



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: Murray Arnold Greenberg and Katrina Anne Powell

Heard: February 25-26, 2014 and May 8, 2014, in Calgary, Alberta
Reasons for Decision: November 10, 2014

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.	Chair
M. Elaine Bradley	Industry Representative
Danielle Ayers	Industry Representative

Appearances:

H.C. Clement Wai)	For the Mutual Fund Dealers Association of
)	Canada
)	
Katrina Anne Powell)	Respondent, appeared in person February 26;
)	did not appear on May 8
)	
Murray Arnold Greenberg)	Respondent, did not attend and was not
)	represented by counsel
)	

1. INTRODUCTION

1. By Notice of Hearing dated July 2, 2013, Murray Greenberg and Katrina Anne Powell (hereinafter referred to collectively as the “Respondents”) were notified that a first appearance would take place by teleconference before the Hearing Panel of the Prairie Regional Council (the “Panel”) on September 17, 2013, concerning a disciplinary proceeding commenced by the Mutual Fund Dealers Association of Canada (“MFDA” or “Staff”).

2. No Reply was made by either of the Respondents within the prescribed 20 days but (1) Mr. Greenberg sent a “without prejudice” (the “without prejudice” was subsequently withdrawn) email to Mr. Wai, Enforcement Counsel, dated August 5, 2012 in which he admitted the misconduct and sought a nominal penalty, and (2) Ms. Powell sent an email to MFDA dated September 17, 2013 advising that she would not be participating in the First Appearance Hearing that day for health/stress reasons. She set out her position in part and contended it was unrealistic to expect she would report Mr. Greenberg’s activities to Partners in Planning (the “Member”) because it would jeopardize her only source of income. The First Appearance Hearing took place by teleconference before the Panel on September 17, 2013. Mr. Greenberg participated, Ms. Powell did not participate.

3. The hearing of this matter on its merits was scheduled to take place on February 25 and 26, 2014. The Respondents were advised of the dates.

4. There were communications between Ms. Powell and the MFDA regarding possible settlement. On February 18, 2014 Ms. Powell sent a “Notice of Motion” to the MFDA requesting “an order to separate the disciplinary proceedings against Murray Arnold Greenberg and Katrina Anne Powell into two separate and distinct matters”. She also submitted an “Agreed Statement of Facts” and a “Proposed Settlement Agreement”, both of which were in the MFDA form of documents. In the Agreed Statement of Facts she admitted certain “facts or allegations” set out in the Notice of Hearing (below) and provided “clarification” of “facts or allegations that I deny because I have no knowledge of them”. Because of the manner in which this case proceeded, with no sworn testimony being given by Ms. Powell, we have incorporated the essence of her

written submissions in paras. 23-31 below to demonstrate that we have taken into account her submissions in reaching our decision.

5. The MFDA rejected the Proposed Settlement Agreement submitted by Ms. Powell but MFDA Enforcement Counsel engaged in further discussions with Ms. Powell regarding a possible settlement, to no avail.

6. The hearing convened on the scheduled date, February 25, 2014. Mr. Greenberg, who lives in Italy, did not attend nor did Counsel on his behalf. Mr. Greenberg did not advise the MFDA that he would not be attending. The hearing proceeded regarding Mr. Greenberg, in his absence, in accordance with Rule 7.3 of the Rules of Procedure of the MFDA (para. 14 below). (Ms. Powell's Notice of Motion to separate the proceeding became redundant in view of Mr. Greenberg not attending the hearing.) Ms. Powell had emailed the MFDA on February 24 advising that she was seeking an adjournment of the hearing scheduled for the next day, and advising that she would be seeking to retain legal counsel as the MFDA had recommended. MFDA Enforcement Counsel had responded to the email advising that there is a procedure for seeking adjournments and she would have to apply for adjournment at the hearing the following day. When Ms. Powell did not appear at the hearing the Panel, out of an abundance of caution, and with the concurrence of MFDA Enforcement Counsel, telephoned Ms. Powell in order to ensure that she was fully aware of the consequences of her failure to attend. The call, on a speaker phone, was recorded by the Court Reporter. We advised Ms. Powell that we found ourselves in a very difficult position with the case having been set for hearing for months and her advising so late that she was not in a position to attend the hearing. We advised that to accommodate her we were prepared to:

- a. Have her attend the hearing that day at 2:00 p.m. or the following day at 10:00 a.m. to apply for an adjournment at which time we would hear argument from both Ms. Powell and MFDA Enforcement Counsel who would be opposing the application for adjournment;
- b. If she did not attend at one of those times we would proceed with the hearing in her absence.

MFDA Enforcement Counsel was invited to summarize his position. He stated that the MFDA opposed the application for adjournment because costs continued to be incurred and it was apparent that there was no prospect for settlement. Ms. Powell advised that she would attend the hearing at 10:00 a.m. the following day, February 26.

7. On February 26, 2014 the hearing convened at 10:00 a.m. Ms. Powell was in attendance. The proceedings were recorded by a Court Reporter. Ms. Powell advised that she would not be retaining counsel. The Chair, on behalf of the Panel, reviewed in detail the steps which had been taken (above) and explained that the Panel was very conscious of the need to accommodate Ms. Powell to the extent that is reasonable and fair both to her and to the MFDA. The Chair explained that Ms. Powell could make application for an adjournment on the basis that she required more time to prepare to present her case, with or without counsel, but if an adjournment was to be considered we would require her undertaking that she would complete her preparation, file a formal Reply with MFDA and attend on the rescheduled date. It was explained that if an adjournment was granted and she did not attend on the rescheduled date the case would proceed in her absence. Alternatively, the hearing could proceed presently after she was fully apprised of the written submissions being made by MFDA Enforcement Counsel.

8. Ms. Powell was stricken with a migraine headache and was in obvious distress. The hearing was adjourned to May 8, 2014 and she was advised that the case would proceed at that time whether or not she was in attendance.

9. On May 5, 2014 Ms. Powell emailed the MFDA (Exhibit 6) advising that she was unable to attend the hearing on May 8 due to extensive health reasons and her condition being exacerbated by stress. She said she had been unable to find some of the information on which she intended to rely. She apologized and said “you will have to make your decision without me”.

10. Ms. Powell did not attend the hearing on May 8 nor did Counsel on her behalf. In view of all the efforts made to accommodate Ms. Powell and in view of the documents from Ms. Powell and the transcript of an interview with Ms. Powell, both of which set out her position, the

Panel proceeded with the hearing in accordance with Rule 7.3 of the Rules of Procedure of the MFDA (para. 14 below).

2. FAILURE TO ATTEND HEARING

11. We have referenced, in the “Introductory” section above, the steps taken by the MFDA and the extent of participation, or non-participation, by the Respondents in these proceedings. We are satisfied, from affidavits presented to this Panel, that all steps required to be taken by the MFDA were taken. Mr. Greenberg was served with the Notice of Hearing (below) which contained the allegations of misconduct and a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing. In his response (Exhibit 4, para. 19 below) he acknowledged that “the facts in the notice of hearing are correct subject to a couple of small details that are not important” and stated: “I admit the misconduct”. He was not served with the Affidavit of Alan Currie (Exhibit 5, below) or the Submissions of Staff of the MFDA because he ceased communicating with the MFDA and did not attend any of the days of hearing. We are satisfied that the Mr. Greenberg was aware of this hearing and chose not to attend although the date had been set in consultation with him.

12. We are satisfied, from Affidavits presented to this Panel, and from her attendance at some of the days of hearing, that Ms. Powell has been served with all necessary documents including the Affidavit of Alan Currie, the Submissions of Staff of the MFDA and the MFDA Book of Authorities. After two adjournments to accommodate Ms. Powell she was either unwilling or unable (according to her email to the MFDA of May 5, 2014 referenced at para. 9 above) to attend the hearing on May 8.

13. Both Mr. Greenberg and Ms. Powell were aware from the Notice of Hearing of the authority of the Panel to proceed with the hearing in their absence. The Notice of Hearing states:

NOTICE is further given that if the Respondent fails:

- a. to **serve** and **file a Reply**; or

- b. attend at the hearing specified in the Notice of Hearing, notwithstanding that a **Reply** may have been served,

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

- 14. The Rules of the Procedure of the MFDA provide:

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;

- 15. We are satisfied that it was in the public interest to proceed with the hearing in the absence of the Respondents, and we so directed.

