



**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: Michael Darrell Harvey**

Heard: September 19, 2011 and November 14, 2011 in Toronto, Ontario  
Decision and Reasons: July 12, 2012

**DECISION AND REASONS**

Hearing Panel of the Central Regional Council:

Kathleen J. Kelly	Chair
Simon Destremes	Industry Representative
Glenda Towle	Industry Representative

Appearances:

Charles Toth	)	Counsel, Mutual Fund Dealers Association of
	)	Canada (MFDA)
Stephen Davis	)	Investigator, MFDA
Michael Darrell Harvey	)	Respondent

Also present:

Edward Moran	)	Hearings Assistant, MFDA
Therese Brennan-Hunt	)	Investigator, Financial Services Commission
	)	Ontario (November 14, 2011 only)

## **Procedural Matters**

1. By Notice of Hearing, dated June 6, 2011, and served on June 15, 2011, Michael Darrell Harvey (“the Respondent”) was notified that a disciplinary proceeding had been commenced against him by the MFDA in regard to the following two allegations:

**Allegation #1:** Commencing in May 2009, Mr. Harvey intentionally failed to comply with the Member’s directions to take such steps as the Member thought were necessary and reasonable to supervise leveraged accounts serviced by Mr. Harvey, contrary to MFDA Rules 1.1.2 and 2.5.1 and MFDA Rule 2.1.1.; and

**Allegation #2:** Commencing in July 2010, Mr. Harvey failed to attend for an interview during the course of an investigation by the MFDA, contrary to s. 22.1 of MFDA By-law No. 1.

2. Mr. Harvey was also notified that the first appearance would take place by telephone conference before a hearing panel (the “Hearing Panel”) of the Central Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) at 10:00 a.m. on July 12, 2011.

3. The commencement of the First Appearance was delayed fifteen minutes to permit Mr. Harvey’s attendance, however he failed to attend either in person or by teleconference. The Panel was satisfied that the Respondent was served with the Notice of Hearing by virtue of the Affidavit of Service of Jean Guy Dion, filed as Exhibit 2 in this matter. The Panel confirmed the Hearing for one day, to proceed on September 19, 2011.

4. On July 22, 2011, the Respondent contacted the MFDA and requested a date for a Motion; the purpose of the Motion was not disclosed. On August 10, 2011, a teleconference was convened with the Respondent, the MFDA, and the Panel, to set a date for the hearing of the Motion. During the course of that teleconference it became clear that the Respondent thought that the teleconference was convened to permit him to make submissions regarding his Motion to dismiss the disciplinary proceedings against him.

5. The Panel informed the Respondent that the appropriate time and place to raise the arguments he wished to make, to have the disciplinary proceedings against him dismissed, would be at the Hearing of the matter. Accordingly, it was agreed that the Disciplinary Hearing,

pursuant to Sections 20 and 24 of MFDA By-law No. 1, would remain convened for September 19, 2011, commencing at 10:00 a.m. in Toronto, to address the two allegations brought against the Respondent.

6. During the August 10, 2011 teleconference, the Respondent was also advised that although his Reply to the Allegations had been due 20 days after the Notice of Hearing was served on him, being July 5, 2011, the Panel would give him until August 19, 2011 to file a Reply. The MFDA was ordered to provide disclosure by September 2, 2011, being 14 days before the start of the Hearing.

7. The Respondent filed a Reply to the Notice of Hearing on August 18, 2011.

8. The Hearing was convened for one day on September 19, 2011. Additional hearing time was needed and November 14, 2011, was scheduled for submissions and argument.

9. There was a preliminary, procedural matter that required determination relating to the manner in which the Respondent would testify. The Respondent intended to give his evidence by filing with the Hearing Panel, and then reading aloud, a prepared statement. This is not standard practice. However, MFDA Staff did not oppose the Respondent's request provided the Respondent was under oath when he read his statement; that he attest to the truth of the contents; and, that he not have the statement before him while under cross-examination.

10. The Panel noted that the Respondent:

- (a) was unrepresented;
- (b) was unfamiliar with Discipline Hearing Procedures;
- (c) was prepared to, in essence, have his statement serve as his direct evidence as if it were a sworn Affidavit of his testimony;
- (d) had prepared to present his answers to the Allegations using his prepared statement;
- (e) agreed to not refer to his statement during cross-examination; and
- (f) agreed to provide a copy of his statement (including copies of documents referred to in the statement) to Counsel for the MFDA, as well as the Panel.

11. The Panel also considered that the Respondent would read his prepared statement into the Record, while under oath.

12. With the above-noted protocols agreed to, and recognizing the efficiency of proceeding in the manner described, the Panel determined that the direct evidence of the Respondent would be received in the manner outlined above.

13. The Affidavit of MFDA Investigator Stephen Davis, sworn September 12, 2011, was admitted into evidence.

## **Background**

14. From about June 2003 to July 2009, the Respondent was registered in Ontario as a mutual fund salesperson with Investia Financial Services Inc. (“Investia”). The Respondent was terminated by Investia on July 14, 2009 as a result of the events that formed the basis of Allegation #1, discussed further below.

15. The Respondent is not currently registered in the securities industry in any capacity. He is, however, currently registered in the life insurance industry.

16. In late 2008, Investia received complaints from two clients, client “TS” and client “JM”, regarding how the Respondent handled their respective margin (leveraged) accounts.

