



**Mutual Fund Dealers Association of Canada**  
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT HEARING  
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF  
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Scott Devries**

Heard: May 14, 2012 in Toronto, Ontario  
Reasons for Decision: July 23, 2012

**REASONS FOR DECISION**

Hearing Panel of the Central Regional Council:

The Hon. John W. Morden	)	Chair
Teri L. Ryan	)	Industry Representative
Glenda Towle	)	Industry Representative

Appearances:

Charles A. Toth	)	Counsel, Mutual Fund Dealers Association of
	)	Canada
Bruce O'Toole	)	For the Respondent, and the Respondent in
	)	person

## INTRODUCTION and OVERVIEW

1. By Notice of Hearing, dated October 7, 2011, the Mutual Fund Dealer's Association of Canada ("MFDA") made the following allegations against Scott Devries (the "Respondent"):

**Allegation #1:** Between about August 2002 and October 2009, the Respondent engaged in personal financial dealings with clients by borrowing \$433,350 from 8 clients, either personally or through his businesses Devries Financial Group Inc. ("Devries Financial") or Frontex Reporting Systems Inc. ("Frontex"), thereby giving rise to conflicts or potential conflicts of interest between the Respondent and the clients that the Respondent failed to ensure were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

**Allegation #2:** Between about September 2004 and December 2009, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling shares and convertible debentures of Frontex to 15 clients and other individuals, contrary to MFDA Rule 1.1.1.

**Allegation #3:** Between about September 2004 and December 2009, the Respondent engaged in personal financial dealings with 9 clients by selling shares and convertible debentures of Frontex to the clients, thereby giving rise to conflicts or potential conflicts of interest between the Respondent and the clients that the Respondent failed to ensure were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

**Allegation #4:** Commencing in December 2010, the Respondent failed to provide information and documentation requested by the MFDA during the course of an investigation, contrary to section 22.1 of MFDA By-law No. 1.

2. By Notice of Settlement Hearing dated May 11, 2012 the MFDA announced that it proposed to hold a hearing to consider whether, pursuant to section 24.4 of By-law No. 1, a Hearing Panel of the Central Regional Council of the MFDA should accept the Settlement

Agreement (the “Settlement Agreement”) entered into between Staff of the MFDA (“Staff”) and Scott Devries (the “Respondent”).

3. Staff advised the Hearing Panel on May 14 that the Settlement Agreement had been prepared in accordance with section 24.4 of By-law No. 1 and that the Notice of Settlement Hearing had been prepared and published in accordance with Rule 15.2(1) of the MFDA Rules of Procedure, with the exception of the 10-day notice provision referred to in the rule.

4. A joint motion was then brought for an order abridging the time requirement relying upon Rules 1.3(1), 1.5(1)(b) and 2.2 of the Rules of Procedure. The Panel made the order as requested to make the notice effective with respect to the May 14, 2012 hearing.

5. The Panel also made an order on consent of Staff and the Respondent to move the proceeding “*in camera*” under Rule 15.2(2) of the Rules of Procedure.

6. We made this order on the condition, which was agreeable to both Staff and the Respondent, that should the Hearing Panel accept the Settlement Agreement, we would provide our reasons for our decision which, along with the record of the Settlement Hearing, would be available to the public. This is consistent with Rule 15.2(3) of the Rules of Procedure.

7. We then considered the provisions of the Settlement Agreement. After having read the Submissions of Staff of the MFDA and hearing submissions from both Mr. Toth and Mr. O’Toole on the applicable law and why the Settlement Agreement met the appropriate criteria, we retired to consider whether we should accept the Settlement Agreement. After consideration, we unanimously accepted the Settlement Agreement and made an order to this effect on May 14, 2012. We advised that our reasons would follow. We turn now to our reasons.

