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: Sharon June Fauth

Heard: October 26, 2016 in Calgary, Alberta
Reasons for Decision: January 20, 2017

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.	Chair
M. Elaine Bradley	Industry Representative
Kathleen Jost	Industry Representative

Appearances:

David Babin	)	Counsel for the Mutual Fund Dealers Association of Canada
Jeffrey N. Thom, Q.C.	)	Counsel for the Respondent
Sharon June Fauth	)	Respondent

1. INTRODUCTION

1. The Hearing Panel (the "Panel") was convened pursuant to a Notice of Hearing dated February 11, 2016 (the "Notice of Hearing") to consider a disciplinary hearing proceeding against Sharon June Fauth (the "Respondent") pursuant to Sections 20 and 24 of MFDA By-law No. 1. At a first appearance by teleconference a hearing date was agreed upon which was subsequently changed to October 26, 2016.

2. The Respondent, through her Counsel, filed a Reply to the Notice of Hearing dated April 28, 2016.

3. Although it was not scheduled to be a settlement hearing, Staff of the MFDA ("Staff"), and the Respondent entered into an Agreed Statement of Facts dated October 21, 2016 (the "Agreed Statement of Facts") which included the penalty proposed by Staff to be imposed on the Respondent subject to the determination of the Panel. The Respondent agreed that she "does not oppose" the proposed penalty.

4. Staff and the Respondent agreed that the matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

5. The Respondent was represented at the Hearing by Counsel. Both Counsel submitted that the Panel should not interfere with the proposed penalties for the reasons set out in *McAuley*, at sub para. 16, para. 7 (page 16) below.

2. AGREED STATEMENT OF FACTS

6. The Agreed Statement of Facts includes the following:

I. INTRODUCTION

2. The Notice of Hearing sets out the following allegations:

Allegation #1: Between October 2003 and January 2014, the Respondent had and continued in other gainful occupations that were not disclosed to or approved by the Member, in respect of the Respondent's activities relating to Fairwest Energy Corporation, Espoir Capital Corporation, Keylink Enterprises Inc. (also known as 1555989 Alberta Ltd.), and 1555986 Alberta Ltd., contrary to MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d), 2.4.2 and 2.1.1).

Allegation #2: Commencing no later than February 22, 2012, the Respondent knew or ought to have known that clients had invested in Fairwest Energy Corporation and Espoir Capital Corporation, thereby creating a conflict or potential conflict between the interests of the Respondent and the interests of the clients which the Respondent failed to disclose to the Member and ensure was addressed by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

5. Subject to the determination of the Hearing Panel, Staff submits, and the Respondent does not oppose, that the appropriate penalty to impose on the Respondent is:

(a) a fine of $20,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

(b) a suspension of the Respondent from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of three years, commencing from the date of the Hearing Panel's Order pursuant to s. 24.1.1(e) of MFDA By-law No. 1; and

(c) and costs of $5,000 pursuant to s. 24.2 of MFDA By-law No. 1.

IV. AGREED FACTS

6. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV and no other facts or documents. In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent. If the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

7. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against her.

Registration History

8. From September 10, 2007 to April 22, 2014, the Respondent was registered in Alberta as a mutual fund salesperson (now known as a dealing representative) with FundEX Investments Inc. ("FundEX"), a Member of the MFDA.

9. From November 2005 to September 2007, the Respondent was registered in Alberta as a mutual fund salesperson with Worldsource Financial Management Inc. ("Worldsource"), a Member of the MFDA.

10. From October 2003 to November 2005, the Respondent was registered in Alberta as a mutual fund salesperson with IQON Financial Inc. ("IQON"), a Member of the MFDA.