17. Investia investigated the complaints, sought and received the response of the Respondent, and in a letter to TS, dated February 10, 2009, wrote that it had determined that the Respondent had not failed in his duty to TS. There was no further information in the file provided to the Panel regarding the complaint from JM, nor was there any necessity for same in the context of the matters before the Panel.

18. The complaints submitted by TS and JM, to Investia, are not the subject of the specific allegations of misconduct against the Respondent in this Hearing, however TS filed a complaint with the MFDA, in late May/early June 2009, and named the Respondent, Investia, the MFDA

and AGF as the parties against whom the complaint was made.

19. Commencing on June 1, 2009, Investia was under active investigation by the MFDA Compliance Staff who were conducting a third compliance examination of Investia's Head Office and its Branches for the purpose of assessing Investia's compliance with MFDA By-laws, Rules and Policies during the period August 1, 2007 to April 30, 2009.

## **The Hearing**

### **The Evidence of the MFDA Investigator – Mr. Stephen Davis**

#### **(a) Client TS**

20. In his affidavit, Mr. Davis states that on November 11, 2008, Investia received a complaint from client TS regarding the Respondent, who was the mutual fund salesperson responsible for servicing client TS's accounts at Investia.

21. In his affidavit, Mr. Davis states that TS alleged that the Respondent failed to inform him that AGF Trust Company ("AGF Trust"), the financial institution from which client TS had borrowed monies to make investments, had sent four warning letters<sup>1</sup> to the Respondent advising that TS's investment account would be subject to a margin call unless TS took steps to restore the required debt to asset margin ratio in the account. TS also alleges that he was not aware any warning letters had been sent, until he had received a letter from AGF Trust in October 2008 notifying him of the margin call.

22. In his affidavit, Mr. Davis states that the MFDA received a complaint submitted by client TS regarding the Respondent and the events described above, in about June 2009.

---

<sup>1</sup> In response to a letter from MFDA Enforcement Staff, dated September 29, 2009, AGF Trust advised in a fax dated November 2009, that it sent only two margin warning letters to the Respondent. AGF Trust confirmed that it sent the margin call letters to both TS and the Respondent, which was the process in effect at AGF at that time.

The Respondent testified that he only received one letter and that he informed AGF that it had used inaccurate fund values in calculating the debt to asset margin ratio in TS's account.

23. Mr. Davis testified that AGF Trust ultimately directed the sale of TS's holdings (collapsed the investment loan held by TS) and TS claims that the Respondent's conduct caused him to incur an investment loss of \$46,800.

24. Mr. Davis testified that he was unable to fully investigate the complaint submitted by client TS, including the discrepancies regarding the number of warning letters issued by AGF Trust and received by the Respondent, because the Respondent did not attend an interview with MFDA Staff.<sup>2</sup>

25. Mr. Davis testified that TS commenced a Small Claims Court lawsuit against the Respondent, Investia, AFG and the MFDA in 2010, which was subsequently dismissed as against the MFDA.

**(b) Client JM**

26. In his affidavit, Mr. Davis states that on December 17, 2008, (sic) Investia received a complaint from JM which alleged that the Respondent had failed to inform client JM that AGF Trust had sent four warning letters to the Respondent advising that JM's investment account would be subject to a margin call unless client JM took steps to restore the required debt to asset margin ratio in the account.

27. In his affidavit, Mr. Davis states that JM also alleged that the Respondent failed to communicate with him about the letters or the status of his account with AGF Trust, other than to call JM, sometime in October 2008, to inform him that he would be receiving a margin call from AGF and that he should ignore it as AGF Trust had made an error which would be corrected by the Respondent.

28. Mr. Davis testified that he found no evidence that AGF Trust made an error in issuing the margin call letter to client JM. He also testified that JM's loss may have been greater than \$45,000; however as with TS, he was unable to fully investigate the complaint submitted by JM because the Respondent did not attend an interview with MFDA Staff.

---

<sup>2</sup> As the client complaints themselves are not the scope or focus of this Hearing, notwithstanding they are the basis of the second Allegation, the issue of how many letters were sent to whom does not need to be reconciled at this time.

29. Aside from not being able to determine losses claimed by TS and JM, Mr. Davis further testified that he was unable to determine whether the Respondent was engaged in the conduct alleged by TS and JM because the Respondent failed to attend for an interview as by the MFDA.

**(c) Investia**

30. In his affidavit, Mr. Davis states that Investia wrote to the Respondent on April 20, 2009, and advised that he was required to, among other things:

- (a) conduct a review of all leveraged client accounts, including meeting with all clients with leveraged accounts, and submit to Investia relevant “Know Your Client” and leverage disclosure documentation with respect to the clients with leveraged accounts;
- (b) suspend any further leveraging activity until further notice; and
- (c) where the Respondent determined, based upon the review of leveraged accounts required by Investia, that the leveraged investment strategy was unsuitable for the client, the Respondent was further instructed by Investia to inform the client of three options available to them:
  - (i) maintain the leverage position;
  - (ii) reduce the leverage position; or
  - (iii) collapse the leverage position entirely.

31. Mr. Davis stated that the Respondent was further instructed to complete the leverage review by August 31, 2009, and was specifically warned that “any failure to comply with [Investia’s directions]...may result in disciplinary action, including notification to the MFDA and other applicable regulators, and may affect the ongoing registration of any Approved Person or the branch.”