## **THE SETTLEMENT AGREEMENT**

8. The material provisions of the Settlement Agreement are as follows:

### **“II. JOINT SETTLEMENT RECOMMENDATION**

2. Staff conducted an investigation of the Respondent's activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent agrees to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule "A".

4. Staff and the Respondent agree that the terms of this Settlement Agreement, including the attached Schedule "A", will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.

### **III. ACKNOWLEDGEMENT**

5. Staff and the Respondent agree with the facts set out in Part IV herein for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondent or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceedings brought by the MFDA (subject to Part IX) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is accepted by the Hearing Panel.

### **IV. AGREED FACTS**

#### **Registration History**

6. From June 2002 to December 2009, the Respondent was registered in Ontario, British Columbia, Alberta and Quebec as a mutual fund salesperson with FundEX Investments Inc. ("FundEX").

7. The Respondent was terminated by FundEX on December 10, 2009 as a result of the events described below. He is not currently registered in the securities industry in any capacity.

8. FundEX became a member of the MFDA on April 12, 2002.

### **The Respondent's Business Activities**

9. Devries Financial is an Ontario corporation. The Respondent is the president, sole shareholder and controlling mind of Devries Financial Group Inc. ("Devries Financial"). At all material times, the Respondent conducted business as a mutual fund salesperson using the trade name Devries Financial, which was approved by FundEX pursuant to MFDA Rule 1.1.7.<sup>1</sup>

10. Frontex Reporting Systems Inc. ("Frontex") is an Ontario corporation. Frontex develops and sells software applications which produce web-based client account statements and reports. Frontex sells its products to mutual fund dealers and mutual fund salespersons. The Respondent is the president, largest shareholder and controlling mind of Frontex. The Respondent sought and obtained approval from FundEX to carry on FrontEx as an outside business activity in accordance with MFDA Rule 1.2.1(d).<sup>2</sup>

### **Allegation #1: Conflict of Interest: Borrowing Monies from Clients**

11. At all material times, FundEX's policies and procedures contained a general requirement that its Approved Persons refrain from engaging in any activities which might create a conflict or potential conflict of interest with clients. Where a conflict or potential conflict of interest did arise, FundEX's policies and procedures required that the Approved Person, among other things:

(a) disclose the conflict of interest to FundEX; and

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<sup>1</sup> FundEX approved the use of the trade name Devries Financial before it became aware that the Respondent borrowed monies from clients through Devries Financial.

<sup>2</sup> As set out in greater detail below, FundEX approved Frontex as an outside business activity without knowing that the Respondent had borrowed monies from clients through Frontex, and had sold shares and convertible debentures of Frontex to clients and other individuals.

(b) disclose the conflict of interest, in writing, to the client.

12. FundEX's policies and procedures expressly prohibited its Approved Persons from borrowing monies from clients on the basis that such activity constituted a conflict of interest.

13. Between about August 2002 and October 2009, the Respondent borrowed \$426,350 from eight clients.<sup>3</sup> The Respondent borrowed the monies either personally or through Devries Financial or Frontex, in the amounts and on the dates summarized below:

Client	Date of Loan	Loan Amount	Borrowing Entity	Loan Repaid
MB	July 27, 2006	\$58,000	Devries Financial	Yes
	September 26, 2006	\$22,000	Devries Financial	Yes
	November 21, 2006	\$15,000	Respondent	Yes
	<b>Total</b>	<b>\$95,000</b>		
RN	August 23, 2006	\$5,000	Unknown	Yes
	September 21, 2006	\$5,000	Unknown	Yes
	June 12, 2007	\$8,500	Unknown	Yes
	July 7, 2007	\$15,000	Unknown	Yes
	August 25, 2008	\$3,000	Unknown	Yes
	<b>Total</b>	<b>\$39,500</b>		
JJ	August 14, 2006	\$15,000	Devries Financial	Yes
	Unknown	\$59,850	Respondent	Yes
	<b>Total</b>	<b>\$74,850</b>		
ND <sup>4</sup>	February 17, 2002	\$7,500	Devries Financial	Yes
	August 13, 2002	\$8,500	Devries Financial	Yes
	October 10, 2003	\$6,000	Devries Financial	Yes
	July 5, 2004	\$7,500	Devries Financial	Yes
	December 5, 2008	\$12,500	Devries Financial	Yes
	<b>Total</b>	<b>\$42,000</b>		
JK	June 3, 2009	\$60,000	Frontex	Yes
	<b>Total</b>	<b>\$60,000</b>		
JMV	April 1, 2009	\$50,000	Frontex	Yes