11. At all materials times, the Respondent conducted business in Calgary, Alberta.

12. The Respondent is not currently registered in the securities industry in any capacity.

Background

13. Beginning no later than November 1, 2005, the Respondent and her husband, VF, were shareholders and directors of Fauth Financial Group Ltd. ("FFG"). Between November 1, 2005 and November 1, 2009, the Respondent owned 25% of the shares of FFG, and VF owned 50%. Between November 1,

2009 and December 15, 2012, the Respondent owned 100% of the shares of FFG. On December 15, 2012, the Respondent sold all of her shares to VF.

14. At all material times, VF was also the Chief Executive Officer ("CEO") and controlling shareholder of Espoir Capital Corporation ("Espoir"). Espoir was a private investment company that pooled investor funds.

15. Between December 29, 2009 and February 9, 2013, VF was also the chairman and CEO of Fairwest Energy Corporation ("Fairwest"). Fairwest was a junior oil and gas company based in Calgary, Alberta, that engaged in the acquisition, exploration, development and production of oil and natural gas in western Canada, and financed its operations, in part, through the sale of exempt securities to investors.

16. On December 12, 2012, Fairwest began restructuring under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 and a monitor was appointed pursuant to an Order of the Court of Queen's Bench of Alberta. On September 19, 2013, Fairwest defaulted on its debtor financing obligations and the corporation was wound down thereafter.

17. In August and December 2013, clients CR and MR and several individuals commenced two lawsuits against, among others, the Respondent, VF, and FFG, claiming damages as a result of investments they made in Espoir and Fairwest and which were allegedly recommended by VF.

18. FundEX became aware of the events described below as a result of an investigation commenced in response to the lawsuits and the receipt of a client complaint.

Allegation #1: Outside Business Activities

A) Espoir Capital Corporation

19. Between 2003 and 2013, the Respondent provided accounting, administrative and technology services to Espoir. In 2014 the Respondent billed to Espoir the following fees for services she had rendered between 2003 and 2013:

Year	Amount Billed Espoir

2003	$62,000
2004	$68,000
2005	$85,000
2006	$92,000
2007	$85,000
2008	$88,000
2009	$79,000
2010	$71,000
2011	$85,000
2012	$78,000
2013	$13,500
Total	$806,500

20. The Respondent did not disclose her activities with respect to Espoir to FundEX, Worldsource, or IQON, and the Members did not approve these activities.

B) Fairwest Energy Corporation and Keylink Enterprises (also known as 155598 Ltd.)

21. Between August 2010 and September 2013, the Respondent provided data management and administrative services to Fairwest through a corporation she owned, Keylink Enterprises Inc. ("Keylink"). Keylink was incorporated on August 31, 2010 as 1555989 Alberta Ltd. ("1555989") and was renamed Keylink on November 18, 2010. The Respondent owned 90% of the shares of Keylink through her wholly owned holding company, 1555986 Alberta Ltd. ("1555986").

22. The Respondent's services provided to Fairwest by way of Keylink included establishing and maintaining a database to record Fairwest investor information. Keylink was paid a fee by Fairwest for providing these services.

23. In addition, according to Exempt Distribution Reports filed by Fairwest, Fairwest paid compensation, including commissions and other fees of a similar nature, to Keylink in the amount of $39,362 in November 2010 and $53,000 in April 2011.

24. The Respondent did not disclose her activities, including the receipt of compensation, relating to Fairwest, Keylink or 1555989 to FundEX and FundEX did not approve these activities.

Allegation #2: Conflicts of Interest Relating to Client Investments in Espoir and Fairwest

25. Commencing no later than February 22, 2012, the Respondent knew or ought to have known that clients whose accounts she serviced at Fund EX had invested monies in Espoir and Fairwest.