**Allegation #1: Failure to Comply with Member’s Directions**

32. In his Affidavit, Mr. Davis stated that based on information he received from Investia, that after Investia received complaints from TS and JM, it commenced an internal investigation of the Respondent’s dealings with those clients and of the Respondent’s leveraging practices generally; and, that as part of its investigation, Investia sent the letter (referenced above) to the

Respondent on April 20, 2009.

33. In his Affidavit, Mr. Davis stated that the Representative Agreement between the Respondent and Investia required the Respondent to comply with Investia's compliance and supervisory procedures, including its directive to conduct a review of leveraged accounts and suspend any further leveraging activity until further notice. In particular, section 5 of the Representative Agreement states:

The Representative's conduct related to the business must be compliant with the applicable laws, regulations, policies and industry standards relating to trading in all financial products through the Dealer, including, without limitation, the Rules and By-laws of the MFDA and with any and all compliance, supervisory and operational procedures as dictated by the Dealer.

34. In his Affidavit, Mr. Davis stated that the Respondent was also required to comply with Investia's directive to conduct a review of leverage accounts by virtue of the terms of its policies and procedures. Investia's policies and procedures manual expressly required the following:

Representatives must conduct regular reviews with their clients that include the leveraged investment status, position of the loan and the clients' financial and personal circumstances to ascertain continued suitability. Representatives are required to keep proof of reviews.

35. In his Affidavit, Mr. Davis stated that the Respondent had previously signed a Compliance Acknowledgement form on December 5, 2008, in which he confirmed that he had received Investia's policies and procedures manual and would abide by its terms.

36. It was Mr. Davis's evidence that the Respondent wrote to Investia on May 1, 2009 advising that he would not comply with its requests. Among other things, Mr. Davis testified that the Respondent wrote:

... the requests being made are completely unreasonable and inappropriate. It should be made known to Investia staff that the recent market environment has become very challenging and difficult to say the least. We have had a stock market decline comparable to the Great Depression and now have unemployment rates at multi-decade highs and rising. Given this, you are asking me to complete suitability analyses for clients who may be unemployed or at risk of being unemployed in the near future with depressed asset market values to determine if they are still suitable for leveraging. Does this not seem ridiculous? Furthermore, is the risk of doing this not apparent? Clients could

very well become suspicious that I or Investia are in trouble and we are working merely to protect ourselves when our knowledge and experience is meant to be used to serve in the best interest of our clients in good and bad times.

. . . suspending my ability to serve existing and future clients with the appropriate use of leveraging and threatening the registration of my license with Investia is the most unprofessional and disrespectful behaviour I have seen yet toward a representative who has done nothing wrong, not to mention childish behaviour by Investia. . . .

Effective immediately, I consider this “suspension” removed and the matter, as presented, closed. I will continue operating my business as usual. . .

37. In his Affidavit, Mr. Davis stated that Investia terminated the Respondent on July 14, 2009, because he had breached the terms of the Representative Agreement by refusing to perform the review of leveraged accounts requested by Investia, and because he had recommended trades to clients for the purpose of generating commissions for the Respondent (for example, that he had engaged in excessive trading activity).

#### **Member’s concerns regarding excessive trading**

38. In his Affidavit, Mr. Davis stated that in about June 2009, Investia identified, during routine supervisory reviews of trading activity, a number of trades in client accounts submitted by the Respondent which appeared to have been recommended to the clients for the purpose of generating commissions for the Respondent. Mr. Davis identified this type of conduct as being commonly referred to as “excessive trading” or “churning”.

39. In his Affidavit, Mr. Davis stated that Investia’s policies and procedures manual expressly prohibited excessive trading, which it defined as:

...any practice whereby a Representative recommends a trade or multiple trades in a client’s account where the trade(s) have little or no economic benefit for the client and where there is little or no rationale for the trade(s) other than the generation of commissions or other benefits for the Representative.

He also stated that Investia’s policies and procedures manual requires Approved Persons to submit a Client Transfer Disclosure Form where the transaction involves the transfer of mutual funds which are subject to deferred sales charges (“DSC”). He stated that with respect to two of the trades identified by Investia, the Respondent noted in the Client Transfer Disclosure Form

the reason for recommending the trade as “To compensate Representative”.

40. In addition, Mr. Davis stated that as part of its supervisory review of the Respondent’s trading activity, Investia attempted to identify the Respondent’s reasons for recommending some of the trades above and that the response provided by the Respondent with respect to the reason for one of the trades under review was:

To manage the clients over the long-term I need to earn income and because the client has a long-term time horizon DSC are justifiable. Keep in mind my clients compensate me, not Investia.

41. Mr. Davis gave evidence that in about June 2009, after Investia had notified the MFDA of a client complaint and its concerns with respect to the Respondent’s trading activity, MFDA Case Assessment Staff commenced a review of the Respondent’s conduct.

42. Mr. Davis stated that during the course of his investigation, Investia provided him with details of certain trades that the Respondent had submitted on behalf of clients and that based upon this information, he conducted a review, and prepared an analysis, of the Respondent’s trading activity during the period July 1, 2008 to July 14, 2009.

43. Mr. Davis testified that, during the course of his review and analysis of the Respondent’s trades, he identified patterns of transactions submitted by the Respondent which were consistent with excessive trading activity and, as such, required further investigation. The patterns of trading activity included:

(a) the redemption of a non-DSC mutual fund and repurchase of the same mutual fund on a DSC basis, thereby generating a sales commission on the transaction; and

(b) the movement of money between mutual funds in the same mutual fund family executed as a redemption and re-purchase rather than as a switch, thereby generating a 5 percent sales commission when the trade could have been done as a switch subject to, at most, a 2 percent switch fee if agreed to by the client.