3. NATURE OF THE EVIDENCE AND APPLICABLE RULES

16. The evidence submitted by the MFDA was entirely by Affidavit of Alan Currie. Mr. Currie was present at the hearing, answered several questions from the Panel and was prepared to testify if required by the Panel. Mr. Currie is a Manager in the Investigations Department of the MFDA. He commenced employment with the MFDA on November 29, 2010. He conducted the investigation with respect to the allegations against the Respondents. An extensive, comprehensive, Affidavit of Mr. Currie, with many exhibits, was entered in evidence (Exhibit 5). The Affidavit is sworn in support of the disciplinary proceedings being conducted against the Respondents. In his Affidavit Mr. Currie traces the registration history of the Respondents and his investigation of the evidence supporting the allegations against the Respondents. The Affidavit included transcripts of interviews by the MFDA of Mr. Greenberg and Ms. Powell and

an extensive “Final Investigation Report” of Mr. Greenberg by IPC Investment Corporation dated October 19, 2011 which led to his termination by IPC on August 31, 2011.

4. ALLEGATIONS OF MISCONDUCT

17. In the Notice of Hearing the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between September 2005 and April 2009, Greenberg engaged in securities related business that was not carried on for the account and through the facilities of the Member by recommending, selling, facilitating the sale or making referrals in respect of the sale of approximately \$13.45 million of investment products to at least 40 clients outside the Member, contrary to MFDA Rules 1.1.1, 2.4.2 and 2.1.1.

Allegation #2: Between September 2005 and April 2009, Greenberg had and continued in another gainful occupation which was not disclosed to and approved by the Member by recommending, selling, facilitating the sale or making referrals in respect of the sale of approximately \$13.45 million of investment products to at least 40 clients outside the Member, contrary to MFDA Rules 1.2.1(d)¹ and 2.1.1.

Allegation #3: In or around July 2009, Greenberg failed to inform the Member of a complaint from client NH Ltd. concerning the sale of an investment outside the Member, contrary to s. 4.1 of MFDA Policy No. 6.

Allegation #4: Between September 2005 and July 2009, Powell failed to fulfill her supervisory responsibilities as a branch manager by permitting, acquiescing in or facilitating the sale or referral of investment products by Greenberg outside the Member, contrary to MFDA Rule 2.5.3(b)², MFDA Policy No. 2 and MFDA Rule 2.1.1.

¹Effective February 22, 2011, the MFDA’s Rules were amended. MFDA Rule 1.2.1(d) was re-numbered as current MFDA Rule 1.2.1(c). The wording of the section was not changed.

²Effective December 3, 2010, MFDA Rule 2.5.3(b) was replaced by MFDA Rule 2.5.5.

5. EVIDENCE

5A. EVIDENCE - PARTICULARS (FROM THE NOTICE OF HEARING)

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

Registration History

Greenberg

1. From June 2011 to August 2011, Murray Arnold Greenberg (“Greenberg”) was registered in Alberta, British Columbia, Nova Scotia, Ontario and Saskatchewan as a dealing representative in the category of mutual fund dealer with IPC Investment Corporation (“IPC”), a Member of the MFDA.
2. From August 2004 to June 2011, which included the material time giving rise to the allegations in this Notice of Hearing, Greenberg was registered as a mutual fund salesperson with Partners In Planning Financial Services Ltd. (“PIP”), formerly a Member of the MFDA³.
3. Prior to August 2004, Greenberg had been registered as a mutual fund salesperson since 1993.
4. During the material time, Greenberg resided and carried on business in Calgary, Alberta.
5. On August 31, 2011, Greenberg was terminated by IPC as a result of the events described herein and is not currently registered in the securities industry in any capacity.

³ In June 2011, IPC Investment Corporation and Partners In Planning Financial Services Ltd. amalgamated and continued business as IPC Investment Corporation

Powell

6. From June 2011 to August 2011, Katrina Anne Powell (“Powell”) was registered in Alberta with IPC as a dealing representative in the category of mutual fund dealer and was designated as a branch manager.
7. From August 2004 to June 2011, which included the material time giving rise to the allegations in this Notice of Hearing, Powell was registered as a mutual fund salesperson and branch manager with PIP, formerly a Member of the MFDA⁴.
8. During the material time, Powell resided and carried on business in Calgary,
9. On August 4, 2011, Powell was terminated by IPC as a result of the events described herein and is not currently registered in the securities industry in any capacity.

Overview

10. Greenberg and Powell have worked together since around 1997. At all material times, Greenberg employed Powell, initially as his administrative assistant and subsequently when she was the designated branch manager for the branch office from which Greenberg carried on business. While acting as the designated branch manager, Powell continued to provide administrative and other support services to Greenberg’s clients and to act as a client contact person for the clients.
11. At all material times, Powell, in her capacity as the designated branch manager, was responsible for supervising trading activity at the branch and ensuring that any business conducted on behalf of PIP was in compliance with MFDA By-laws, Rules and Policies and applicable securities legislation.

⁴ See note 3.

12. During the material time, Greenberg and his spouse were the sole directors and equal owners of Financial Dynamics Inc. (“FDI”) and Dootkey Powder Company Limited (“Dootkey”), two companies incorporated in Alberta.

13. At all material times, Greenberg was licensed in Alberta to sell insurance and he did so through FDI. Greenberg sought and obtained approval from PIP to sell insurance through FDI.

14. In July 2010, NH Ltd., by then a former client of PIP whose account had been serviced by Greenberg, commenced a legal proceeding in the Court of Queen’s Bench of Alberta against PIP, Greenberg and FDI (the “Statement of Claim”). The Statement of Claim alleged, among other things, that in July 2006 NH Ltd. had invested \$500,000 in a land development project owned by Arcus Developments Inc. based upon negligent representations made by the defendants that were inaccurate, misleading or untrue. According to the Statement of Claim, the land development project had not proceeded as represented and NH Ltd. had suffered losses as a result.

15. Upon being served with the Statement of Claim in August 2010, PIP notified the MFDA by filing a report on the MFDA’s Member Event Tracking System (“METS”), in accordance with its obligations under MFDA Policy No. 6. Shortly thereafter, PIP and Staff of the MFDA (“Staff”) commenced separate investigations into the Respondents’ activities.

16. As set out in greater detail below, Staff’s investigation determined that commencing in approximately September 2005, Greenberg began to engage in outside business activities not disclosed to PIP by recommending, selling, facilitating the sale or making referrals in respect of the sale of approximately \$13.45 million of investment products to at least 40 clients of PIP. Greenberg facilitated some of the sales and referrals through FDI and Dootkey pursuant to agreements with the issuers or vendors of the investment products signed by Greenberg’s spouse on his behalf. At all material times, Powell was

aware of and assisted with the processing and tracking of the sales of the investment products to the clients.

Panel Note: For each of the following securities there are (in paras. 18, 24, 26 and 31) of the Notice of Hearing statements the same or similar to the following:

Greenberg did not seek or obtain approval from PIP with respect to his involvement with (the investment). At the material time, PIP was not aware of Greenberg's outside business activities involving (the investment). None of the sales or referrals of the investment products were processed through the facilities or for the account of PIP.

Allegation #1: Securities related business outside the Member

a) Westmount Mortgage Corporation

17. Westmount Mortgage Corporation (“Westmount”) is a firm located in Calgary, Alberta.

18. In or around September 2005, Greenberg recommended, sold, facilitated the sale or made referrals in respect of the sale of at least \$2.8 million of mortgage investment products offered by Westmount to clients outside PIP...*(rest of para. set out in Panel Note above in italics).*

19. Greenberg received approximately \$252,000 in commissions, fees or other compensation relating to the sale of the Westmount investment products pursuant to an agreement between Dootkey and Westmount signed by Greenberg's spouse on behalf of Dootkey. (Neither Dootkey nor Greenberg's spouse were registered in any capacity.)

b) The CareVest Group

20. The CareVest Group of Companies (“CareVest”) offered investment products relating to commercial, industrial and residential real estate. CareVest Capital Inc.

("CareVest Capital") and CVC Market Point Inc. ("CVC" Market Point") are related companies to CareVest.