<sup>3</sup> The Notice of Hearing alleges that the Respondent borrowed \$433,350 from clients. This amount should be \$426,350.

<sup>4</sup> ND is the sister of the Respondent.

<b>Client</b>	<b>Date of Loan</b>	<b>Loan Amount</b>	<b>Borrowing Entity</b>	<b>Loan Repaid</b>
	<b>Total</b>	<b>\$50,000</b>		
BS	March 11, 2009	\$25,000	Frontex	Yes
	<b>Total</b>	<b>\$25,000</b>		
DR	April 1, 2009	\$40,000	Frontex	Yes
	<b>Total</b>	<b>\$40,000</b>		
	<b>Total Client Loans</b>	<b>\$426,350</b>		

14. The Respondent used the monies that he borrowed from the clients to pay the operating expenses of Devries Financial and Frontex. The Respondent also used the borrowed monies to pay expenses including the Respondent's salary, his automobile lease, and the monthly cost of the condominium in which he resided.

15. The terms of the loans varied between clients. Generally, the loans purported to pay interest of approximately 12-14 percent per annum, and the loan principal and interest were payable within a period of less than two years.

16. The Respondent repaid the monies borrowed from all of the clients listed above.

17. At the time the Respondent initially borrowed monies from client MB, the loans were not subject to specific interest or repayment terms, except that the Respondent claims that he agreed to repay the loans as soon as possible and to pay interest at a rate to be agreed upon at a later date.

18. The MFDA and FundEX initially became aware that the Respondent had borrowed monies from clients as a result of an anonymous complaint received in September 2009.

19. Prior to September 2009, the Respondent had not previously disclosed to FundEX, and FundEX was not otherwise aware, that the Respondent was borrowing or had borrowed monies from clients.

20. Shortly after the Respondent became aware that FundEX had received a complaint regarding his dealings with client MB, the Respondent prepared and signed a promissory note dated October 9, 2009 in the amount of \$18,150 payable to client MB by the Respondent personally (“PN #1”). According to PN #1, the Respondent was required to repay the \$15,000 borrowed from client MB by November 21, 2006, together with interest in the amount of \$3,150.

21. The Respondent prepared and signed a second promissory note dated October 9, 2009 in the amount of \$93,300 payable to client MB by Devries Financial (“PN #2”). PN #2 required the Respondent to repay the \$80,000 borrowed from client MB on July 27, 2006 and September 26, 2006, together with interest in the amount of \$13,300.<sup>5</sup>

22. PN #1 and PN #2 were due to be paid in full by December 8, 2009.

23. The Respondent did not pay PN #1 or PN #2 by December 8, 2009.

24. The Respondent subsequently prepared and signed a new promissory note dated November 10, 2010 in the amount of \$19,420 payable to client MB by the Respondent personally (“PN #3”), which purported to replace PN #1. The Respondent paid PN #3 in full on November 22, 2010.

25. With respect to the monies owed pursuant to PN #2, the Respondent prepared and signed a new promissory note dated November 10, 2010 in the amount of \$98,831 payable to client MB by Devries Financial (“PN #4”). PN #4 required the Respondent to pay the balance owed to client MB in four equal monthly installments commencing January 7, 2011 and continuing until April 7, 2011.