44. Mr. Davis testified that his concerns as to the Respondent’s trading activities were not as

a result of submitted client complaints. He also testified that he was unable to determine whether the Respondent actually engaged in excessive trading because he did not get an opportunity to interview the Respondent.

### **Allegation #2: Failure to Cooperate**

45. In his Affidavit, Mr. Davis stated that he determined it was necessary to interview the Respondent so that he could investigate, among other things:

- (a) the allegations raised by TS and JM regarding the Respondent's failure to disclose margin call warning letters, and the Respondent's leveraging practices;
- (b) the allegations made in a complaint received by MFDA Staff in October 2009 regarding the Respondent's role in recommending a leveraging strategy to clients PV and DP; and
- (c) so he could identify and assess the Respondent's reasons, if any, for recommending and carrying out certain trades in clients' accounts in order to determine whether he engaged in excessive trading activity.

46. In his Affidavit, Mr. Davis gave evidence that he sent two letters to the Respondent by regular mail and by registered mail, and a third letter by process server.

- A letter dated July 13, 2010, advised the Respondent that the MFDA had commenced an investigation and was requesting his attendance at an interview with MFDA Staff to answer questions concerning complaints from clients TM, PV and DP about the Respondent's handling of the clients' files.
- The letter dated July 28, 2010, advised the Respondent that he was required to attend an interview with MFDA Staff pursuant to s. 22.1 of MFDA By-law No. 1, notwithstanding that he was no longer registered as a mutual fund salesperson. The letter requested that the Respondent contact MFDA Staff within 10 days to schedule an interview.

- The third letter, dated August 19, 2010, and delivered to the Respondent by process server, on August 24, 2010, again requested the Respondent's attendance at an interview with MFDA Staff. This letter expressly advised that the Respondent's failure to attend an interview would result in a disciplinary proceeding against him on the basis that he had failed to cooperate with an investigation by MFDA Staff.

47. In his Affidavit, Mr. Davis also gave evidence that the Respondent replied only to his first letter with a letter to Mr. Davis dated July 22, 2010, in which he wrote:

This letter is to inform you that I am not currently seeking registration with the MFDA or anyone affiliated with the MFDA, nor do I ever plan to seek registration with the MFDA or anyone affiliated with the MFDA going forward. Therefore, I am declining your request for an interview.

48. Lastly, in his Affidavit, Mr. Davis gave evidence that the Respondent did not, at any time, attend an interview with MFDA Staff and as a result of this non-attendance he was unable to determine the full nature and extent of the Respondent's conduct, including his activities involving clients TS and JM, and his trading and leveraging practices while he was registered as a mutual fund salesperson with Investia.

### **The Evidence of the Respondent – Michael Darrell Harvey**

#### **Allegation #1: Failure to Comply with Member's Directions**

49. The Respondent testified that he did not comply with the compliance directive as requested by Investia in its letter dated April 20, 2009, however, the Respondent testified that he did provide documentation to Investia to demonstrate that he had met with clients prior to receiving the compliance directive and that he performed extensive account reviews. The Respondent further testified that, as a result of these account reviews, he had already assembled much of the information and documentation that Investia was requesting. The Respondent testified that he believed once he educated Investia about his account review practices, it would no longer require that he comply with the compliance directive, as he believed he had already

done what was being asked.

50. The Respondent further testified that the disclosure he received from the MFDA includes an email exchange between himself and the Assistant Chief Compliance Officer (the “ACCO”) for Investia at the time, as well as hand-written notes, from June 2009. He submits this email exchange demonstrates he and Investia had begun the review. He testified the disclosure also confirms his offer to Investia, for Investia compliance staff to attend at his office and review his client files. Lastly, he testified that he was surprised when he received the July 14, 2009 letter of termination from Investia as he “believed I was waiting for a response from [the ACCO] regarding our conversation and the last email I sent to [the ACCO] on June 11, 2009”.

51. The Respondent testified that after he received the letter of termination, he offered to attend at Investia’s office in Toronto, to review the work he had done for his clients and on his clients’ files.

52. The Respondent admitted that he was aware of, and required to abide by section 5.2 of the Representative Agreement. He also admitted that his obligation to conduct regular reviews with clients to ascertain “continued suitability” of the client’s leveraged investments applied regardless of whether the client’s financial situation had changed over time. He testified:

I work hard for my clients and had just spent the previous seven months adjusting client portfolios and amending investment loans in response to the market crash. In addition, the compliance acknowledgement Mr. Davis pointed out that I signed in December 2008, to acknowledge receipt of Investia’s updated Policies and Procedure manual, also required New Account Application forms and Leverage Disclosure forms which I had been collecting over the four months prior to receiving this letter. It was a very stressful time for my clients, and I was genuinely concerned, with how this request would be perceived as clients were already questioning the need to sign a second leverage disclosure. I believed going to them for a third leverage disclosure in a matter of months, plus additional compliance to sign, would raise even more concerns to which I had no explanation. I did not understand why Investia was requesting this of me, given they had all of this on file already. I only learned afterwards that this additional

compliance became industry standard and I believe had Investia communicated this to me, I would have certainly complied, just as I complied with new requirements in the past.