21. On or about June 7, 2006, Dootkey entered into a referral agreement with CareVest Capital. Greenberg's spouse signed the agreement on behalf of Dootkey. Under the terms of the referral agreement, Dootkey was entitled to receive referral fees for referring investments in the following issuers, among others (referred to collectively as the "Issuers"):

- a. Canadian Horizons (Naramata) Limited Partnership;
- b. Canadian Horizons (Sendero) Limited Partnership;
- c. Canadian Horizons First Mortgage Investment Corporation; and
- d. Canadian Horizons Blended Mortgage Investment Corporation.

22. Beginning in or around August 2006 and continuing until at least April 2009, Greenberg recommended, sold, facilitated the sale or made referrals in respect of the sale of at least \$8.48 million of investment products offered by the Issuers to approximately 35 clients. Dootkey was paid approximately \$616,256.35 in commissions or fees in relation to these sales or referrals.

23. On April 2, 2008, Dootkey entered into a second referral agreement, on this occasion with CVC Market Point. Greenberg's spouse signed the agreement on behalf of Dootkey. There is no evidence that Greenberg made any sales or referrals in relation to this second referral agreement.

24. *(Set out in Panel Note above in italics.)*

c) Arcus Developments Inc.

25. Arcus Developments Inc. ("Arcus") is a real estate development company located in Calgary Alberta. On or around July 25, 2006, client NH Ltd. entered into an agreement

(the “Arcus Agreement”) with Arcus based on a recommendation by Greenberg. As set out in the Arcus Agreement, NH Ltd. provided \$500,000 to Arcus for an unsecured interest in a condominium development project in Edmonton, Alberta. Greenberg received a commission of approximately \$25,000.

26. *(Set out in Panel Note above in italics.)*

d) Quadrex Asset Management Inc.

27. Quadrex Asset Management Inc. (“Quadrex”) is an exempt market dealer (formerly, a limited market dealer) based in Toronto, Ontario⁵.

28. From around July 2007 to August 2008, Greenberg sold or referred approximately \$2.35 million of the following investment products offered for sale by Quadrex to approximately 27 clients of PIP:

- a. HFI Limited Partnership;
- b. Property Values Income & Common Shares LP; and
- c. Diversified Assets Limited Partnership.

29. Dootkey received approximately \$166,750 in commissions, fees or other compensation in relation to these sales.

30. By letter dated February 14, 2012, Quadrex advised the Alberta Securities Commission that there were no referral agreements in place between Quadrex and Greenberg, Dootkey or FDI. Quadrex stated that it understood that the sales agent in respect of such sales was Greenberg’s spouse. At all material times, Greenberg’s spouse was not registered in the securities industry in any capacity.

31. *(Set out in Panel Note above in italics.)*

⁵ On February 19, 2013, the Ontario Securities Commission suspended Quadrex’s registration as an Exempt Market Dealer for a matter unrelated to this Notice of Hearing.

32. On or about August 28, 2008, Quadrexx purchased Greenberg's insurance and exempt market business by purchasing all of the shares of FDI, at which time Greenberg ceased his involvement in the sale of products offered for sale by Quadrexx outside PIP. Greenberg continued to sell CareVest investment products until at least April 2009.

Staff's Investigation

33. On March 7, 2012, Staff interviewed Greenberg during the course of its investigation. During the interview, Greenberg made the following admissions, among others:

- a. that he had engaged in undisclosed securities related business outside of PIP for which he did not seek or obtain PIP's approval; and
- b. that his spouse had signed the referral agreements entered into on his behalf by Dootkey in part for tax reasons and in part to avoid possible detection and scrutiny of his activities.

PIP's Policies and Procedures and Investigation

34. PIP required all of its Approved Persons, including Greenberg, to periodically sign an Acknowledgement form confirming that they understood and agreed to comply fully with PIP's policies and procedures and all applicable securities laws, rules and regulations.

35. At all material times, PIP's policies and procedures, consistent with MFDA requirements, required all Approved Persons to report in writing all outside business activities to PIP and to obtain PIP's prior approval before commencing any outside business activities.

36. In August 2010, after being served with the Statement of Claim, PIP commenced an investigation of the Respondents' activities, which included a surprise examination of the Respondents' branch office.

37. On October 12, 2010, PIP placed both Greenberg and Powell on "close supervision" which required, among other things, that all trades processed by Greenberg in clients' accounts be approved by PIP's head office in advance.

38. On or about August 31, 2011, Greenberg and Powell resigned at the request of IPC (PIP had since amalgamated with IPC and the combined entity carried on business under the name IPC - see footnote #3 above).

39. On October 19, 2011, IPC completed its investigation of the Respondents' activities and determined, among other things, that Greenberg had been selling and referring various investment products outside the accounts and facilities of PIP without PIP's knowledge and approval.

Summary

40. In summary, from September 2005 until at least April 2009 Greenberg sold, recommended, referred or facilitated the sale of approximately \$13.45 million of investment products offered by the following issuers or companies to over 40 clients of PIP:

- a. Westmont;
- b. CareVest;
- c. Arcus; and
- d. Quadrex.

41. In total, Greenberg received sales commissions, referral fees or other compensation, either paid to him directly or indirectly to FDI, Dootkey or his spouse, in the amount of approximately \$1.06 million in relation to these sales and referrals.

42. By engaging in the conduct described above, Greenberg engaged in securities related business that was not carried on for the account and through the facilities of PIP, contrary to MFDA Rules 1.1.1, 2.4.2 and 2.1.1.

Allegation #2: Undisclosed dual occupations

43. To the extent any of the activity described in Allegation #1 above did not constitute securities related business, then Greenberg had and continued in another gainful occupation that was not disclosed to and approved by PIP, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation #3: The Complaint

44. On or about July 14, 2009, NH Ltd.'s counsel sent a letter to Greenberg outlining concerns his client had with the Arcus Agreement. The concerns included but were not limited to the fact that:

- a. the Arcus Agreement did not allow NH Ltd. to take a secured interest in the lands to be developed;
- b. a different legal entity other than Arcus owned the condominium project;
- c. the Arcus Agreement did not disclose a legal address for the lands to be developed; and
- d. the Arcus Agreement provided a municipal address in the city of Edmonton which did not exist.

45. Greenberg referred the letter to his lawyer, who dealt directly with NH Ltd.'s lawyer. Greenberg failed to inform PIP of NH Ltd.'s letter, which letter constituted a complaint in writing under section 4.1(a) of MFDA Policy No. 6.

46. In July 2010, one year later after NH Ltd.'s lawyer had sent the letter to Greenberg, NH Ltd. commenced the statement of Claim against PIP, Greenberg and FDI.

47. In an email dated November 29, 2010 sent from Powell to the Chief Compliance Officer of PIP during the course of PIP's investigation, Greenberg stated: "I did not report the complaint to [PIP] because my lawyer handled it and I considered the matter to be concluded and irrelevant."

48. By engaging in the conduct described above, Greenberg failed to inform PIP of a complaint in writing received from client NH Ltd., contrary to s. 4.1(a) of MFDA Policy No. 6.

Allegation #4: Branch Manager Supervision

49. At all material times, Powell was the designated branch manager of PIP responsible for supervising trading activity at the branch and ensuring that any business conducted on behalf of PIP was in compliance with PIP's policies and procedures, MFDA By-laws, Rules and Policies and applicable securities legislation.

50. On May 31, 2012, Powell attended an interview requested by Staff during the course of its investigation. At the interview, Powell admitted, among other things that she:

- a. processed the paperwork and performed other administrative tasks associated with the sale and referral of the unauthorized investment products by Greenberg to clients outside the Member;
- b. maintained a list of the outside investment products owned by clients in order to track the clients' holdings and assist Greenberg in reporting to the clients;

- c. was aware that Greenberg attended client meetings to discuss the sale of investment products that were not approved for sale by PIP;
- d. never questioned or challenged Greenberg regarding the sale or referral of the unapproved investment products or required that he cease engaging in the activity; and
- e. never reported Greenberg's unauthorized outside business activities to PIP.

51. During Greenberg's interview with Staff, Greenberg stated that Powell was aware of all of his outside business activities as she processed most of the documents relating to the purchases or referrals of the investments, was responsible for sending the documents to the issuers or companies selling the investments, and verified with the issuers or companies whether the commissions, fees or other compensation to which Greenberg was entitled had been paid.