26. The Respondent did not pay PN #4 in accordance with its terms.

27. On May 11, 2012, Staff received confirmation that the monies owed to client MB had been repaid in full by the Respondent.

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<sup>5</sup> The Respondent previously provided an additional interest payment to the client MB in the amount of \$3,500 with respect to the loans.

## Allegation #2: Securities Related Business - Sale of Frontex Shares and Debentures

28. At all material times, FundEX's policies and procedures required that all securities related business must be conducted through FundEX in accordance with the requirements of MFDA Rule 1.1.1.

29. Between about September 2004 and December 2009, the Respondent sold shares of Frontex, and debentures which were convertible into shares of Frontex, to clients and other individuals, as summarized below:

Purchaser	Mutual Fund Client	Date of Share Purchase	# of Shares Purchased	Amount Invested
JB	No	September 20, 2004	50	\$0
RB	No	September 20, 2004	50	\$0
CR	No	September 20, 2004	250	\$0 <sup>6</sup>
JPL	No	September 20, 2004	2,000	\$0
MS	No	September 20, 2004	1,250	\$0 <sup>7</sup>
WS (954171 Ontario Inc.)	Yes	April 1, 2005	400	\$75,000
JMV	Yes	July 11, 2006	675	\$100,000
ST	No	September 1, 2006	325	\$50,000
		June 1, 2009	75	\$0 <sup>8</sup>
DR	Yes	November 17, 2007	255	\$50,000
		June 14, 2008	205	\$40,000
SR (1479095 Ontario Inc.)	No	April 30, 2008	400	\$120,000
BS	Yes	July 17, 2008	200	\$50,000
		January 20, 2009	200	\$50,000
RN/PK	Yes/No	June 1, 2009	600	\$0 <sup>9</sup>
JK	Yes	June 29, 2009	400	\$120,000
PH	No	August 13, 2009	200	\$60,000
		<b>Total</b>	<b>7,535</b>	<b>\$715,000</b>

30. At all material times, the Respondent owned, directly or indirectly, at least 4,740 common shares and 1,250 Class A common shares of Frontex. The Respondent is the largest common shareholder and the sole Class A common shareholder of Frontex.

<sup>6</sup> CR received shares in exchange for providing legal services to Frontex

<sup>7</sup> MS received shares in exchange for providing technology-related and other services to Frontex.

<sup>8</sup> ST received shares in exchange for providing legal services to Frontex

<sup>9</sup> RN and PK received shares in exchange for providing legal services to Frontex.

31. The shares of Frontex were sold to clients and other individuals pursuant to the terms of subscription agreements, convertible debenture agreements, and share purchase agreements which were prepared by the Respondent.

32. The shares sold pursuant to subscription agreements were offered in purported reliance on the condition that the issue and sale of the shares was exempt from the registration and prospectus requirements of the Ontario *Securities Act*, R.S.O. 1990 c. S.5 as amended (the "*Securities Act*").

33. The convertible debenture agreements granted the debenture holder the right to convert the debenture into shares of Frontex, but did not otherwise identify the provisions of the *Securities Act* which the Respondent purported to rely upon in order to issue and sell the shares of Frontex.

34. The share purchase agreements do not refer to the *Securities Act*.

35. The shares and convertible debentures of FrontEx were not investment products approved by FundEX for sale by its Approved Persons, including the Respondent. The Respondent did not disclose to FundEX, and FundEX was not otherwise aware, that the Respondent was selling shares and convertible debentures of Frontex to clients and other individuals, until October 2009.

36. The sale of the shares and convertible debentures of Frontex, whether conducted by subscription agreement, convertible debenture agreement, or share purchase agreement, was not carried on for the account or through the facilities of FundEX.

### **Allegation #3: Conflict of Interest - Sale of Frontex Shares and Debentures**

37. As stated above, the Respondent is the president, largest shareholder and controlling mind of Frontex. As a result, the sale of the shares and convertible debentures of Frontex gave rise to a conflict between the interests of the clients and the interests of the Respondent.