26. The client investments in Espoir and Fairwest created real and/or potential conflicts of interest between the interests of the Respondent and the clients having regard to the following:

(a) the Respondent's husband, VF, was the CEO and controlling shareholder of Espoir, and the CEO of Fairwest;

(b) the Respondent knew or ought to have known that FFG (a corporation for which she was a shareholder and director) had received compensation of at least $164,115.90 from Fairwest between October 2006 and August 2008. FFG received fees from Fairwest, as a result of loans and investments between Espoir and Fairwest, or as a result clients buying Fairwest securities;

(c) the Respondent was, directly or indirectly through corporations she controlled, claiming and/or receiving compensation from Espoir and Fairwest for services rendered to these companies; and/or

(d) there was a risk that the clients would believe that their investments in Espoir and Fairwest related to Member business conducted by the Respondent. The Respondent states, however, that no clients ever mentioned to her that they were concerned about a connection between any MFDA activities, and any of their investments in Fairwest or Espoir.

27. By engaging in the conduct described above, the Respondent admits that she:

(a) had and continued in other gainful occupations that were not disclosed to or approved by the Member, in respect of her activities relating to Fairwest, Espoir, Keylink (also known as 1555989, and 1555986), contrary to MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d), 2.4.1, and 2.1.1; and

(b) failed to disclose conflicts or potential conflicts of interest to the Member and ensure the conflicts were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rule 2.1.4 and 2.1.1.

3. SUBMISSIONS OF STAFF OF THE MFDA

7. Staff Enforcement Counsel submitted written Submissions and a Book of Authorities. He referred to the facts as set out in the Agreed Statement of Facts (above) and to the admissions by the Respondent to the allegations of misconduct. The Submissions include:

LAW (MISCONDUCT)

Applicable Provisions

3. The relevant MFDA provisions in this matter are:

Law	Details of Provision
MFDA Rule 1.2.1	Dual Occupations
MFDA Rule 2.1.1	Standard of Conduct
MFDA Rule 2.1.4	Conflicts of Interest
MFDA By-law No. 1	° Section 24.1 - Power of Hearing Panels To Discipline - Approved Persons ° Section 24.2 - Costs

Allegation #1 - Undisclosed and Unapproved Outside Business Activities

4. MFDA Rule 1.2.1(c), which was the version of the outside business rule in force during the material time, requires an Approved Person to inform their Member of any gainful occupation, otherwise known as an Outside Business Activity, that they wish to engage in. The Member must then approve the OBA.

5. The Hearing Panel in *Vitch* described the rationale for Rule 1.2.1 as follows:

> The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious…The first is that a failure to know about an employee's other commercial activities impinges upon a Member's ability to properly supervise its employee. The second…the Member could be exposed to litigation alleging that the Approved Person's activity was within the scope of his/her employment with the Member.
>
> *Vitch,* File No. 201103, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 22, 2011, at para. 53

6. Rule 1.2.1(c) seeks to ensure that securities legislation and internal procedures are being complied with; clients are aware that the outside activity is not the business or responsibility of the Member; and actual or potential conflicts of interest are dealt with appropriately; and the MFDA, its Members, and the mutual fund industry are not being brought into disrepute by way of improper or inappropriate outside business activities carried on by Approved Persons.

The Respondent's business was a 'gainful occupation'

7. The definition of 'gainful occupation' under Rule 1.2.1(c) is not limited to an occupation where an Approved Person is earning an income at the time of disclosure. MFDA Hearing Panels have held that at its very least, the meaning which must be given to 'gainful occupation' is that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it.

> *Mawer*, File No. 201331, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated April 3, 2014 at para. 35.

8. The evidence demonstrates that the Respondent intended to benefit from her work with Espoir Capital Corporation ("Espoir"), based on her billing approximately $806,500 to Espoir for technology services rendered between 2003 and 2013. The evidence also demonstrates that the Respondent intended to benefit from her involvement with Fairwest Energy Corporation ("Fairwest") and Keylink Enterprises ("Keylink") based on her position as majority owner of Keylink, and fees paid to Keylink by Fairwest. The Respondent did not disclose her activities with Espoir and Keylink to the Member. (*Agreed Statement of Facts at paras. 19-24.*)

9. The Respondent's failure to disclose her OBAs to the Member also ran afoul of MFDA Rule 2.1.1. MFDA Rule 2.1.1 is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct. MFDA Hearing Panels have consistently stated that the Rule encompasses "the most fundamental obligations of all registrants in the securities industry". The Respondent, by not disclosing her involvement with her OBAs, did not meet her obligations as a registrant.