52. By engaging in the conduct described above, Powell failed to fulfill her supervisory responsibilities as the designated branch manager by permitting, acquiescing in or facilitating the sale or referral of investment products by Greenberg outside the Member, contrary to MFDA Rule 2.5.3(b), MFDA Policy No. 2 and MFDA Rule 2.1.1.

Panel Note: The Notice of Hearing concluded with statements regarding the powers of the Panel to "impose any one or more of the following penalties" in its discretion, to require that the Respondents pay the whole or any portion of the costs of the proceedings, and stated the requirements with respect to a Reply by the Respondents.

5B. EVIDENCE - STATEMENTS BY RESPONDENTS OF THEIR POSITIONS

18. As stated above, Mr. Greenberg did not attend the hearing and Ms. Powell, although she attended on one day of the hearing (with no evidence being given), did not attend on the last day and was unable or unwilling to testify. Mr. Greenberg provided a Reply to the MFDA and, as stated above, Ms. Powell submitted to the MFDA a proposed Agreed Statement of Facts and a proposed Settlement Agreement in which she set out "The Respondent's Position". Although we

did not have sworn testimony from the Respondents, we believe that these documents served to inform the Panel of their positions and we are, therefore, providing a summary of those positions.

19. Mr. Greenberg in a three page “Without Prejudice” letter dated August 15, 2013 (Exhibit 4) and a later letter dated November 21, 2013 in exactly the same form but with “Without Prejudice” removed, summarized his position as:

- 1) The facts in the notice of hearing are correct, subject to a couple of small details that are not important.
- 2) I admit the misconduct.
- 3) An appropriate penalty should be one dollar (\$1.00), probably with those censure measures that the MFDA would deem appropriate.

20. He went on to provide a fairly extensive explanation of what he considered “mitigating factors” including:

(a) He used “unapproved products” (mostly mortgages) on behalf of his clients for Individual Pension Plans (“IPPs”) he had set up for many of his clients in order to seek to achieve the Federal Government mandated return rate of 7.5% and avoid or minimize the shortfall which clients would have to deposit. He referred to the Westmount and CareVest mortgages as not being approved but identical to products which had been approved previously.

(b) No client suffered losses from having invested in the Walton (Westmount) and CareVest mortgages, and have benefited “hugely” from the investments. There have not been “dozens of clients pounding at the MFDA’s door wanting my scalp”.

(c) He used “other non-approved investment products for clients looking for some diversification and possibly higher returns. “Some did well others did less well and some failed to achieve anywhere near the sought after results”. However, he explained, he

used those investments cautiously so that losses were “proportionately small and affordable in all cases”.

(d) He concluded his letter:

The final mitigating factor that I see as part of this scenario is simply that I voluntarily surrendered my mutual fund license two years ago and ceased all activity in this area at that time. About two years prior to that, I had previously ceased ALL activity on non-approved products as well, maintaining only my life and disability insurance licenses. I am now in my seventy-second year and not looking to break any records as the oldest practitioner in ANY field since I am fully retired and living in the south of Italy.

It also seems to me, from studying that part of the MFDA website that deals with enforcement, that the most egregious offenses involve misrepresentations (many to seniors), inappropriate investment recommendations (resulting in major losses, of course) and leveraging issues. Since NONE of these apply in my situation, I think my position on any penalties to be imposed is fairly reasonable. I think, you have some understanding of how I got to where we are today. It's possible for me to take the position that, since no clients have suffered serious losses and most of them have had enhanced results based on my recommendations, that any punitive measures should be mostly censures rather than fines and you see that I have stated that. As we also discussed quite frankly, in terms of the collection of any significant fine, I am further outside the MFDA's ability to collect than most others you might have dealt with historically. A settlement that encompasses the needed factors as I see them, would give the MFDA a closed case and perhaps contribute in a small way to an increase in the percentage of cases settled where the AP is outside the MFDA's jurisdiction (including being not currently licensed).

21. *Panel Note: Mr. Greenberg did not discuss the \$500,000 investment which is the subject of the lawsuit against him, the Member and FDI, but he did discuss that briefly in his interview by the MFDA on March 7, 2012 (Currie Affidavit, Tab A, pp. 8-11). His position was essentially that he had conducted due diligence about the apartment development in Edmonton and that he felt it is was a good investment. Asked whether, when he received a letter dated July 14, 2009 (Currie Affidavit, Tab N) from the client's lawyer, he was obliged to report that to the Member as a “complaint”, he responded: “Probably”. He then said he believed the matter “went away” until he received the Statement of Claim a year later. He was then advised by his lawyer to report the claim to his liability insurer, which he did. (It was the Statement of Claim that led to*

the investigation by the Member and the suspension of Mr. Greenberg, followed by reinstatement under close supervision and eventually to his termination.) He also explained, in the interview, that the client had “exchanged the asset...for a different one” without his participation. The letter from the client’s lawyer indicates that the investment in Edmonton was “dead” and that although there were discussions about that investment being changed for another investment, investigations indicated that the possible replacement investment appeared very tenuous.

22. As regards Ms. Powell, Mr. Greenberg in his interview with the MFDA (Transcript: Currie Affidavit, Tab A) was asked about the involvement of Ms. Powell, as the Branch Manager in the exempt products and his commissions. He said that Ms. Powell “was the one who did most of the processing” (Currie Affidavit, Tab A, p. 31), was aware of his meetings with clients to present the products (p. 32) and although she did not “reconcile the commissions to ensure he was paid correctly” she “generally verified that the commissions had been paid”. When he was advised that Ms. Powell “denied knowing anything about this”, he replied: “I’m not surprised” (p. 32). He was asked in terms of supervising, was he saying that Ms. Powell knew everything that was going on, he replied: “How could she not”. He then seemed to qualify that answer but said Ms. Powell’s signature was on a lot of documents, and he then said: “From an operational and client relations standpoint there’s nothing that went on in the office that Katrina didn’t know” (p. 36). Asked if Ms. Powell, as Branch Manager, ever told him he couldn’t do anything, he said: “No, we discussed the fact that I’m dealing in a non-approved product, we knew that, okay. No question”. Mr. Greenberg said that Ms. Powell “over time bent the rules for convenience”. Asked if “Ms. Powell knew that all this was going on and knew that the Member - PIP - wouldn’t be happy if they found out obviously”, Mr. Greenberg replied: “H’mmm, that’s why she had two sets of books...one showed only mutual funds, that’s what she’d showed to PIP...the other (showed) life insurance...and other stuff” (pp. 38, 39). He said clients called Ms. Powell and asked about exempt products and “everything” (p. 39).

23. Ms. Powell, as referenced above, had negotiations with the MFDA regarding a possible settlement. She submitted to the MFDA on February 18, 2014 a proposed “Agreed Statement of Facts” and “Proposed Settlement Agreement”. She also had sent an email to the MFDA on February 17, 2013, in which she sought to “clarify” some of the statements in the Notice of

hearing. Ms. Powell had been interviewed by the MFDA on May 31, 2012 (Transcript: Currie Affidavit, Tab B). Although Ms. Powell never did testify on any of the days of hearing, her position is set forth in these documents in considerable detail. She acknowledged having taken the Branch Manager's course "probably 10 years ago" (Transcript p. 6) and became Branch Manager five or six years ago (2006-07) when "it was decided that it wasn't really appropriate for Murray (*Greenberg*) to be his own branch manager" (Transcript p. 7). As an overall observation, Ms. Powell seemed knowledgeable about the securities industry and articulate in the interview but her answers were sometimes oblique. She acknowledged being aware of some of the products Mr. Greenberg was selling, or was introducing clients to were inappropriate, but she rationalized not getting involved as Branch Manager for various reasons such as (1) they had previously been approved and became unapproved; (2) Quadrex was selling its own products and although Mr. Greenberg was introducing clients to Quadrex, she did not know he was receiving referral fees; (3) Mr. Greenberg was in the course of selling his business to Quadrex so she seemed to suggest that because that sale would probably happen (and did) selling Quadrex products or referring clients to Quadrex for the sales was not a concern; and (4) she just mainly performed administrative and miscellaneous duties in the office.