38. The Respondent did not disclose to FundEX, and FundEX was not otherwise aware, that the Respondent was selling shares and convertible debentures of Frontex to clients and other individuals until October 2009.

39. The Respondent failed to comply with FundEX's policies and procedures with respect to conflicts of interest, as described above.

#### **Allegation #4: Failure to Cooperate**

40. On November 23, 2010, the Respondent was interviewed by Staff with respect to the events described in Allegations #1 to #3 above. During the interview, the Respondent gave a number of undertakings to provide certain information and documentation requested by Staff.

41. On December 2 and 3, 2010, Staff made additional requests for information and documentation from the Respondent.

42. For the remainder of this Settlement Agreement, the undertakings given during the Respondent's interview with Staff, and the additional information requested from the Respondent on December 2 and 3, 2010, will be referred to collectively as the "Undertakings".

43. Commencing in December 2010, Staff made repeated requests for the Respondent to answer the Undertakings.

44. Despite Staff's repeated requests, the Respondent failed to answer 13 of the 19 Undertakings on a timely basis, as summarized below:

<b>Undertaking #</b>	<b>Item Requested</b>	<b>Date Response Received</b>	<b>Delay</b>
2.	Copy of any archived e-mail correspondence with Michael Greer regarding Frontex.	4/5/11	4 months
5.	A copy of the "booklet" that was used in the	4/5/11	4 months

<b>Undertaking #</b>	<b>Item Requested</b>	<b>Date Response Received</b>	<b>Delay</b>
	focus groups that were conducted.		
6.	Copies of any e-mails, evidence of discussion of focus group.	4/5/11	4 months
7.	Copy of any shareholder agreements and all loan agreements/promissory notes for all Frontex investors, including those shareholders that invested after your termination from FundEX (including but not limited to CC).	5/4/12	17 months
8.	Copies of any e-mails, letters, notes or any other documentation that may exist between you and any Frontex shareholders regarding any loans or investments in Frontex.	5/10/12	17 months
10.	Copies of the notes, meeting minutes and agendas from all shareholder meetings of Frontex.	5/10/12	17 months
11.	A list of shareholders and their percentage of ownership (provide historical information as well when the shareholders changed).	7/5/11	7 months
12.	Provide confirmation of future payments made to MB.	5/11/12	17 months
13.	Account statements from Devries Financial from January 2006 to December 2009.	4/13/12	16 months
16.	Confirm if MS and BS were ever mutual fund clients while you were registered with FundEX.	5/10/12	17 months
17.	For those personal loans that were made with RN, JJ, BS, ND, and DS:  (a) Provide confirmation that payments were made (copies of cashed cheques, Account Statements and/or written statements from the individuals); (b) Confirm the source of the monies that were used to pay the loans (how did you pay back the loans?); and (c) Are there any other loans outstanding?	5/8/12	17 months
18.	MFDA Staff received information about additional loans extended to JPL involving Frontex (\$27,000) and a Numbered Ontario Corp. (\$285,000) that were not previously disclosed. Please comment on this information and provide all supporting documentation in your response. Please also advise if there is a numbered company or companies that you have used for business purposes and provide information	5/8/12	17 months

Undertaking #	Item Requested	Date Response Received	Delay
	regarding the date the account was set up, the purpose of the account, the account numbers, account holders, etc.		
19.	Comment on how commission rebating was being facilitated at the branch and explain the process that was in place while you were registered with FundEX.	5/8/12	17 months

45. All of the Undertakings have now been answered.

46. The Respondent's failure to answer the Undertakings on a timely basis frustrated the ability of Staff to investigate the full nature and extent of the Respondent's misconduct as described in Allegations #1 to #3 above.

#### **Additional**

47. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

48. Apart from the anonymous complaint received regarding the monies that the Respondent had borrowed from client MB (see paragraph 18 above), Staff did not receive further complaints with respect to the Respondent.