53. The Respondent also testified that when Investia asked him to do a leverage review of his clients, in its letter of April 20, 2009, he had just done it and that was why he was questioning Investia about it in his response of May 1, 2009. He testified that he knew he had to do one each year and that he would do another one before the end of 2009, but not by August 30, 2009.

54. With respect to the issue of excessive trading the Respondent acknowledged that he was aware that it was prohibited by Investia and that engaging in this conduct was grounds for termination by Investia.

55. With regard to specific trades identified and questioned by Investia Regional Branch Manager, Zara Thilova, the Respondent testified that it was his understanding that the questioned transactions he processed for his clients were compliant per Investia's Policies and Procedures manual; the required DSC Disclosure form was signed and submitted with each transaction. He testified that no one explained to him, nor did he understand why the reasons provided on the disclosure forms and his responses to Investia's questions were unsatisfactory. He testified, "I believed I was being honest, and after all, for what other reason does an advisor use DSC but to be compensated? I felt like any other response would be untruthful."

56. The Respondent also testified that since Investia allowed DSC funds to be sold to clients, it implicitly permitted trades intended solely to generate compensation for Approved Persons.

57. The Respondent testified that he was aware of his obligations and duties contained in the Representative Agreement, and that he was required to abide by the Agreement and to comply "with any and all compliance, supervisory and operational procedures as dictated by the Dealer", and he testified that he thought his periodic (at least annual) review of his clients' portfolios and the other actions he took were consistent with his obligations as outlined in the Representative Agreement.

## **Allegation #2: Failure to Cooperate**

58. The Respondent testified that he did not attend an interview with MFDA Staff for several reasons. He testified that he read the first letter from Mr. Davis, MFDA Investigator, as “requesting” him to attend, which he interpreted as implying that he had a choice. He testified that he chose not to attend because he had been terminated by Investia for over a year at that time, and he realized that he could no longer work as a mutual fund representative. He testified that he felt he had been wronged.

59. The Respondent testified that a second reason he did not attend an interview with MFDA Staff was partially because he thought the MFDA was determined to find him in violation of “any rule or by-law”, and attending an interview would permit the MFDA to manipulate him and his words; and partially that he was, by the summer of 2010 unemployable in the industry.

60. The Respondent also testified that he believed that the MFDA’s own investigation would ultimately have shown that he had done his job with his clients; that he always worked hard and in the best interests of his clients, with the interests of his clients being a priority for him; and that he always aimed to follow compliance requirements and improve where he lacked in the past.

61. In addition, the Respondent testified that he believed that he had fully co-operated with both Investia, and then the MFDA, when asked to respond to the complaint filed by TS, with Investia in 2008 and the MFDA in 2009. He testified that Investia’s investigation found the he had not failed in his duties as TS’s adviser. He testified that he did not receive three of the margin warnings that TS was apparently told by AGF that it sent; that the investigation by the MFDA indicated that AGF told the MFDA that only two were sent, yet the MFDA, having the information it required on this issue, persisted in its correspondence to TS that the Respondent was being uncooperative.

62. The Respondent’s evidence and his testimony support that within days of receiving a letter from the MFDA Enforcement Department (dated September 8, 2009) regarding the complaint of TS, the Respondent responded by letter dated September 15, 2009, and provided the MFDA Enforcement Department with several documents regarding TS’s account including:

several emails to and from TS about the margin call; an email to Investia outlining action he had taken, with attached documents responding to the complaint, the status of TS's portfolio and financial summary, and a letter to AGF on behalf of TS.

63. The Respondent testified that he believed it was unnecessary for him to attend an interview because the investigation by MFDA Staff would show that he had done his job, and as he was not intending to re-register as a licensed mutual fund sales person his file with the MFDA would be closed. The Respondent added that he sincerely apologized to the MFDA if he offended the MFDA by declining to attend for an interview.

64. When asked by the Hearing Panel how MFDA Investigator, Mr. Davis could be expected to know that the Respondent had done his job, without the benefit of hearing his side of the story, the Respondent testified that any questions which MFDA Staff may have had for him were "already answered in the disclosure they provided". With regard to the trades, he testified it was his belief that if the MFDA Staff had reviewed in detail, the trades that were shown, the analysis would have shown that "virtually all of those trades resulted in better results" for his clients.

## **MISCONDUCT: THE LAW**

### **Applicable Rules and Provisions**

65. MFDA Counsel submits, and the Panel accepts, that the relevant rules and provisions with respect to misconduct are:

- (a) MFDA Rule 1.1.2 (Compliance by Approved Persons);
- (b) MFDA Rule 2.5.1 (Member Responsibilities - Policies and Procedures);
- (c) MFDA Rule 2.1.1 (Standard of Conduct); and
- (d) MFDA By-law No. 1, s. 22.1 (Investigatory Powers - Failure to Cooperate)

### **Regarding Allegation #1 – Failure to Comply with Member's Directions**

66. MFDA Rule 2.5.1, Member Responsibilities, states:

Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.

67. MFDA Counsel submits that in order to fulfill the obligations imposed by MFDA Rule 2.5.1, Members are required to establish, implement and maintain a supervisory structure appropriate to the manner in which the Member carries on business. This includes, among other things, supervisory procedures to monitor and review trading activity and other business conducted by Approved Persons involving the Member's clients to ensure that Approved Persons comply with the Member's policies and procedures, and all applicable MFDA requirements, and securities legislation.