Allegation #2 - Conflicts of Interest

10. MFDA Rule 2.1.4 requires that Approved Persons disclose to their Members, any potential or actual conflicts of interest, and address such conflicts with the exercise of responsible business judgment influenced only by the best interests of the client.

11. The Respondent was engaged in real or potential conflicts of interest, which she failed to disclose to the Member, and failed to address with the exercise of responsible business judgment influenced only by the best interests of the client. (*Agreed Statement of Facts at paras. 25 and 26.*)

12. The Respondent has admitted to the misconduct at issue, and does not oppose the proposed penalty in this matter.

LAW (PENALTY)

Factors Concerning the Appropriateness of the Proposed Penalty

13. The primary goal of securities regulation is the protection of the investor. In addition to protection of the public, the goals of securities regulation also

includes the fostering of public confidence in the capital markets and the securities industry.

> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at paras. 59, 68.
>
> *Breckenridge*, MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007, at para. 74.

14. The Hearing Panel in *Tonnies*, stated that role of a Hearing Panel, when imposing sanctions in furtherance of the above goals.

> *Tonnies*, MFDA File No. 201315, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 16, 2013, at para. 45.

15. Sanctions imposed by a Hearing Panel should therefore be protective, preventative, and intended to be exercised to prevent likely future harm to the markets.

> *Hesselink*, MFDA File No. 201315, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 16, 2013, at para. 45.

16. In contrast to a settlement hearing pursuant to s. 24.4 of MFDA By-law No. 1, the Hearing Panel in the present case is not required to either accept or reject the penalties proposed in the Agreed Statement of Facts. The Hearing Panel may impose any of the penalties prescribed in s. 24.1.1 of MFDA By-law No. 1 that the Hearing Panel deems appropriate, based upon the facts and misconduct admitted to in the Agreement Statement of Facts. However, where the Respondent and Staff effectively make a joint submission on penalty, a Hearing Panel should not interfere with the joint recommendation of Staff and the Respondent unless the recommendation is seen to be "manifestly unfit".

> *McAuley*, MFDA File No. 201018 Hearing Panel of the Central Regional Council, Decision and Reasons dated April 11, 2011, at para. 5.

17. To determine whether a penalty is appropriate, the Hearing Panel should consider:

(a) the protection of the investing public;
(b) the integrity of the securities 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.

Tonnies, supra, at para. 46.

18. Hearing Panels also frequently consider the following factors when determining whether a penalty is appropriate:

(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.

Breckenridge, supra, at para. 77 and the decisions cited therein.

MFDA Penalty Guidelines

19. The MFDA Penalty Guidelines are an additional resource that a Hearing Panel may consult when determining the appropriateness of the penalty to be imposed pursuant to a settlement agreement. The Penalty Guidelines are intended

to provide a basis upon which a Hearing Panel's discretion can be exercised consistently in like circumstances. As stated in the introduction to the Penalty Guidelines under the heading "Purpose Of The MFDA Penalty Guidelines":

> **Range Is Guideline Only**
>
> The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.

20. In cases involving the type of misconduct in the present case, the Penalty Guidelines recommend consideration of the following penalties and factors:

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
Standard of Conduct (Rule 2.1.1) (Guidelines, p. 27)	• Fine: Minimum of $5,000. • Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course). • Suspension. • Permanent prohibition in egregious cases.	1) Nature of the circumstances and conduct. 2) Number of individuals affected. 3) Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.
Conflicts of Interest (Rule 2.1.4) (Guidelines, p. 10)	• Fine Minimum of $10,000. • Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course). • Suspension. • Permanent prohibition in egregious cases.	1) Whether the activity was an isolated incident or part of a larger pattern of conduct involving multiple clients. 2) Whether the conflict of interest was adequately explained to the client. 3) Level of client sophistication: did the client understand the nature and significance of the conflict of interest? 4) Whether the conflict of interest was brought to the

		attention of the Member. 5) Whether the Respondent was aware of the prohibited nature of the activity. 6) Whether the Respondent concealed or attempted to conceal the activity from the client and/or the Member. 7) Whether the client was harmed by the activity.