49. Staff's investigation did not reveal any evidence of client loss.

#### **V. CONTRAVENTIONS**

50. The Respondent admits the following contraventions of the By-laws, Rules or Policies of the MFDA:

(a) between about August 2002 and October 2009, the Respondent engaged in personal financial dealings with clients by borrowing \$426,350 from 8 clients, either personally or through his businesses Devries Financial or Frontex, thereby giving rise to conflicts or potential conflicts of interest between the Respondent

and the clients that the Respondent failed to ensure were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1;

(b) between about September 2004 and December 2009, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling shares and convertible debentures of Frontex to 15 clients and other individuals, contrary to MFDA Rule 1.1.1;

(c) between about September 2004 and December 2009, the Respondent engaged in personal financial dealings with 9 clients by selling shares and convertible debentures of Frontex to the clients, thereby giving rise to conflicts or potential conflicts of interest between the Respondent and the clients that the Respondent failed to ensure were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1; and

(d) commencing in December 2010, the Respondent failed to provide information and documentation requested by MFDA Staff during the course of an investigation, when he failed to answer undertakings on a timely basis that he had given during an interview with MFDA Staff, contrary to section 22.1 of MFDA By-law No. 1.

## **VI. TERMS OF SETTLEMENT**

51. The Respondent agrees to the following terms of settlement:

(a) the Respondent shall for a period of seven (7) years be prohibited from conducting securities related business while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

(b) the Respondent shall pay a fine in the amount of \$20,000.00 pursuant to s. 24.1.1(b) of MFDA By-law No. 1, payable as follows:

- i. \$10,000.00 payable on or before November 15, 2012; and
- ii. \$10,000.00 payable on or before February 15, 2013.

(c) the Respondent shall pay costs in the amount of \$5,000.00 pursuant to s. 24.2 of MFDA By-law No. 1 payable upon acceptance of the settlement;

(d) if the Respondent fails to comply with subparagraphs (b) or (c), then without further notice to the Respondent, the Respondent shall summarily be permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

(e) the Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations made thereunder, including Rules 1.1.1, 2.1.1, 2.1.4, and section 22.1 of MFDA By-law No. 1; and

(f) the Respondent will attend in person, on the date set for the Settlement Hearing.

## **VII. STAFF COMMITMENT**

52. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the facts set out in Part IV and the contraventions described in Part V of this Settlement Agreement, subject to the provisions of Part X below. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any facts and contraventions that are not set out in Parts IV and V of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the facts and contraventions set out in Parts IV and V, whether known or

unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

#### **VIII. PROCEDURE FOR APPROVAL OF SETTLEMENT**

53. Acceptance of this Settlement Agreement shall be sought at a hearing of the Central Regional Council of the MFDA on a date agreed to by counsel for Staff and the Respondent.

54. Staff and the Respondent may refer to any part, or all, of the Settlement Agreement at the settlement hearing. Staff and the Respondent also agree that if this Settlement Agreement is accepted by the Hearing Panel, it will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter, and the Respondent agrees to waive his rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction.

55. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, then the Respondent shall be deemed to have been penalized by the Hearing Panel pursuant to s. 24.1.2 of By-law No. 1 for the purpose of giving notice to the public thereof in accordance with s. 24.5 of By-law No. 1.

56. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

#### **IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT**

57. If this Settlement Agreement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to honour any of the Terms of Settlement set out

herein, Staff reserves the right to bring proceedings under section 24.3 of the By-laws of the MFDA against the Respondent based on, but not limited to, the facts set out in Part IV of the Settlement Agreement, as well as the breach of the Settlement Agreement. If such additional enforcement action is taken, the Respondent agrees that the proceeding(s) may be heard and determined by a hearing panel comprised of all or some of the same members of the hearing panel that accepted the Settlement Agreement, if available.

