime much sooner" of his alleged outside business activities but made no allegations against him until May 14, 2008.

58. According to the Smith Affidavit, Staff opened a file with respect to the conduct of the Respondent on May 24, 2006. The Smith Affidavit then traces the history of the investigation from a letter to the Respondent, dated May 25, 2006, informing him of the investigation and requesting his written response, up to and including the commencement of proceedings on May 14, 2008.

59. The Smith Affidavit also shows how each stage of the process was within the time frames contemplated in the published benchmarks of the MFDA, which benchmarks have been reviewed and approved by each of the Canadian Securities Administrators in accordance with the Recognition Orders in each jurisdiction.

60. The Respondent also alleged that the "MFDA would not schedule a hearing on the merits of its allegations sooner than late fall of 2008." What this allegation fails to acknowledge is that the First Appearance in this matter took place before the Hearing Panel on June 23, 2008, at which time a consensual timetable was established, including the dates for the Hearing on the Merits.

61. In Blencoe, the Supreme Court of Canada stated as follows:

> "There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy. It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair

hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied."

Re: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, para. 102.

62. The Supreme Court went on to say that the delay must be such that it "would necessarily result in a hearing that lacks the essential elements of fairness."

Re: *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, para. 104.

63. In order to find an abuse of process, the Court held that: "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted". For there to be abuse of process, the proceedings must be "unfair to the point that they are contrary to the interests of justice. Cases of this nature will be extremely rare".

Re: *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, para. 120.

64. The Supreme Court held that: "There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings."

Re: *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, para. 121.

65. The Supreme Court further held that: "There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected."

Re: *Blencoe v. British Columbia (Human Rights Commission)*, *supra*, para. 133.

66. Finally, the Supreme Court held that: "The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case."

Re: *Blencoe v. British Columbia (Human Rights Commission), supra*, para. 122.

67. We do not find that the circumstances of this case come anywhere close to meeting the Blencoe tests established by the Supreme Court. The Respondent's submissions with respect to alleged delay are dismissed.

68. In his Notice of Motion, the Respondent contested the adequacy of Staff's evidence in support of the allegations against him as well as the reasonableness of penalties that Staff might seek at the Hearing on the Merits or allegedly had been proposed to the Respondent or his counsel during the course of settlement discussions.

69. During the oral presentation of submissions on the Motion, we advised the Respondent that it was premature for the Hearing Panel to hear or consider evidence on the merits, any mitigating factors concerning his conduct or discuss any potential penalties. We also advised that any settlement discussions were privileged and were not to be made the subject matter of any portion of the Motion.

70. During the course of providing brief reasons for our decision to dismiss the Motion, we encouraged the Respondent to attend the Hearing on the Merits, at which time all admissible evidence would be considered.

71. Likewise, we advised the Respondent that we were not in a position to "direct" Staff to seek a settlement with the Respondent on any terms, let alone those set out in paragraph 5 of the Respondent's prayer for relief in the Notice of Motion.

72. For all of the foregoing reasons, the Respondent's Motion was dismissed. Consequently, we were not prepared to accede to the Respondent's request for an Order that any reference to him be removed from the MFDA website.

IV. HEARING ON THE MERITS – June 22, 2010

73. Subsequent to the dismissal of the Respondent's Motion, on May 31, 2010, the Hearing

Panel directed that the venue of the Hearing on the Merits be moved to London, Ontario owing to a concern about possible disruption in Toronto owing to the G20 series of meetings. London was chosen, in part, for the convenience of the Respondent who was residing in Windsor, Ontario.

74. At the commencement of the Hearing on the Merits, counsel for the MFDA advised the Hearing Panel that he had received an e-mail from the Respondent, dated June 5, 2010, in which the Respondent indicated, *inter alia*, that he would be blocking receipt of any further e-mails from the MFDA and would decline to receive conventional mail. The Respondent subsequently refused to accept delivery of courier packages containing certain disclosure items.

75. At the conclusion of the Motion, on May 31, 2010, the Respondent had advised the Hearing Panel that he would not be attending the Hearing on the Merits on June 22, 2010. The Hearing Panel encouraged him to change his mind and attend. He did not do so. No one attended on his behalf.

76. In our view, every reasonable attempt was made by Staff and the Hearing Panel to ensure that the Respondent could, if he so chose, participate fully in the Hearing on the Merits.

77. Rule 13.5(1) of the MFDA Rules of Procedure provides that:

> "**13.5** ***Where a Respondent Fails to Attend a Disciplinary Hearing***
> (1) Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance Rule 7.3."