21. The fine sought in the present case exceeds the minimum recommended fine in the penalty guidelines.

APPLICATION IN THE PRESENT CASE

Seriousness of the Misconduct

22. Staff submits that the proven misconduct in the present case is serious.

Undisclosed and Unapproved Dual Occupations

23. An Approved Person's failure to disclose and obtain approval of his or her outside business activities is serious misconduct as it deprives the Member of a proper opportunity to supervise the Approved Person, prevent the Approved Person from contravening regulatory requirements, and protect itself from the risk of litigation.

24. The Respondent's failure to disclose her involvement with Espoir and Keylink to FundEX made it impossible for FundEX to make any determination as to what risk it and any of its clients may have been exposed to.

25. MFDA Hearing Panels have likewise held that engaging in undisclosed OBAs constitutes serious misconduct that is worthy of significant sanction.

> *Okopny,* MFDA File No. 201512, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated August 31, 2016, at para. 20.

Westgard, MFDA File No. 200937, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated July 5, 2010, at par. 53.

Conflicts of Interest

26. The failure by an Approved Person to disclose a real or potential conflict of interest to both clients and Members alike, represents a serious form of misconduct. Where a conflict of interest arises, the information generally will reside solely with the Approved Person. It is therefore imperative that they disclose any real or potential conflicts, in order that they can be properly addressed in the best interest of the client.

Member Regulation Notice, MR-0054: Conflicts of Interest

27. MFDA Hearing Panels, have also found that where an Approved Person fails to disclose a real or potential conflict of interest, they have engaged in serious misconduct.

Franco, MFDA File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011, para. 75.

Respondent's Past Conduct and Experience in the Capital Markets

28. The Respondent was registered as a mutual fund salesperson (now a mutual fund dealing representative) with three different Members from October 2003 to April 2014. During that time, the Respondent was not subject to any discipline by the MFDA. (*Agreed Statement of Facts, at paras. 8-10.*)

Remorse or Recognition by the Respondent of the Seriousness of the Misconduct

29. By entering into an Agreed Statement of Facts and not opposing the proposed penalties in this matter, the Respondent has demonstrated that she recognizes the seriousness of her misconduct. The Respondent has also expressed remorse for her actions.

Harm Suffered by Investors and Benefits Received by the Respondent

30. There is no indication of investor harm arising from the Respondent`s conduct. The Respondent indirectly benefitted from her misconduct by way of

the fees paid by Fairwest to Keylink. Fairwest paid a total of $92,362 to Keylink, which was 90% owned by the Respondent. (*Agreed Statement of Facts, paras. 21-23*.)

Risk to Investors and Markets if the Respondent Continues Operating in Industry

31. There is little indication that the Respondent poses a risk to other investors or the market at large if she is allowed to return to the industry. While the misconduct she engaged in was serious, it did not arise from deliberate or malicious intentions. While the Respondent should have been vigilant in disclosing her OBAs and conflicts of interest to the Member, her misconduct does not indicate that she is likely to repeat the same mistake if she is allowed to operate in the mutual fund industry in the future.

Deterrence

32. The Supreme Court of Canada in *Cartaway Resources Corp.* and MFDA Hearing Panels have held that it is appropriate for deterrence to be among the factors taken into account when determining penalty.

> *Cartaway Resources Corp,* [2004] 1 S.C.R. at paras. 52-62.
> *Tonnies, supra* at para. 47.