**X. NON-ACCEPTANCE OF SETTLEMENT AGREEMENT**

58. If, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel or an Order in the form attached as Schedule “A” is not made by the Hearing Panel, each of Staff and the Respondent will be entitled to any available proceedings, remedies and challenges, including proceeding to a disciplinary hearing pursuant to sections 20 and 24 of By-law No. 1, unaffected by this Settlement Agreement or the settlement negotiations.

. . . .

**XI. DISCLOSURE OF AGREEMENT**

60. The terms of this Settlement Agreement will be treated as confidential by the parties hereto until accepted by the Hearing Panel, and forever if, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel, except with the written consent of both the Respondent and Staff or as may be required by law.

61. Any obligations of confidentiality shall terminate upon acceptance of this Settlement Agreement by the Hearing Panel.”

9. We are satisfied that the facts relating to the four allegations made in the Notice of Hearing, which are agreed to, amply support, in law, the allegations made. They are set forth in detail in paragraph 6 to 49 in the Settlement Agreement set forth above.

10. Further, we are satisfied that the penalty is appropriate having regard to the facts and the

applicable principles relating to the acceptance of settlement agreements. The basic principle is that we are not to reject a settlement unless we view the penalty “as clearly falling outside a reasonable range of appropriateness” (*Milewski (Re)*, [1999] I.D.A.C.D. No 17 at p. 10).

11. We should also make reference to the MFDA Penalty Guidelines. It is accepted that Penalty Guidelines are not mandatory but are intended to assist Hearing Panels in considering the appropriate penalties in MFDA Disciplinary Proceedings. The Penalty Guidelines recommend (1) for personal financial dealings (borrowing from clients) a minimum fine of \$10,000; write or re-write an appropriate industry course; increased supervision; suspension; permanent prohibition in egregious cases; and for (2) conflict of interest a minimum fine of \$5,000; write or re-write an appropriate industry course; suspension; permanent prohibition in egregious cases; and (3) with respect to failure to co-operate a minimum fine of \$50,000; permanent prohibition; interim order. These guidelines provide that penalties which are below the range identified in the guidelines may be appropriate depending on the nature of the violation.

12. As far as client harm is concerned, as part of the process leading to the settlement, the Respondent repaid client M.B. the moneys that he borrowed from her. As a result, all of the clients from whom the Respondent borrowed moneys have now been repaid.

13. During the course of the hearing the Panel asked a question related to the matter of possible loss to the clients of the Respondent. The transcript of this part of the hearing is as follows:

“The Chair: We have a question. And I'll say in advance that this is a question for which Rule 15.3 in the rules of procedure applies and therefore the answer need not be given, if you have an answer, without a consent. You mentioned that in your submissions earlier.

Ms. Ryan: Just an inquiry in relation in helping us consider the reasonableness of the settlement reached. You mentioned in your submissions about the borrowed funds being repaid and that speaks to the client impact and the importance that those clients have been made whole. Something that does not specifically address -- and you did indicate that no other client loss have been identified and no other client complaints have come in, but what wasn't specifically addressed was any assessment or investigation into client impact or potential harm in relation to the Frontex shares and debentures that were sold. Do we have confirmation that the clients were fully aware of those shares purchased and those shares and debentures were in no way associated with FundEX? Particularly given the fact

that FundEX and Frontex are so similarly tied in name, it would be easy to mislead a client regarding the nature of what they were purchasing and whether any assessment or investigation was done in that regard.

Mr. Toth: Just so I'm clear on the question, I want to make sure I can answer it fully. You'd like to know whether there was any assessment or investigation into I think you called it the impact of the shares purchased, and namely whether the shareholders knew that they were buying shares in Frontex and that that wasn't affiliated with FundEX.

Ms. Ryan: Correct. And whether there's been any negative impact to those clients in relation to the purchase of those shares or debentures."