68. MFDA Counsel also submits that where a Member becomes aware, during the course of its own supervisory reviews, through the receipt of client complaints or by some other means, that an Approved Person may have engaged in conduct which contravenes the Member's policies and procedures or regulatory requirements, the Member has a regulatory obligation to conduct a reasonable supervisory investigation of the activities and take appropriate action (if necessary) to address the conduct.

69. Further, MFDA Counsel submits that to ensure that a Member is able to fulfill its supervisory responsibilities, Approved Persons have corresponding obligations, under MFDA Rules 1.1.2 and 2.1.1, to adhere to the Member's policies and procedures, and to cooperate with all supervisory activities undertaken by the Member. In this regard, MFDA Rule 1.1.2, Compliance by Approved Persons, states that:

Each Approved Person who conducts or participates in any securities related business in respect of a Member ... shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.

70. MFDA Counsel submits that this Rule provides that any obligation owed by a Member under the Rules or By-law is also an obligation owed by an Approved Person to the extent the Approved Person is involved in, or required for, the discharge of the Member's obligation. By aligning the regulatory duties of Members and Approved Persons, MFDA Rule 1.1.2 requires

Approved Persons to conduct themselves in a manner consistent with the Member's supervisory structures.

71. MFDA Counsel submits that MFDA Rule 2.1.1, Standard of Conduct, is a rule of general application which prescribes the standard of conduct applicable to Members and Approved Persons. It states, in part, that each Member and Approved Person shall:

...

- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and...

72. MFDA Counsel also submits that MFDA Rule 2.1.1 is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of conduct. The standard of conduct includes the obligation of an Approved Person to comply with the policies and procedures of their Member and cooperate with the supervisory activities undertaken by the Member.

*Arnold Tonnies (Re)*, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 2000503, Panel Decision dated June 27, 2005 ("*Tonnies (Re)*"), pages 16-19.

73. MFDA Counsel submits Investia issued a clear and unambiguous compliance directive to the Respondent, which required the Respondent to conduct a review of leveraged accounts that he serviced in order to determine whether the leveraging that he had recommended to clients was suitable. MFDA Counsel submits Investia took this step after it became aware of complaints from clients who had been unable to maintain the margin requirements applicable to their leveraged accounts.

74. The MFDA submits that contrary to the clear requirements of the Representative Agreement and Investia's policies and procedures manual, the Respondent failed to comply with the compliance directive issued by Investia in its letter dated April 20, 2009, and that this refusal impeded Investia's ability to fulfill its regulatory obligations owed pursuant to MFDA Rule 2.5.1 to ensure that its business is handled in accordance with the By-laws, Rules and Policies of the MFDA and with other applicable securities legislation. The MFDA submits that it was also a breach of the Respondent's corresponding obligations under MFDA Rules 1.1.2 and 2.1.1.

75. The MFDA submits that other MFDA Hearing Panels have similarly held that an Approved Person's failure to comply with a Member's compliance directive, or its policies and procedures, is conduct which is contrary to MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

*David Irwin (Re)*, [2009] Hearing Panel of the Central Regional Council, MFDA File No. 200915, Panel Decision dated April 28, 2010 ("*Irwin (Re)*").

*Michael Johns (Re)*, [2009] Hearing Panel of the Central Regional Council, MFDA File No. 200905, Panel Decision dated June II, 2010 ("*Johns (Re)*").

*Vilfort (Re)*, [2010] Hearing Panel of the Central Regional Council, MFDA File No. 201021, Panel Decision dated December 15, 2010 ("*Vilfort (Re)*").

*Tonnies (Re)*.

76. The MFDA submits that none of the reasons offered up by the Respondent to explain why he did not perform the leverage review requested by Investia relieved the Respondent of his obligation to comply with Investia's compliance directive. The Respondent was obligated to perform the review requested by Investia by virtue of the regulatory requirements imposed by MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

77. The MFDA submits that, in any event, there is no evidence that the Respondent attempted to have a "discussion" with Investia about its leveraging review request after he received Investia's letter dated April 20, 2009. Instead, the Respondent sent a strongly worded letter to Investia on May 1, 2009 making it clear that he would not comply with its request and he considered the matter "closed". The Respondent did not adduce any evidence that he retracted the position he took in his letter dated May 1, 2009, he did not provide any documentary evidence to demonstrate the scope of the account reviews that he allegedly performed, nor did he produce any evidence that he asked Investia to waive, or otherwise delay, its requirement that he complete the review of leverage accounts.

## **Allegation #2 - Failure to Cooperate**

78. The MFDA submits that pursuant to s. 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations into the conduct, business or affairs of an Approved

Person as it considers necessary or desirable in connection with any matter relating to compliance by the Approved Person with:

- (a) the By-laws, Rules or Policies of the MFDA;
- (b) any securities legislation applicable to such person; or
- (c) the by-laws rules, regulations and policies of any self-regulatory organization.

79. The MFDA submits there is a corresponding obligation on Approved Persons to cooperate with MFDA examinations and investigations in s. 22.1 of MFDA By-law No. 1, which states:

For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

- a) to submit a report in writing with regard to any matter involved in such investigation;
- b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated;
- c) to attend and give information respecting any such matters;

and the Member or person shall be obliged to submit such report, to permit inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation...

*Parkinson (Re)*, [2005] MFDA Ontario Regional Council, File No 200501, Hearing Panel Decision dated April 29, 2005 ("*Parkinson (Re)*").

*Stephan Headley (Re)*, [2006] MFDA Ontario Regional Council, File No. 200509, Hearing Panel Decision dated February 21, 2006 ("*Headley (Re)*").