78. Rule 7.3(1) provides that:

> "**7.3** ***Failure to Attend 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 sections 24.1 and 24.2 respectively of MFDA By-law No. 1."

79. In this case, the Respondent has never filed a Reply in accordance with Rules 8.1 and 8.2 of the Rules of Procedure. In that case, Rule 8.4(1)(a) and (b) provides as follows:

> "**8.4 Effect of Failure to Deliver a Proper Reply**
>
> (1) 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."

80. In our opinion, the Respondent was properly served with the Notice of Hearing, was aware of the date, time and location of the Hearing on the Merits and chose not to attend in person or be represented by counsel.

81. Although both Rules 7.3(1)(b) and 8.4(1)(b) of the Rules of Procedure authorize the Hearing Panel to accept the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing as proven, where the Respondent fails to serve and file a Reply or attend the Hearing, Enforcement Counsel sought to prove the Allegations by means of admissible evidence. We agreed with that approach.

82. Staff then indicated that it intended to withdraw Allegation #2 in the Notice of Hearing but would proceed to seek to prove Allegation #1 and Allegation #3.

A. THE EVIDENCE

83. The evidence before the Hearing Panel with respect to the Allegations consisted of an Affidavit ("the June 2010 Smith Affidavit") of Ian Smith, sworn June 14, 2010, along with 23 exhibits, as well as an Affidavit ("the Valenti Affidavit") of Anne Valenti, Vice-President and Chief Compliance Officer of Independent Planning Group ("IPG"), sworn June 15, 2010, along

with 24 exhibits. The evidence established the following

84. The Respondent was registered as a Mutual Fund Salesperson with Money Concepts Group Capital Corporation ("Money Concepts"), from January 11, 1988, to April 23, 2002. He was also a Branch Manager with Money Concepts from April 22, 1993, to April 23, 2002.

85. He was registered as a mutual fund salesperson and Branch Manager with IPG from May 9, 2002, until May 19, 2006, when he was terminated for cause as a result of the conduct which subsequently constituted the basis for this proceeding.

86. The Respondent was, thereafter, registered with Sterling Mutuals Inc. ("Sterling Mutuals") as a mutual fund salesperson from July of 2006 until he submitted his voluntary resignation on January 9, 2009. His registration with Sterling Mutuals was subject to terms of strict supervision imposed by the OSC.

87. These disciplinary proceedings concern the alleged conduct of the Respondent while he was an Approved Person of IPG.

88. IPG became a Member of the MFDA on February 8, 2002.

89. On April 9, 2002, the Respondent executed an IPG Associate Agreement ("Agreement") confirming that he wished to become an Approved Person of IPG for the purpose of trading in mutual fund securities on behalf of the co.

90. The terms of this Agreement provided, *inter alia*, that the Respondent would:

> "comply with all applicable laws, regulations and policies, including without limitation rules adopted by self-regulatory associations and/or industry associations applicable to [IPG] and its representatives and all policies and procedures adopted from time to time by [IPG] in order to ensure regulatory compliance and a high standard of business conduct.
>
> . . .
>
> comply with . . . supervisory procedures which are established [by IPG] from time to time, and without limitation, . . . maintain in accordance with such

> requirements all records and other information and to deliver or provide unrestricted access thereto as required by such procedures
>
> . . .
>
> as a Branch Manager . . . in respect to [IPG] . . . to ensure that business conducted at the branch is in compliance with all applicable regulatory requirements.
>
> . . . [and]
>
> not conduct securities related business with any person other than through [IPG] in accordance with the terms of this Agreement and shall not conduct any other business other than that specified in Schedule #1 hereto without the consent of [IPG] having first been obtained."

91. In Schedule I of the Agreement, the Respondent did not disclose any outside business activities.

92. On May 9, 2002, the Respondent executed an Agreement of Approved Person in which he, *inter alia*, agreed to:

> "be bound by, observe and comply with the MFDA Rules as they are from time to time amended or supplemented;
>
> . . . and
>
> to submit to the jurisdiction of the MFDA . . ."

93. In the Fall of 2002, the Respondent requested permission from IPG to sell limited partnership products promoted by the Jaymor Group ("Jaymor"). After attempting to conduct some due diligence on Jaymor and the limited partnership products it was promoting, the Respondent was informed that IPG was not prepared to approve the sale of Jaymor products. The Respondent acknowledged IPG's decision not to approve the sale of Jaymor limited partnership products, in an e-mail to Anne Valenti of IPG, dated November 7, 2002.