14. Following this the Panel retired briefly to enable the questions to be considered by the parties and their counsel. After the hearing reconvened Mr. Toth gave the following answer on behalf of the parties:

"Mr. Toth: We have consulted and we can tell you this. The sales -- what I call the sales documentation, which I think in the Settlement Agreement is identified as the subscription agreement, share agreement and a debenture agreement, that does not speak to the issue that you've asked in terms of a Frontex/FundEX relationship. They're silent on it.

However, in October of 2010, FundEX sent a letter to all of Mr. Devries' clients, with the heading "outside business activities, Mr. Scott Devries." And it asked about whether any of these clients had any involvement in an outside business activity of his, namely, Frontex Reporting Systems Inc, and if they had, they were asked to contact a member. They also asked any client whether they had loaned monies to Mr. Devries and asked that the clients contact FundEX to discuss this.

This does not result in any client complaints or any client coming forward to say they were unhappy about their investment in Frontex or unhappy about any loan which had been advanced to Mr. Devries. In addition, in September and October of 2009 ... Staff received letters. We just can't recall offhand whether these letters were sent to FundEX or sent to the MFDA directly, but what we have is letters from all of the mutual fund clients who had invested in Frontex, and they all confirmed that they were, and I quote, very comfortable with my investment in Frontex.

. . . .

So as a result of that letter from FundEX to the clients with regards to the outside business activity, if any complaints had resulted from that, if any information had been received from FundEX that a client was unhappy with their position or unhappy with their involvement with Mr. Devries, that would have been reported on METS. The member has an obligation to report that and we didn't get that information.

. . . .

Ms. Ryan: I just want to clarify one point, since you said that I want to make sure I understood you correctly is that there was no indication or no evidence to indicate that the clients who invested in the shares or the debentures, that any money was removed from active mutual fund accounts to invest in that subsequent opportunity?

Mr. Toth: That's correct.

Ms Ryan: Okay.”

15. The parties consented to these additional facts being disclosed to the Panel under Rule 15.3(1) of the Rules of Procedure.

16. The Panel was concerned with respect to the total amount of the fine having regard to the minimum fine of \$50,000 provided in the Penalty Guidelines in relation to failure to co-operate with an MFDA investigation. The Staff responded that it was not seeking the penalty recommended in the Penalty Guidelines for failure to co-operate in light of the fact that the Respondent attended an interview with the MFDA Staff and ultimately answered (albeit late) the undertakings which arose out of the interview. In the circumstances of this case we accept this reasoning.

#### **THE SETTLEMENT AGREEMENT DISPOSITION**

17. On May 14, 2012 we signed the operative part of the order set forth in the Settlement Agreement. It reads as follows:

**IT IS HEREBY ORDERED THAT** the Settlement Agreement is accepted, as a consequence of which:

1. The Respondent shall for a period of seven (7) years be prohibited from conducting securities related business while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

2. The Respondent shall pay a fine in the amount of \$20,000.00 pursuant to s. 24.1.1(b) of MFDA By-law No. 1, payable as follows:

- a) \$10,000.00 payable on or before November 15, 2012; and
- b) \$10,000.00 payable on or before February 15, 2013.

3. The Respondent shall pay costs in the amount of \$5,000.00 pursuant to s. 24.2 of MFDA By-law No. 1 payable upon acceptance of the settlement.

4. If the Respondent fails to comply with paragraphs (2) or (3), then without further notice to the Respondent, the Respondent shall summarily be permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1.

5. The Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations made thereunder, including Rules 1.1.1, 2.1.1, 2.1.4, and section 22.1 of MFDA By-law No. 1.

6. If at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA Rules of Procedure.

**DATED** this 23<sup>rd</sup> day of July, 2012.

“John W. Morden”  
The Hon. John W. Morden,  
Chair

“Teri L. Ryan”  
Teri L. Ryan,  
Industry Representative

“Glenda Towle”

Glenda Towle,  
Industry Representative

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