80. MFDA Staff submits there are no exceptions to the obligation of an Approved Person under s. 1 of MFDA By-law No. 1. An Approved Person must attend an interview and provide evidence in respect of matters under investigation by MFDA Staff. This obligation applies regardless of Approved Person's views with respect to the merits of the matters under investigation or the Approved Person's belief that it is not in their own self-interest to attend an interview.

81. MFDA Counsel submits that in *Artinian v. College of Physicians and Surgeons of Ontario*, the Ontario Divisional Court underscored the importance and necessity of members cooperating with their self-regulating bodies:

Fundamentally, every professional has an obligation to co-operate with his self-governing body.

*Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct.).

*Parkinson (Re)*.

### **Findings of Misconduct**

82. MFDA Staff submits that it has proven, on a balance of probabilities, the Allegations contained in the Notice of Hearing. MFDA Staff, therefore, requests that the Hearing Panel make the following findings of misconduct:

- (a) commencing in May 2009, the Respondent intentionally failed to comply with the Member's directions to take such steps as the Member thought were necessary and reasonable to supervise leveraged accounts serviced by the Respondent, contrary to MFDA Rules 1.1.2 and 2.5.1 and MFDA Rule 2.1.1; and
- (b) commencing in July 2010, the Respondent failed to attend for an interview during the course of an investigation by the MFDA, contrary to s. 22.1 of MFDA By-law No. 1.

### **PENALTY: THE LAW**

#### **Applicable Rules and Provisions**

83. The relevant rules and provisions with respect to penalty are contained in s. 24.1.1 of MFDA By-law No. 1.

#### **Proposed Penalty and MFDA Submissions**

84. Should the Hearing Panel conclude that the Respondent engaged in the misconduct alleged in the Notice of Hearing, MFDA Staff submits that the appropriate penalty to impose on the Respondent is:

(a) with regards to the failure to comply with the Member's directive (Allegation #1):

- (i) a two year prohibition on the authority of the Respondent to conduct securities related business in any capacity over which the MFDA has jurisdiction, pursuant to s. 24.1.1(e) of MFDA By-law No. 1<sup>3</sup>; and
- (ii) a fine in the amount of \$25,000, pursuant to s. 24.1.1 (b) of MFDA By-law No. 1;

(b) with regards to the failure to cooperate (Allegation #2):

- (i) a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity over which the MFDA has jurisdiction, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- (ii) a fine in the amount of \$50,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

(c) costs of \$10,000, pursuant to s. 24.2 of MFDA By-law No. 1.

### **Factors Concerning the Appropriateness of the Penalty**

85. It is accepted that the primary goal of securities regulation is the protection of the investor.

*Pezim v. British Columbia (Superintendent of Broker)*, [1994] 2 S.C.R. 557 (S.C.C.) at paras. 59, 68.

---

<sup>3</sup> The term of the two-year prohibition imposed with respect to Allegation #1 is intended to be concurrent with the term of the permanent prohibition imposed with respect to Allegation #2.

86. Hearing Panels frequently consider the following factors 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.

*Stephan Headley (Re)*, [2006] MFDA Ontario Regional Council, File No. 200509, Hearing Panel Decision dated February 21, 2006 ("*Headley (Re)*").

87. An additional source of factors to be taken into account is the MFDA Penalty Guidelines. The Penalty Guidelines are not mandatory but are intended to assist Hearing Panels, MFDA Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings.

*Extract from the MFDA Penalty Guidelines*

88. The Penalty Guidelines recommend the following:

- (a) Failure to comply with the Member's policies and procedures: minimum fine of \$5,000; write or re-write an appropriate industry course; suspension; permanent prohibition in egregious cases; and
- (b) Failure to cooperate: minimum fine of \$50,000; permanent prohibition.

## **Considerations in the Present Case**

89. MFDA Staff have taken the factors set out above into account in arriving at the proposed penalty, as follows:

### **(a) Nature of the Misconduct**

90. The Respondent's misconduct was serious, deliberate, and demonstrated a pattern of disregard for his obligations as a registrant in the mutual fund industry.

91. First, the Respondent made a decision not to comply with a clear and unambiguous compliance directive issued by Investia. This behaviour hindered Investia's ability to determine whether investment loans recommended by the Respondent were suitable for clients, and impeded Investia from discharging its regulatory duty to ensure that its business is handled in accordance with the By-laws, Rules and Policies of the MFDA and with other applicable securities legislation.

92. Second, the Respondent chose not to attend an interview with MFDA Staff, which prevented MFDA Staff from determining the full nature and extent of his activities, including possible wrongdoing with respect to the handling of client accounts. Failure to cooperate with a regulator is among the most serious forms of misconduct. It is behaviour which is fundamentally inconsistent with the duties owed by registrants in a self-regulatory regime, and it interferes with the ability of the MFDA to fulfill its regulatory duty to ensure that registrants abide by all relevant regulatory requirements.

### **(b) Client Harm**

93. Client TS alleged, in his complaint, that the Respondent's conduct caused him to incur an investment loss of \$46,800.

94. Client JM alleged, in his complaint, that the Respondent's conduct caused him to lose his

entire investment which he quantified as \$45,000. Mr. Davis testified that client JM's actual loss may have been greater than \$45,000 as he appeared to have invested \$75,000.