24. Illustrative of the equivocation in her answers about her knowledge of the situation and her role as Branch Manager are the following passages from the Transcript (pp. 21-25, 29):

Q: This documentation for the sale of Carevest products, particularly Canadian Horizons First Mortgage and others, so the clients purchased these securities, they were reflected on your statements. You stated that the paperwork would pass through your office...

A: Sometimes, yes.

Q: And you would review it for completeness?

A: ... I might, yes.

Q: But you had, at points, reviewed it for completeness?

A: M'hmm.

Q: And then if the document was completed properly you would send it off to Canadian Horizons?

A: M'hmm.

Q: Yes?

A: Yes.

Q: So why do you think that was happening? I mean, Murray was being paid for placing those products.

A: Okay.

Q: Are you denying that?

A: I am saying, okay, I'm assuming that somehow he got something, yes, I assume. I wouldn't know for sure.

Q: So did you question him on essentially why he was selling an unapproved product or why he was engaged in an unapproved or undisclosed referral arrangement with Carevest at that time?

A: No, because I assumed it had something to do with Quadrex. And because they had come into the picture and they were limited market dealer...it was all part of the same arrangement that Murray and Quadrex had. And you say that they did some of these things before they actually signed the paperwork to purchase the business, well, maybe they did, but they certainly had an arrangement before that.

Q: So this sounds like a referral arrangement, then, how come it was never reported?

A: Well, it could have been if Murray was selling it --- if Murray was introducing them to his clients so they could sell his clients limited market products, then maybe it was a referral arrangement.

Q: Did you ever question him on that?

A: No, I did not.

Q: And why didn't you?

A: Well, because Quadrex was selling these products to our clients and Quadrex was going to buy the business and they were meeting our clients and they were going to take over when Murray retired. So, no, I did not.

Q: Did you ever suspect that Murray was referring these clients?

- A: He referred all his clients to Quadrexx.
- Q: So this sounds like an undisclosed referral arrangement to me.
- A: Or preparation to introduce somebody to your clients so that you can sell them your business. We were told Quadrexx was buying the business. Charla and I were told that Quadrexx was buying the business and they were LMDs and they had products on their shelf and they could sell any of our clients anything they wanted.
- Q: Did you ever consider that Murray might have been getting paid for any of this?
- A: I just knew that he was going to get paid for the sale of his business. How that happened, I have no idea. I don't know what arrangements they had for that. They transferred his insurance book, I don't know exactly what date, I don't know what the split was after that point about the renewal commissions on the insurance, I don't know anything about commissions.
- Q: I guess regardless of whether he was intending to sell a portion of his business or not, if he's meeting with clients and referring business to another entity, regardless of what his intentions are, surely Partners in Planning would have wanted to know that; correct?
- A: Partners in Planning probably would want to know, yes, if he was making commissions for referrals that they didn't approve. I'm sure they would. If it was quite clear that that was going on, I'm sure they would have liked to have known that. Murray referred people to a lot of things...
...where would my proof be that he was making any money on that? I don't have access to any of his commission information, I never did.
- Q: Well, there were signs, apparently, at the time, with all of this information coming through your office. Like, I don't understand why you, as the branch manager for a mutual fund salesperson, would be ensuring that a subscription agreement for an exempt product was properly completed.
- A: Because we were employees of Quadrexx as well, as we were told.
- Q: So you thought of yourself as an employee of Quadrexx at that time?
- A: Yes, because they were --- Gail made this quite clear.
- Q: Did you tell Partners in Planning that you were an employee of Quadrexx at the time?

A: I don't know, I didn't have any proof of that, actually. Because my cheque was still coming from Financial Dynamics (*Mr. Greenberg's company*). But apparently we were supposed to give a certain amount of support to Quadrexx.

Q: So you thought of yourself as an employee at that time, but you did not tell Partners in Planning that you were an employee of Quadrexx or acting as an employee.

A: No, I did not. Because as a branch manager, I just figured, you know, there are things that I have to do in this office that I put a different hat on to do. Because I don't know a lot of branch managers that have to do the dishes or do insurance applications.

...

Q: So as his branch manager, you were responsible for supervising to ensure that Mr. Greenberg did not engage in outside business activities; is that correct?

A: Yes.

Q: And that he did not engage in undisclosed referral arrangements?

A: M'hmm.

Q: And it appears that you did not do so in these circumstances?

A: It appears I made an assumption that was incorrect and I should have said something.

25. Regarding the unauthorized sale of Westmount Mortgage Products she said she knew about the sales but did not report them to the Member because "they knew about it...I'm sure there had been conversations" (Transcript p. 35, lines 10-17, 23-25; p. 36, line 1).

26. Ms. Powell said, in the interview and in the documents, that she had no knowledge of the Arcus Developments Inc. claim by the client until she learned from Compliance that the Statement of Claim had been issued, at which point she raised it with Mr. Greenberg (Transcript p. 34, lines 11-13):

A: And I said to Murray, "What the hell, do you know you're supposed to tell me these things?" And he says, "No, I didn't think about it because my lawyer said it's no big deal and it'll go away".

27. However, she acknowledged that the client had earlier questioned why Arcus was not shown in their statements. She asked Mr. Greenberg about it and he said to “just put down \$500,000” (Transcript p. 34, line 5). (*She did not at that time question the unauthorized investment.*)

28. In her “Agreed Statement of Facts” Ms. Powell said she was not terminated by the Member. She resigned on August 2, 2011 and accepted a full-time position with Quadrexx Asset Management Inc. She stated:

It is correct that I am not currently registered in the securities industry in any capacity, and I do not intend to ever be registered in the securities industry in any capacity in the future.

29. Ms. Powell stated, in her proposed “Settlement Agreement”:

10. The Respondent (*Ms. Powell*) believes that her actions were directly affected by extenuating circumstances, and influences beyond her control, and wishes to acknowledge and explain the incident without an admission of misconduct.

11. The Respondent’s sole source of income was a salary earned from her employer, the same individual that she was responsible for supervising.

12. The Respondent feels the Dealer had an unrealistic expectation that the supervision of her employer could be adequate under the circumstances.

30. In her September 17, 2013 email to the MFDA she responds to Allegation #4 in the Notice of Hearing (para. 17 above):

I did question and challenge Murray Greenberg regarding the sale of unapproved products. I mentioned to Mr. Greenberg on more than one occasion that he would get into trouble for this activity.

31. In the same email, in response to Item 50 in the Notice of Hearing, she set out the essence of her position and her explanation of why she was not in a position to report Mr. Greenberg to the Member:

It is true that I did not report Mr. Greenberg's unauthorized activities to PIP, and to that point I wish to make the following statement.

Financial Dynamics Inc., owned by Murray and Gail Greenberg, was my only source of income. I did not receive any share of his commissions or trailers for any of his business activities. My monthly salary was not increased for the last seven years before I resigned. My cost of living increases were paid by way of increases to my Christmas Bonus.

As a female in my late 50's, with several chronic health conditions, I am quite sure it would have been a challenge for me to find similar employment.

I think it is very unrealistic to expect that I could report Murray Greenberg to PIP or IPC, and jeopardize my only source of income.

Does anyone seriously think that I would have kept my job if I had reported my boss for outside business activities?

Can anyone really believe that I had a choice in the matter?

6. SUBMISSIONS OF STAFF ON ALLEGATIONS AND PENALTY

6A. SUBMISSIONS OF STAFF REGARDING MR. GREENBERG SUBMISSIONS OF STAFF ON THE ALLEGATIONS (GREENBERG)

32. At the hearing, Enforcement Counsel for the MFDA summarized the Association's position which is set forth in written "Submissions of Staff of the MFDA" and "Book of Authorities".

Allegation #1 - Securities related business outside the Member

33. MFDA Rule 1.1.1 states, in part, that no Approved Person ("AP") shall directly or indirectly, engage in any securities related business unless it is carried on for the account of the Member, through the facilities of the Member, and in accordance with the By-laws and Rules. The subject of "Outside Business Activities" is addressed in MSN - 0040 - ("Staff Notice") dated May 20, 2005.

34. “Securities Related Business” is defined in MFDA By-law No. 1 as follows:

...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.