33. The effect of general deterrence should advance the goal of protecting investors. As a result, the penalty levied should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry.

34. Staff submits that the proposed penalties are necessary, in order to communicate to other Approved Persons that a failure to disclose OBAs, and a failure to disclose conflicts of interest, or to address those conflicts by the exercise of responsible business judgment influenced only by the best interests of the client, will result in substantial regulatory penalties.

35. Staff further submits that the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons. Furthermore, the proposed sanctions will prevent future misconduct by the Respondent, deter others from

engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.

Penalty Guidelines

36. Staff submits, on the basis of the foregoing factors, that a penalty higher than those recommended by the MFDA Penalty Guidelines is warranted in the present case. The Penalty Guidelines are non-binding and are meant to guide Hearing Panels.

37. The following specific aggravating factors are at issue in the present case, and justify a fine higher than the recommended minimum:

Rule 1.2.1:

a) The Respondent having billed more than $800,000 for her provision of services to Espoir indicates that her undisclosed OBA was of a sufficient magnitude to warrant more than the minimum penalties in the guidelines.

b) The Respondent enjoyed indirect financial benefits from the fees paid to Keylink by Fairwest, given that she owned the majority of Fairwest through her numbered corporation. The Respondent also had very clear personal interests in her outside businesses, both with respect to her ownership of Keylink and her direct interest in providing technology services to Espoir. These factors consequently militate in favor of a higher than the minimum suggested penalties outlined by the penalty guidelines.

Previous Decisions Made in Similar Circumstances

38. [Counsel reviewed the pertinent circumstances and penalties assessed in each of the following cases, which are addressed in the Decision below.]

Abate, MFDA File No. 201412, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated September 4, 2015.

Dhindsa, MFDA File No. 201119, Hearing Panel of the Pacific Regional Council, Decision and Reasons, dated May 15, 2012.

Gabrielson, MFDA File No. 200938, Hearing Panel of the Prairie Regional Council, Decision and Reasons, dated January 17, 2011.

Cronin, MFDA File No. 201414, Hearing Panel of the Central Regional Council, Decision and Reasons, dated January 19, 2015.

Franco, supra

Sarang, MFDA File No. 201535, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated March 21, 2016.

SUMMARY

39. Staff submits that the proposed penalties are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case.

40. Staff further submits that the proposed penalties are sufficient to deter the Respondent and other MFDA registrants from engaging in similar misconduct in the future, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry. In particular, the penalties sought will convey to the investing public, and clients in particular, that Approved Persons who fail to disclose OBAs and engage in conflicts of interest will be held accountable.

41. Finally, the proposed penalties are in keeping with the purpose of the MFDA ensuring high standards of conduct by Members and Approved Persons.

4. SUBMISSIONS OF THE RESPONDENT

8. Counsel for the Respondent advised (by agreement) that the reason the Respondent did not disclose the Outside Business Activities is she honestly believed they were minor and would not affect her clients.

9. Counsel also brought to the Panel's attention a very recent decision of the Supreme Court of Canada in *R v. Anthony Cook* (October, 2016, S.C.C. 43) in which the appeal from the British Columbia Court of Appeal was allowed. The Court reinforced the test set out in *McAuley*

(above) as to the proper legal test to be applied by judges in deciding whether it is appropriate in a particular case to depart from a joint (*agreed*) submission. Although *R v. Anthony Cook* was a criminal case, the same principles apply in other cases such as the present where there are agreed penalties. As was stated by the Supreme Court of Canada at page 4:

> …Trial judges should not reject a joint submission lightly. They should only do so where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty.

10. Counsel for the Respondent reiterated that the Counsel in this case are experienced Counsel and have agreed on the facts and penalties.

5. **DECISION**

11. The Respondent has admitted to the misconduct set out in sub para. 2 of para. 6 (page 2) above, has acknowledged the seriousness of the misconduct and expressed remorse. She has cooperated with Staff in entering into the Agreed Statement of Facts and in not opposing the proposed penalties. These actions demonstrate that the Respondent has learned from her misconduct and is unlikely to repeat such conduct. She had no disciplinary history.