94. On November 18, 2003, IPG established and implemented a specific policy concerning the sales of Limited Partnerships. This policy provided, in part, that:

> "Due to the risks involved with selling a product of this nature, IPG associates are not permitted to sell any Limited Partnership (LP) unless the product has been

approved by IPG and the associate has been given IPG authorization to sell the LP.

IPG Head Office must approve all LP's prior to sale . . ." (emphasis in original).

95. The June 2010 Smith Affidavit, provides documentation and analysis which proves that, between November 5, 2002, and November 25, 2005, the Respondent sold Limited Partnership units, promoted by Jaymor and Villabar Real Estate, to five individuals for the total sum of approximately $532,000.00, which generated commissions payable to the Respondent totaling approximately $41,000.00. The Respondent acknowledged these facts in a letter to the MFDA, dated June 23, 2006, which letter was attached as an exhibit to the June 2010 Smith Affidavit.

96. The Valenti Affidavit discusses, in detail, the various compliance examinations conducted by IPG in the relevant time frame.

97. This material includes 5 separate compliance questionnaires signed by the Respondent and forwarded to IPG, the relevant details of which include:

(a) A January 16, 2003, Branch Manager Compliance Questionnaire, executed by the Respondent on February 18, 2003, which indicated that "no" representatives in the branch were involved in referral arrangements and confirmed that approval must be obtained from Head Office before selling Limited Partnerships.
(b) A July 2, 2003, Branch Manager Compliance Questionnaire, executed by the Respondent on July 2, 2003, which indicated that neither referral arrangements nor investments in limited partnerships were applicable to the branch.
(c) A July 2, 2003, Associate Compliance Questionnaire, executed by the Respondent on July 2, 2003, replied "No" to the question: "In the last year have you sold any Limited Partnerships?"
(d) A November 17, 2004, Branch Manager Compliance Questionnaire, executed by the Respondent on November 17, 2004, which indicated "not applicable" to the question: "Are any branch representatives currently involved in any formal referral arrangements in which compensation is paid for the referral?"
(e) A November 24, 2004, Associate Compliance Questionnaire, executed by the Respondent on November 17, 2004, which did not indicate any referral arrangements

with respect to the sale of limited partnerships in the "Referral Arrangement" section of the questionnaire and did not include a check mark in response to the question: "In the last year, have you sold any limited partnerships?"

98. In each of the five questionnaires, the following sentence appeared just above the Respondent's signature: "I have provided you with accurate and complete information."

99. In light of the Respondent's responses to, *inter alia*, the above referenced questionnaires, Ann Valenti, the Vice-President and Chief Compliance Officer at IPG, has sworn that IPG had "no reason to believe that the Respondent was selling limited partnerships."

100. By letter, dated May 4, 2006, the Enforcement Branch of the OSC advised IPG that it had come to the attention of the OSC that the Respondent "has been selling real estate limited partnership units on behalf of Jaymor to Ontario residents."

101. IPG immediately contacted the Respondent, who, in a letter dated May 8, 2006, provided detailed information as to the limited partnership sales made by him and the commissions received.

102. As a result of its investigation, IPG concluded that "contrary to the IPG policies and procedures, the Respondent had not sold the limited partnership products for the account of IPG or with the prior approval and authorization of IPG and the Respondent did not provide disclosure documents to the clients indicating that the limited partnership sales constituted non-IPG business."

103. On May 19, 2006, IPG terminated the Respondent for cause for failure to follow corporate policies and procedures, including conducting business outside of the dealer.

B. APPLICABLE RULES

104. Allegation #1 in the Notice of Hearing alleges a breach of MFDA Rule 1.1.1. This Rule states, in part, as follows:

"1.1.1 **Members**. No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

(a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than:

(i) such business as relates solely to trading in deposit instruments conducted by any Approved Person not on account of the Member; and

. . .

(b) all revenues, fees or consideration in any form relating to any business engaged in by the Member is paid or credited directly to the Member and is recorded on the books of the Member;

(c) the relationship between the Member and any person conducting securities related business on account of the Member is that of:

(i) an employer and employee, in compliance with Rule 1.1.4,
(ii) a principal and agent, in compliance with Rule 1.1.5, or
(iii) an introducing dealer and carrying dealer, in compliance with Rule 1.1.6;

. . ."