35. The rule on securities related business was described in *Laverdière* as “fundamental to the regulatory mandate of the MFDA”. The policy rationale underlying the prohibition on off-book business is that when transactions are carried out off a Member’s books, the Member loses its ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor. As such, the Rule protects both investors and Members.

Luc Marc Andre Laverdière, Pacific Regional Council decision dated May 12, 2010, MFDA File No. 200936, at para. 5.

36. In *Larson*, it was found that Approved Persons who facilitate investments by clients in products or companies unknown to and unapproved by the Member, or who act as an intermediary between clients and the perpetrators of an investment scheme, are engaged in securities related business outside of the Member and have breached Rule 1.1.1.

Wayne Larson, Prairie Regional Council decision dated October 14, 2009, MFDA File No. 200826, at para. 59.

37. As set out in section A5 of the Partners In Planning Financial Services Ltd. (“PIP”) Compliance Manual set out in the Currie Affidavit, Exhibit M, IPC Final Investigation Report, p. 7:

Apart from the specific exception in Rule 1.1.1, Approved Persons are prohibited from selling or advising on any investments that would be considered securities under applicable legislation through any entity other than the Member (often referred to as “selling away” or “off book trading”).

38. MFDA Rule 2.4.2 sets out the conditions that must be met for permitted referral arrangements under MFDA Rules. As set out in Rule 2.4.2, Approved Persons are not permitted to enter in referral arrangements.

39. The MFDA has provided guidance to Members and their Approved Persons in complying with MFDA Rules and securities legislation when engaging in referral arrangements in Member Regulation Notices, MR-0030 and MR-0071.

40. Approved Persons are obligated to deal fairly, honestly and in good faith with clients and observe high standards of ethics and conduct in the transaction of business in accordance with MFDA Rule 2.1.1. The rule encompasses the most fundamental obligations of all registrants in the securities industry and is designed to protect the public interest.

Allegation #2 - Dual Occupation

41. MFDA Rule 1.2.1(d) articulates the rights and restrictions on an Approved Person to hold dual occupations or conduct business activities outside the Member. The Rule seeks to ensure that only authorized dual occupations are carried on by an Approved Person and that they are done so with the knowledge and approval of the Member.

Allegation #3 - Failing to Inform Member of a Complaint

42. MFDA Policy No. 3 is titled “Complaint Handling, Supervisory Investigations and Internal Discipline” and provides in section 2 a definition of “complaint”:

A “complaint” shall be deemed to include any written or verbal statement of grievance, including electronic communications from a client, former client, or any person who is acting on behalf of a client and had written authorization to so act, or of a prospective client who has dealt with a Member or an Approved Person, alleging a grievance involving the Member, Approved Person of the Member or former Approved Person of the Member, if the grievance involves matters that occurred while the Approved Person was an Approved Person of the Member.

43. The relevant portion of MFDA Policy No. 6 which was in effect at the material time, provides as follows:

- 4.1 An Approved Person shall report the following events to his or her current Member in such detail as required by the Member, within 2 business days:
- (a) the Approved Person is the subject of a client complaint in writing;...

44. The obligation of Approved Persons to comply with the policies and procedures of the Members that they are registered with is a cornerstone of the self-regulatory system. MFDA Members are expected to be aware of their regulatory obligations and to implement policies and procedures to ensure compliance. When Approved Persons disregard those obligations, the Member's ability to supervise the conduct of such Approved Persons and protect the interests of clients and the public is undermined.

Summary

45. The self-regulatory system works with checks and balances which ensure that investors are protected. In this system it is paramount that Approved Person's operate with complete honesty and candor with their Member. When an Approved Person sells products outside of their Member's approved list and off the books and records of their Member, they place their client's investment at risk in the following manner:

- (a) the Member has not had the opportunity to conduct due diligence on the product to determine whether the product should in fact be sold or referred to investors and that any limitations or conditions on its authorization of dealings with the product are observed;
- (b) the Member has not had an opportunity to ensure that the Approved Person's involvement with the investment does not impair the ability of the Approved Person and the Member to provide continuous and effective service to clients;

- (c) the Member is prevented from supervising the sale or referral process to ensure that transaction recommendations are suitable and (meet) all regulatory requirements;
- (d) the Member's compliance staff does not have an opportunity to apply any guidance received from regulators concerning the product even after the sale or referral of the product has been approved; and
- (e) the Member has not had the opportunity to deal with any actual or potential conflicts of interest to ensure they are addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

46. Where Approved Persons fail to inform their Member of client complaints and/or settle complaints or claims directly with the client without Member authorization, the Member is frustrated in its ability to conduct a supervisory investigation and deal with the client complaint in a timely manner. Further, investors may be at risk as the Member is unable to assess the full scope and nature of the Approved Person's misconduct.

SUBMISSIONS OF STAFF ON PENALTY (GREENBERG)

Factors Concerning the Appropriateness of the Penalty

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

Pezim v. British Columbia (Superintendent of Brokers), [1994], S.C.J. 58, Iacobucci, J. at paras. 59 and 68.

48. When determining the appropriate sanctions to impose, a 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.

Arnold Tonnies, Prairie Regional Council decision dated June 27, 2005, MFDA File No. 200503 at p. 22.

49. Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- (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.

Tonnies, Supra at p. 23

50. Sanctions are intended to be preventive, protective and prospective in nature. One of the objectives of securities regulation is to prevent harm to investors and capital markets. It is therefore appropriate for a Hearing Panel to impose sanctions on the basis of past conduct that will protect the public interest and prevent future conduct detrimental to the integrity of the capital markets by "removing from the capital markets - wholly or partially, permanently or

temporarily as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets”.

Tonnies, supra at pp. 21-22.

51. The effect of general deterrence should thereby advance the goal of protecting investors. Thus, 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. As the Supreme Court of Canada stated in *Re: Cartaway Resources Corp.* [2004] 1 S.C.R. 672 at para. 61:

A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction...The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged...

52. An additional source that may be taken into account when determining the appropriate penalties are the MFDA Penalty Guidelines. The Penalty Guidelines are intended to assist Hearing Panels, MFDA Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings. 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.

53. The MFDA Penalty Guidelines set out “Specific Factors To Consider” and “Penalty Types & Ranges” for the various allegations in this case being Outside Business Activity and Complaint Handling. The Specific Factors are discussed below in relation to the present case. The Guideline Penalties include minimum fines of \$10,000 (Outside Business Activity) and

\$5,000 (Complaint Handling), to suspensions to “permanent prohibition in egregious cases (e.g. undisclosed activity resulting in client loss).

54. The MFDA Penalty Guidelines recommend the following penalties and considerations for Standard of Conduct:

SPECIFIC FACTORS TO CONSIDER	PENALTY TYPES & RANGES
1. Nature of the circumstances and conduct.	<ul style="list-style-type: none">• Fine: Minimum of \$5,000
2. Number of individuals affected.	<ul style="list-style-type: none">• Write or rewrite an appropriate industry course (e.g. IFIC Officers’, Partners’ and Directors’ Course or Canadian Investment Funds Course).
3. Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.	<ul style="list-style-type: none">• Suspension.• Permanent prohibition in egregious cases.

Considerations in the Present Case

55. It is submitted that the penalties sought by MFDA Staff in the present case are appropriate for the following reasons:

(i) Seriousness of the misconduct

56. Conducting securities related business or outside business activity without the approval or knowledge of the Member is serious misconduct. The Member loses its ability to supervise the transactions and to assess the suitability of the transactions for the investors. The misconduct can have dire consequences for the investors involved as the off-book investments may not be suitable for the investors or even legitimate investments. The misconduct may bring the Member or the mutual fund industry into disrepute. (In the Statement of Claim regarding the Arcus Developments Inc. it is alleged that the investment was not suitable for the client.)

57. The outside business activity occurred over a period of 3.5 years involving approximately 40 individuals that purchased approximately \$13.45 million of investment products. The misconduct was repeated and intentional. The misconduct was egregious.

58. The Respondent also took measures to conceal the activity from the Member by having his spouse as the signatory of referral agreements entered into on his behalf.