12. We accept the Submissions of Staff Enforcement Counsel and agree with his summary of the cases referenced in his Submissions on penalty (sub para. 38, para. 7) (page 17) above.

13. In *Dhindsa, Gabrielson* and *Sarang,* all of which involved somewhat similar circumstances to the present case, the Panels, in addition to a fine and costs, imposed permanent prohibitions. The circumstances in those cases were more serious (e.g. received previous warnings in *Dhindsa,* failed to provide information to Staff during its investigation in *Gabrielson* and mislead the Member by falsely certifying information to the Member in *Sarang*).

14. The cases bearing greater similarity to the present case, and which are therefore the most instructive, are:

a. *Abbott:* The respondent was found to have continued in another gainful occupation that was not disclosed to and approved by the Member. The respondent was negligent in not disclosing his directorship and office in the outside business but no client losses were confirmed and the respondent received no remuneration in connection with his position as a director. The respondent was fined $15,000, costs were assessed at $5,000 and a six-month suspension was imposed. The circumstances were clearly less serious than those in the present case.

b. *Cronin*: The respondent admitted that over a nine year period he had and continued another gainful occupation, which was not disclosed to or approved by two Members, by arranging private loans and mortgages for third-party borrowers and lenders, which included borrowing from clients. The respondent admitted that he had received fees in respect of the loans. The respondent had partially disclosed to his second Member that he arranged private loans, but failed to adequately explain, or omitted to explain, the true nature and extent of his activity in relation to arranging private loans and mortgages. The respondent was fined $10,000, costs were assessed at $2,500 and a ten-year prohibition was imposed. These circumstances were more serious than in the present case.

c. *Franco*: The respondent had another gainful occupation that was not disclosed to and approved by the Member by facilitating participation in the total amount of $428,279 by twenty-six (26) clients in four charitable donation programs. He recommended and facilitated the participation of twenty-six (26) clients in four charitable donation programs without disclosing to the clients that he would receive, in total, $80,176 in commissions for doing so, thereby giving rise to an actual or potential conflict of interest between the respondent and the clients which he failed to address by the exercise of responsible business judgment. The

clients at issue were notified by the CRA that Charitable Donation Programs were disallowed, and consequently, the clients faced the possibility of substantial losses stemming from reassessments. The respondent was fined $40,000, costs were assessed at $5,000 and a five-year suspension was imposed. The circumstances were more serious than in the present case particularly having regard to the potential exposure of the clients to CRA reassessments. We recognize that two clients of the present Respondent commenced lawsuits against the Respondent, among others, claiming damages arising from their investments in two companies with which the Respondent was involved; however, there was no claim against the Member.

15. A serious disciplinary response is required in this case having regard to all the factors set out in the Submissions of Staff and summarized at sub para. 40, para. 7 (page 17) above. We consider the penalties as proposed to be reasonable and find no reason to depart from what has been agreed to by experienced Counsel. In so doing we are following the principles set out in *McAuley* and *R v. Anthony Cook* above at sub para. 16, para. 7 (page 10) above and para. 9 above. We recognize that the Respondent has been out of the industry for more than two years.

16. We confirm our decision on penalty as follows:

a) a fine of $20,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
b) a suspension of the Respondent from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of three years, commencing from the date of the Hearing Panel's Order, October 26, 2016, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
c) costs of $5,000 pursuant to s. 24.2 of MFDA By-law No. 1.

17. At the conclusion of the Hearing we signed an Order confirming the foregoing.

DATED this 20th day of January, 2017.

"Alan V. M. Beattie"

Alan V. M. Beattie, Q.C.
Chair

"M. Elaine Bradley"

M. Elaine Bradley
Industry Representative

"Kathleen Jost"

Kathleen Jost
Industry Representative

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