105. "Approved Person" and "securities related business" are defined in section 1 of MFDA By-law No. 1, as follows:

"Approved Person" means, in respect of a Member, an individual who is a partner, director, officer, compliance officer, branch manager, or alternate branch manager, employee or agent of the Member who conducts or participates in the dealer business of the Member and who (i) is registered, licensed or approved in the appropriate category, where required by applicable securities legislation, by the securities commission having jurisdiction, and (ii) is designated and qualified as such in accordance with the Rules, or (iii) is otherwise subject to the jurisdiction of the Corporation."

"securities related business" means 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."

106. Allegation #3 alleges breaches of MFDA Rules 1.1.2 and 2.1.1. These Rules provide as follows:

> "1.1.2 **Compliance by Approved Persons.** Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person."
>
> "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."

C. FINDINGS AND THE LAW

107. Enforcement Counsel presented the Hearing Panel with both written and oral submissions, as well as a very extensive casebook, for which we are indebted.

I. Allegation #1

108. The Offering Memoranda, describing the Limited Partnership units sold by the Respondent, during the period of time set out in Allegation #1, were attached as exhibits to the June 2010 Smith Affidavit. Each of them refer to the investments as "securities".

109. Section 1(1) of the *Securities Act* defines "trade" or "trading", in part, as including:

> "(a) any sale or disposition of a security for valuable consideration . . .
> . . .
> (c) any receipt by a registrant of an order to buy or sell a security,
> . . .
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;"

110. The OSC has, repeatedly, defined "acts in furtherance" of a trade in a very wide and all-encompassing manner. For example, in Re Sabourin (2009), 32 OSCB. 2707, it stated:

> "60. The Commission in *Momentas* (Momentas Corp. (Re) (2006), 29 O.S.C.B. 7408), listed examples of activities found to have been "acts in furtherance" of a trade, at para. 80, including:
>
> (a) providing potential investors with subscription agreements to execute;
> (b) distributing promotional materials concerning potential investments;
> (c) issuing and signing share certificates;
> (d) preparing and disseminating materials describing investment programs;
> (e) preparing and disseminating forms of agreements for signature by investors;
> (f) conducting information sessions with groups of investors; and
> (g) meeting with individual investors.
>
> 61. The Commission also found, in other cases, that evidence that a respondent "received consideration or other benefit from an eventual sale would be an indication of a promotional purpose and thus an act in furtherance of a trade.
> (*Momentas, supra* at paras. 87-88.)
>
> 62. The Commission reaffirmed these principles in *Limelight* (Limelight Entertainment Inc. (Re) 2008, 31 O.S.C.B. 1727), stating at para. 131:
>
> > The Commission has taken "a contextual approach" that examines "the totality of the conduct and the setting in which the acts have occurred." The primary consideration is, however, the effect of the acts on investors and potential investors . . . . In our view, depositing an investor cheque in a bank account is an act in furtherance of a trade."
>
> Re: *Re Sabourin* (2009), 32 OSCB 2707 at paras. 60-62.

111. In his June 23, 2006, letter to the MFDA, referred to in paragraph 95 *supra*, the Respondent acknowledged that:

(a) EG, HG, PD and DV were each introduced to Limited Partnerships by the Respondent.

(b) the Respondent personally made the determination that the Limited Partnerships that he sold were suitable for the investors who purchased them;

(c) the Respondent filled out the Limited Partnership subscription forms for each of the investors;

(d) the Respondent obtained cheques from the investors for each Limited Partnership purchase on behalf of the issuers and subsequently forwarded the money and the completed documentation required for the purchase to Jaymor or Villabar; and

(e) the Respondent received approximately $41,000 in compensation for the sale of Limited Partnerships to the five investors.

112. We are unanimously of the view that the sale of Limited Partnership units by the Respondent, while he was an Approved Person of IPG, constituted "securities related business" within the meaning of that term, as it is defined in MFDA By-law No.1.

113. The Limited Partnership units were not sold for the account of IPG or with the prior approval and authorization of IPG and the compensation paid to the Respondent in respect of the sales was not paid or credited to IPG or processed on the books and records of IPG.

114. We are, consequently, unanimously of the view that Allegation #1 has been established.

II. Allegation #3

115. It is clear from the evidence that the Respondent agreed to not conduct any securities related business with any person other than through IPG. It is also clear that he was required to obtain prior approval from IPG before entering into any kind of referral arrangement.

116. In fact, the Respondent requested permission from IPG to sell certain limited partnership products. This permission was refused. The Respondent then proceeded to sell these products without the knowledge, consent or prior approval of IPG.