59. The requirement that Approved Persons inform their Member of client complaints ensures that the Member is able to fulfill their duty to engage in an adequate and reasonable assessment of all complaints. When an Approved Person fails to inform their Member, the Member's ability to assess the complaint as well as their ability to determine if there are further issues with the Approved Person is subverted. (The Member did not learn of the initial complaint regarding Arcus Developments Inc. until one year after the complaint when the Statement of Claim was issued.)

(ii) Investor harm

60. It is alleged by client NH in the Statement of Claim that NH's investment of \$500,000 in Arcus Developments Inc. facilitated by the Respondent is now worthless.

61. The Respondent has stated that there have been no "significant losses" as a result of the outside business activity however the Respondent has not provided any evidence in support of this. It is very difficult for the MFDA to determine the extent of client losses as there were no other client complaints or evidence of losses, other than the claim regarding Arcus.

(iii) The Respondent's recognition of the seriousness of his misconduct

62. The Respondent has cooperated with Staff's investigation as well as the Member's investigation into the matter (although he, perhaps understandably, did not attend the hearing). In addition he has admitted to the material facts and misconduct as alleged in the Notice of Hearing.

iv Benefits received by the Respondent

63. In total, the Respondent received sales commission, referral fees or other compensation, either paid to him directly or indirectly to FDI, Dootkey or his spouse, in the amount of approximately \$1.06 million in relation to these sales and referrals.

(v) Whether the Respondent was aware of the prohibited nature of the activity

64. Respondent was aware that the products were not approved by the Member and were not permitted to be sold to the clients. This was not merely a technical failure to comply with the PIP's policies and procedures but an intentional disregard of them.

(vi) The Respondent's past conduct and level of activity in the capital markets

65. Although the Respondent has no past disciplinary history with the MFDA, this factor should be given very little weight in light of the serious nature of the misconduct in this matter.

(vii) Previous decisions made in similar circumstances

66. Generally, in matters involving outside business activity, Hearing Panels have imposed penalties which include a permanent prohibition and fines.

67. The penalties proposed by Staff are consistent with previous decisions made in similar circumstances.

68. In *Re: Meiz Mohammed Majdoub*, Central Regional Council decision dated November 12, 2010, MFDA File No. 201010, the Respondent facilitated the sale of about \$840,000 in off-book investments in an entity used to raise capital for proposed business enterprises. The Respondent received about \$120,000 in commissions and thereby also engaged in a dual occupation not disclosed to the Member. 19 individuals, including family members and friends,

lost all, or most of, the money they had invested. Following an uncontested hearing, the Panel imposed a permanent prohibition; a fine of \$120,000; and costs of \$10,000.

69. In *Re: Wijaysri Sivasubramanian*, Central Regional Council decision dated May 4, 2011, MFDA File No. 201002, over a period of approximately six years, the Respondent solicited and accepted investments by eight clients and two individuals in the amount of about \$750,000 in companies he owned and operated. Substantially all of the principal and interest pursuant to the terms of the investment (in most cases a promissory note) remained outstanding at the time of the hearing. The Respondent was also found to have engaged in a dual occupation in regards to this activity. The Respondent was also in a conflict of interest with respect to this activity and failed to provide answers to his undertakings. Following an uncontested hearing, the Panel imposed a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member; a global fine of \$1 million; and \$25,000 in costs.

70. In *Re: Tadeusz ("Ted") Bytnar*, Prairie Regional Council decision dated April 6, 2011, MFDA File No. 201015, 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, interfered with the Member's ability to conduct a reasonable supervisory investigation and failed to cooperate with the MFDA. The Respondent was found to have sold, referred or facilitated the sale of an investment product to 4 individuals, 2 of whom were clients of the Member. The Hearing Panel ordered the following penalties: (1) permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member; (2) \$90,000 fine for engaging in securities related business outside the Member/undisclosed dual occupation; (3) \$10,000 fine for interfering with the Member's ability to conduct a reasonable supervisory investigation; (4) \$50,000 fine for failing to cooperate with an MFDA investigation; and (5) \$7,500 in costs.

Summary on Penalty

71. The proposed penalties reflect the seriousness of the Respondent's misconduct and 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 its Members and Approved Persons.

72. A permanent prohibition of the Respondent from conducting securities related business will prevent future misconduct by the Respondent, although it is recognized by the MFDA that in the Respondent's circumstances (age, absence from Canada and no longer involved in the industry) it will have little effect on him. However, the proposed sanctions will deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants, and foster public confidence in the securities industry.

73. Having regard to all of the foregoing considerations, it is submitted that the proposed penalties are reasonable and proportionate having regard to the conduct of the Respondents and the circumstances of this case.

Costs

74. Staff also request that an order for costs be made against the Respondent Greenberg. The amount requested will permit the MFDA to recover from the Respondent a portion of the costs attributable to conducting the investigation and this hearing, such that these costs do not have to be borne by the MFDA or subsidized by those Members and Approved Persons of the MFDA who do not engage in this type of activity.

6B. SUBMISSIONS OF STAFF REGARDING MS. POWELL

SUBMISSIONS OF STAFF ON THE ALLEGATIONS (POWELL)

75. A branch manager has a duty pursuant to Rule 2.5.3(b) and Policy 2 to ensure that activities of the Member at a branch or sub-branch are compliant with MFDA By-laws, Rules and Policies and with applicable securities legislation. This duty includes ensuring that all

securities related business in conducted through the accounts and facilities of the Member and all outside business activities carried on at the branch have been approved.

76. Approved Persons are obligated to deal fairly, honestly and in good faith with clients and observe high standards of ethics and conduct in the transaction of business in accordance with MFDA Rule 2.1.1. The rule encompasses the most fundamental obligations of all registrants in the securities industry and is designed to protect the public interest.

77. As a branch manager, Powell's position required her to play an important compliance role on the front line of investor protection. A branch manager who fails to ensure compliance of Approved Persons under his or her supervision, where they knew or ought to have known the Approved Person was in breach of the Rules, is in breach of Rule 2.5.3(b) and MFDA Policy 2.

78. Generally, a branch manager's responsibilities include, among other things, the training and supervision of branch employees to ensure that they understand what practices are and are not acceptable. The heightened responsibility of a Branch Manager is indicated in MFDA Rule 1.2.2, which sets out the experience, education and proficiency requirements to be registered as a branch manager.

SUBMISSIONS OF STAFF ON PENALTY (POWELL)

Factors Concerning the Appropriateness of the Penalty

79. Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include many of the factors set out at para. 49 above. Those factors are enumerated and discussed in *Robert Roy Parkinson*, Ontario Regional Council decision dated April 29, 2005, MFDA File No. 200501 at p. 22.

80. An additional source of factors to be taken into account when determining the appropriate penalties to be imposed in disciplinary proceedings is the MFDA Penalty Guidelines described in paras. 52-54 above. The MFDA Penalty Guidelines state the following for supervision:

1. Extent of inadequacy in the procedures for supervision or the actual supervision of employee(s).	Approved Person:
2. Extent of employee(s) misconduct.	• Fine: Minimum of \$10,000
3. Amount of losses or compensation for which the Member is liable as a result of the employee(s) misconduct.	• Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course).
4. "Red flag" warnings that should have been caught by a proper system of supervision or follow-up.	• Conditions on Approved Person.
5. Corrective measures taken since discovery of problem.	• Suspension.
6. Intentional or reckless disregard for requirements or whether due to carelessness or inadvertence.	• Permanent prohibition in egregious cases

Considerations in the Present Case

81. It is submitted that the penalties sought by MFDA Staff are appropriate for the following reasons:

(i) Nature of the Misconduct

82. At all material times, Powell was the designated branch manager of PIP responsible for supervising trading activity at the branch (Greenberg was the sole mutual fund salesperson at the branch) and ensuring that any business conduct on behalf of PIP was in compliance with PIP's policies and procedures, MFDA By-laws, Rules and Policies and applicable securities legislation.

83. Powell was aware that Greenberg was involved in facilitating approximately \$13.45 million of investment products to over 40 clients of PIP outside the accounts and facilities of PIP.

84. Powell processed most of the documents relating to the outside business activity, was responsible for sending the documents to the issuers or companies selling the investments, and

verified with the issuers or companies whether the commissions, fees or other compensation to which Greenberg was entitled had been paid.

85. The outside business activity which Powell failed to properly supervise occurred over a period of approximately 3.5 years. Powell's misconduct was intentional and was not on account of carelessness or inadvertence.