117. During the relevant period of time, the Respondent signed and submitted to IPG a total of 5 compliance questionnaires, which contained false and misleading responses to questions relating to referral arrangements and the sale of investments in limited partnerships.

118. We are unanimously of the view that, by his conduct, the Respondent contravened IPG's policies and procedures, deliberately misled IPG and undermined supervisory processes designed to ensure compliance with regulatory requirements.

119. Allegation #3 has been established.

D. PENALTY REQUESTED

120. In his written and oral submissions, MFDA Enforcement Counsel sought the following penalties:

(a) A permanent prohibition on the authority of the Respondent to be registered or act in the capacity of Ultimate Designated Person, Chief Compliance Officer, Compliance Officer or Branch Manager for a Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No.1;

(b) A prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA for a period of 5 years, pursuant to section 24.1.1(e) of MFDA By-law No. 1;

(c) A fine in the amount of $45,000, pursuant to s.24.1.1(b) of MFDA By-law No. 1; and

(d) Costs in the amount of $5,000, pursuant to s.24.2 of MFDA By-law No. 1.

E. FACTORS TO BE CONSIDERED

121. The primary goal of securities regulation is the protection of the investor

122. Precedents also suggest that the Hearing Panel should consider the following specific factors:

(a) the seriousness of the allegations proved against the Respondent;

(b) the Respondent's past conduct, including prior sanctions;

(c) the Respondent's experience and level of activity in the capital markets;

(d) whether the Respondent recognizes the seriousness of the improper activity;

(e) the harm suffered by investors as a result of the Respondent's activities;

(f) the benefits received by the Respondent as a result of the improper activity;

(g) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;

(h) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;

(i) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

(j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and

(k) previous decisions made in similar circumstances.

Re: *Lamoureux (Re)*, [2002] A.S.C.D. No. 125 at para. 11.

Re: *In the Matter of Melvin Robert Penney*, [2009], MFDA File No. 200831, at para. 13.

123. Past MFDA Hearing Panels have set out some of the factors which should be considered in determining the appropriate penalty. They include:

(a) the protection of the investing public;

(b) the integrity of the capital markets;

(c) specific and general deterrence;

(d) the protection of the MFDA's membership; and

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

Re: *In the Matter of Kenneth Roy Breckenridge*, [2007], MFDA File No. 200718, at page 21.

124. Enforcement Counsel also referred us to the MFDA Penalty Guidelines. These Guidelines are not mandatory or binding on a Hearing Panel but do set out factors and penalty ranges that should be taken into account generally and with respect to specific types of misconduct.

125. In cases involving the misconduct alleged in the present case, the MFDA Penalty Guidelines recommend consideration of the following penalties for Approved Persons:

(a) Securities Related Business / Outside Business Activity / Referral Arrangements: minimum fine of $10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; and permanent prohibition; and

(b) Standard of Conduct / Policies and Procedures of Member: minimum fine of $5,000; write or rewrite an appropriate industry course; suspension; and permanent prohibition.

126. The case before us raises two important aspects of the investor protection mandate

127. Firstly, all securities related business is required to be carried on for the account of the Member, through the facilities of the Member and only a Member is authorized to enter into referral arrangements involving securities.

128. As submitted by Staff, this ensures that:

(a) the Member has had an opportunity to conduct due diligence on all securities products offered to investors by its Approved Persons to determine whether the product should in fact be sold or referred;

(b) the Member is able to determine appropriate limitations or conditions on its authorization of dealings with the product;

(c) the Member has the ability to supervise the sale or referral process to ensure that transaction recommendations are suitable, all regulatory requirements are complied with, and any compliance processes or conditions that the Member has established are observed;

(d) the Member's compliance staff has an opportunity to apply any guidance received from regulators concerning the product even after the sale or referral of the product has been approved;

(e) any actual or potential conflicts of interest are closely scrutinized and addressed by the exercise of responsible business judgment influenced only by the best interests of the client (including, if appropriate by means of the provision of

appropriate disclosure); and

(f) clients can rest assured that the Member stands behind and takes responsibility for the securities business conducted by its Approved Persons.