(ii) The Respondent's Past Conduct and Sanctions

86. Powell has not been the subject of any previous MFDA disciplinary proceedings.

(iii) The Respondent's Experience in the Capital Markets

87. Powell has been registered as a dealing representative in the category of mutual fund dealer and was designated as a branch manager IPC Investment Corporation ("IPC") since August 2004. As a branch manager, Powell's position required her to play an important role in ensuring compliance of the branch.

88. Greenberg and Powell have worked together since around 1993. At all material times, Greenberg employed Powell, initially as his administrative assistant and subsequently when she was the designated branch manager for the branch office from which Greenberg carried on business. While acting as the designated branch manager, Powell continued to provide administrative and other support services to Greenberg's clients and to act as a client contact person for the clients.

89. Powell's position as a branch manager was far from the typical case and consideration should be made to the inherent conflict that would exist for Powell in exercising her role as the branch manager supervising Greenberg who was also her employer.

(iv) The Respondent's Recognition of the Seriousness of her Misconduct

90. Powell has cooperated with both the Member and Staff's investigation.

91. Powell is not currently registered in the securities industry in any capacity.

(v) Client Harm

92. It is alleged by client NH in the Statement of Claim that NH's investment of \$500,000 in Arcus Developments Inc. facilitated by Greenberg is now worthless.

(vi) Benefits received by the Respondent

93. There is no evidence that Powell received any commissions related to the outside business activity. Often branch managers receive an override; there was none here. Her motivation of "blind eye" was not for more money but to keep her job.

(vii) Previous Decisions in Similar Circumstances

94. The penalties proposed are consistent with previous decisions made in similar circumstances.

95. In *Re: Leo Alexander O'Brien and David Baxter Snow*, Atlantic Regional Council decision dated November 25, 2008, MFDA File No. 200809, the branch manager (Snow) failed fulfill his supervisory obligations when he failed to make reasonable inquiries of O'Brien to question the excessive number of switches that were made in client accounts and the substantial switch fees charged to the clients during a short period of time. The Panel imposed a prohibition from acting in a compliance or supervisory capacity with a Member for a period of 3 years; re-education prior to becoming registered in any compliance or supervisory position; a fine of \$10,000; and costs of \$5,000.

96. In determining the appropriate penalty (permanent ban, penalty of \$5,000 and costs of \$5,000) in *Re Elizabeth Anne VandenBoomen*, Central Regional Council decision dated

October 30, 2013, MFDA File No. 201306, the Panel considered that the Respondent had worked essentially as the administrative assistant and was not the central figure in the misconduct.

(viii) Specific and General Deterrence

97. These are significant penalties which will deter future misconduct by Powell as she will be permanently prohibited from the industry, deter others from engaging in similar misconduct, and improve overall compliance by mutual fund industry participants.

(ix) The Protection of the Investing Public

98. 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 its Members and Approved Persons.

99. The costs of \$5,000 to be paid by Powell to the MFDA will contribute to partially offsetting the considerable resources called upon to conduct the investigation and prosecution of this matter.

7. REASONS FOR DECISION

100. We confirm our decisions declared at the conclusion of the hearing that we are satisfied the allegations of misconduct against both Defendants have been proven and accept that the penalties proposed by the MFDA are reasonable and appropriate.

101. We accept and adopt the submissions made by Enforcement Counsel for the MFDA (paras. 38-99), including the factors which a Hearing Panel should consider in exercising its discretion to impose penalties.

102. We recognize that there are mitigating factors in favour of the Respondents including that both had discipline-free records and they cooperated with the MFDA (up to the point of not appearing at the final hearings).

103. Decisions of Hearing Panels, in circumstances similar to those in the present case, support the penalties proposed, and the cost sought by the MFDA. We take into account the protection of the investing public, the integrity of the securities markets, specific and general deterrence, the protection of the MFDA's membership and the protection of the integrity of the MFDA's enforcement processes.

7A. REASONS REGARDING MR. GREENBERG

104. There is no doubt that the allegations of misconduct against Mr. Greenberg have been proven. He has admitted the wrongdoing in his Reply (and was seeking only to persuade the MFDA that any penalties assessed against him would have no practical effect). We recognize that the penalties will not have a specific deterrence effect as regards Mr. Greenberg at his age, long removed from the securities industry and living in Italy. However, general deterrence of other Approved Persons is a major factor to be taken into consideration in assessing penalties.

105. It is not possible, on the information available, to determine the extent of losses suffered by clients other than the probable loss of \$500,000 by client NH Ltd. on the Arcus Developments Inc. investment. What is significant is the irresponsible manner in which Mr. Greenberg carried on making investments and referrals for clients in "off book", unapproved securities or other investments, which deprived clients and the Member of the protection provided by the Member being able to supervise the investments and be responsible for the suitability of the investments for the clients. These are serious offences and breach the most fundamental of the rules governing conduct of Approved Persons. Such misconduct can bring the mutual fund industry into disrepute.

106. Mr. Greenberg benefited greatly in commissions received from the unapproved transactions and the magnitude of that benefit should be reflected in the fine imposed. The fine

sought by the MFDA, \$250,000 appears to take into account the lack of proof of the extent of client losses since it does not approximate the commissions earned by Mr. Greenberg. In the circumstances of this case we consider the fine appropriate.

107. Ironically in this case, as much as Mr. Greenberg needed supervision, there was no supervision because his supervisor was his employee (discussed below).

108. See “Conclusion On Penalties And Costs” below at p. 46.

7B. REASONS REGARDING MS. POWELL

109. There is no doubt that the allegations of misconduct against Ms. Powell have been proven. She acknowledges performing virtually **no** supervision of Mr. Greenberg with whom she was in close contact for many years and observed circumstances beyond the “red flags” which are often referred to in securities cases. She attempted to explain and rationalize her failure to supervise on the basis that she could not be expected to prejudice her job as an employee of Mr. Greenberg by reporting his improper activities. She also seemed incapable of recognizing that any functions she was performing on behalf of Quadrex could not affect her responsibilities as Branch Manager of the Member. While we can have some empathy for Ms. Powell because of her very difficult situation and her health issues, lack of supervision cannot be condoned. These situations involving “captive branch managers” are fraught with the potential for disaster for clients and Members. Such situations should not be permitted to exist. Ms. Powell had taken the Branch Manager’s course, had extensive experience in the securities industry and had to know her responsibilities as Branch Manager. She should not have accepted the position if she was not prepared to carry out her duties. General deterrence of other branch managers from engaging in similar misconduct is an important factor in assessing penalties.

110. The Panel has referenced information regarding Ms. Powell provided by Mr. Greenberg in his interview (para. 22). That information is not accepted as being proven evidence since it was not given under oath and was not subject to cross-examination. It does, however, serve to

provide some context for much of what one would reasonably expect to be occurring in the small office with the close interaction between Ms. Powell and Mr. Greenberg for many years.

111. In our view Ms. Powell's lack of judgment and failure to act, her rationalization and unwillingness to admit wrongdoing, do not speak well for her being able to continue in the industry. In any event, that is not an issue for her as she has acknowledged that she has no interest in being in the industry.

112. In the circumstances of this case, we consider that the MFDA has acted very reasonably and compassionately in not proposing that a fine be imposed and in proposing that costs of only \$5,000 be imposed.

7C. CONCLUSION ON PENALTY AND COSTS

113. We confirm our decisions declared at the conclusion of each hearing that the penalties proposed by the MFDA are reasonable and appropriate, and we confirm our Orders:

As Against Mr. Greenberg

- (a) A permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- (b) A fine of \$250,000, pursuant to s. 24.1(b) of MFDA By-law No. 1; and
- (c) Costs attributable to conducting the investigation and hearing of this matter in the amount of \$10,000, pursuant to s. 24.2 of MFDA By-law No. 1.

As Against Ms. Powell

- (a) A permanent prohibition on the authority of Ms. Powell to conduct 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; and

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

114. At the conclusion of the hearings we signed Orders confirming the foregoing.

DATED this 10th day of November, 2014.

“Alan V. M. Beattie”

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

“M. Elaine Bradley

M. Elaine Bradley
Industry Representative

“Danielle Ayers”

Danielle Ayers
Industry Representative

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