129. Secondly, Approved Persons are obliged to comply with the policies, procedures and directions of their Members in order to ensure the effectiveness of the compliance and supervision process. Failure to comply with the policies and procedures of the Member constitutes a breach of the standard of conduct and is inconsistent with the high standards of ethics and conduct in the transaction of business that is expected of Approved Persons

130. Staff submitted that the penalties sought in this case were appropriate for a number of reasons. These included:

(a) The Respondent's misconduct was serious, as he deliberately disregarded the explicit instructions of his Member and then provided false or misleading answers on compliance questionnaires in order to conceal his conduct from the Member.

(b) By recommending and facilitating the purchase of over $530,000 worth of exempt securities that the Member had not authorized him to sell (and, in the case of the first Limited Partnership, had examined and denied authorization to sell), the Respondent exposed his clients and the Member to a risk of substantial harm.

(c) Although the investments that the Respondent recommended do not appear to have resulted in any complaints, harm or financial losses to the purchasers of the investments or to the Member, this fortunate outcome does not diminish the seriousness of the misconduct.

(d) The Respondent was a Branch Manager who the Member relied on to ensure compliance by Approved Persons with regulatory requirements and the Member's policies and procedures. Branch Managers serve as the Member's eyes and ears on the ground at a Member's branch offices and they have a heightened responsibility to set a positive example and uphold the Member's compliance system.

(e) The Respondent earned approximately $41,000 in compensation from the sale of the Limited Partnerships.

(f) The proposed fine will result in the disgorgement by the Respondent of the

financial benefit that he obtained as a result of his misconduct.

(g) The Respondent's conduct occurred in the early days of the MFDA's regulatory mandate, prior to the issuance of many Member Regulation Notices, disciplinary decisions and other sources of guidance that have clarified the obligations of Approved Persons to conduct all securities related business for the account of and through the facilities of the Member.

(h) The penalties sought are consistent with the Penalty Guidelines and decisions made in similar circumstances.

131. Staff also requested that the Hearing Panel take into account certain mitigating factors. These included:

(a) The Respondent was registered in the industry for more than 20 years and had no previous disciplinary history.

(b) In May 2006, when the OSC made inquiries of IPG about the Respondent's role in selling Limited Partnerships, the Respondent co-operated with the Member's investigation and appears to have disclosed the facts relevant to his off-book sales of exempt securities.

(c) After the Respondent's conduct was discovered, the Respondent was required to submit to a lengthy period of strict supervision as a term and condition on his registration.

(d) The Respondent co-operated with Staff's investigation of his conduct.

(e) The Respondent has not worked in the securities industry since January 2009.

E. PENALTIES IMPOSED

(a) Permanent Prohibition of Certain Registrations

132. In our view, it is incumbent upon the Hearing Panel to communicate to the Respondent, to the public and to the mutual fund industry, as a whole, that serious consequences will befall those who are engaged in activities similar to those of the Respondent. Consequently, there will be a permanent prohibition on the authority of the Respondent to be registered or act in the capacity of Ultimate Designated Person, Chief Compliance Officer, Compliance Officer or

Branch Manager for a Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1.

(b) 5 Year Prohibition

133. Likewise, there will be a prohibition on the authority of the Respondent to conduct securities related business, while in the employ of or associated with any Member of the MFDA, for a period of 5 years, pursuant to section 24.1.1(e) of MFDA By-law No. 1.

(c) Fine

134. In our view, the fine which we impose in this matter should reflect a careful weighing of both the aggravating and mitigating factors outlined above. It should result in the disgorgement by the Respondent of the financial benefits which he obtained as a result of his misconduct. It also should be of a sufficient amount to deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster confidence in the securities industry. We believe that a fine in the amount of $45,000 will achieve these objectives and, consequently, we so order.

(d) Costs

135. Section 24.2 of By-law No. 1 provides that:

> "24.2 **Costs**
> A Hearing Panel may in any case in its discretion require that the Member or Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section 24.3 and any investigations relating thereto."

Staff requested an Order for costs against the Respondent in the amount of $5,000. This was described as "a portion of the costs attributable to conducting the investigation and prosecution of this matter." In our view, in the circumstances of this case, this request is appropriate and we so order.

(e) Redaction of Documents

136. At the conclusion of the case, and at the request of Staff, we included a provision in our Order which allows for the confidentiality of any client documents to be protected by enabling the Corporate Secretary's office to redact references to client names and personal information if any requests are made by members of the public for access to the record.

DATED this 8th day of December, 2010.

"Thomas J. Lockwood"
Thomas J. Lockwood, Q.C.,
Chair

"Brigitte Geisler"
Brigitte Geisler,
Industry Representative

"Christopher Marrese"
Christopher Marrese,
Industry Representative

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