95. By failing to attend an interview with MFDA Staff, the Respondent prevented MFDA Staff from determining the merits of these complaints. The Respondent's failure to cooperate also prevented MFDA Staff determining whether other clients suffered harm as a result of the Respondent's activities.

**(c) Benefits Received by the Respondent**

96. It is not known whether, or to what extent, the Respondent received benefits as a result of his activities. Again, MFDA Staff could not make this determination because the Respondent failed to attend an interview with MFDA Staff.

97. If the Respondent did, in fact, engage in excessive trading, he may have improperly earned sales commissions in respect of this activity.

**(d) Risk to Investors**

98. The Respondent refused to comply with requests made by his Member and the MFDA, both of which were intended to ensure that the Respondent was fulfilling his obligations as a registrant. By his misconduct, the Respondent has demonstrated that he would pose a risk to investors and the capital markets were he to continue to operate in the capital markets. The proposed penalty, which includes a permanent prohibition, will eliminate this risk to the extent permitted under the MFDA's jurisdiction.

**(e) The Respondent's Past Conduct including Prior Sanctions**

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

**(f) The Respondent's Recognition of the Seriousness of his Misconduct**

100. The Respondent made comments, during the Hearing on the Merits, which suggests that

he now recognizes the seriousness of his misconduct and feels remorse for his behaviour.

101. For instance, the statement which the Respondent read during his direct examination begins with the following passage:

In preparation for this day, I considered a number of different approaches to defend myself. In the end, I realized that I have been wrong about things in the past, but I believe I have always worked hard and in the best interest of my clients. Of utmost importance to me now is ensuring I communicate this with you, as well provide (*sic*) you with insight to my thinking about the circumstances which have lead to us all being here today.

102. The Respondent further stated that he regretted the comments that he made to Investia in his letter dated May 1, 2009, in which he refused to comply with its request that he perform of review of the leveraged accounts that he was servicing. He acknowledged that these comments presented him as “non-compliant and uncooperative”.

103. The Respondent also apologized for his failure to attend an interview with MFDA Staff.

**(g) Deterrence**

104. A permanent prohibition on the authority of an Approved Person to conduct securities related business with an MFDA Member is a serious penalty, which will deter others in the capital markets from engaging in similar activity.

105. In addition, fines totaling \$75,000 against an Approved Person are significant and could not reasonably be viewed as a license fee or cost of doing business.

**(h) Penalty Guidelines**

106. A permanent prohibition and fines in the range proposed are consistent with the penalties described in the Penalty Guidelines.

**(i) Previous Decisions Made in Similar Circumstances**

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

*Irwin (Re)*

*Johns (Re)*

*Vilfort (Re)*

*Tonnies (Re)*

108. As described above, in *Irwin (Re)*, the Approved Person failed to comply with a compliance directive issued by the Member which required its Approved Persons to refrain from selling limited partnerships, or entering into referral arrangements with third parties, unless the Member had approved of the activity and it was conducted through the facilities of the Member. Pursuant to the terms of a Settlement Agreement, the Hearing Panel imposed a 5-year prohibition on the Approved Person's authority to conduct securities related business, a fine of \$40,000 and costs of \$1,000.

*Irwin (Re)*

109. In *Johns (Re)*, the Approved Person failed to comply with the Member's policies and procedures which prevented its Approved Persons from selling products which had not been approved by the Member, or entering into referral arrangements with third parties without the knowledge or approval of the Member. The Hearing Panel imposed, in accordance with the terms of a Settlement Agreement, a 6-year prohibition on the Approved Person's authority to conduct securities related business, a fine of \$50,000 and costs of \$1,000.

*Johns (Re)*

110. In almost all cases involving an Approved Person who failed to attend an interview with MFDA Staff, MFDA Hearing Panel's have imposed a permanent prohibition and a fine of at least \$50,000.

*Tonnies (Re)*

*Parkinson (Re)*

*Headley (Re)*

*Kevin Desbois (Re)*, [2009] MFDA Central Regional Council, File No. 200822, Hearing Panel Decision dated March 16, 2009.

*Robert Brick (Re)*, [2007] MFDA Central Regional Council, File No. 200705, Hearing Panel Decision dated October 29, 2007.

*Kent Owen Westguard (Re)*, (2009) MFDA Prairie Regional Council, File No. 200937, Hearing Panel Decision dated July 15, 2010.

#### **(j) Penalties in this Case**

111. The penalties proposed by MFDA Counsel in this case include: (1) a two year prohibition and fine of \$25,000 with regards to the failure to comply with the Member's directive; (2) a permanent prohibition and fine of \$50,000 with regards to the failure to cooperate; and (3) costs of \$10,000.

112. MFDA Counsel submits that having regard to all of the foregoing considerations, the proposed penalties are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case.

#### **ANALYSIS AND FINDINGS**

113. The Notice of Hearing sets out the Allegations against the Respondent and the Particulars, or summary of facts alleged and intended to be relied upon by the MFDA at the hearing.

114. The Panel notes that the events described in the client complaints, the concerns identified with respect to excessive trading, and the Respondent's position with respect to the merits of the client complaints or the concerns identified with respect to excessive trading are not relevant to this proceeding, as they are not the subject of the specified allegations of misconduct against the Respondent.

115. The Panel accepts and finds that the MFDA Rules, identified by MFDA Counsel, are the applicable MFDA Rules to apply in this matter.

116. The Panel is satisfied that Allegation #1 was proved although the Panel is not persuaded,

after hearing the evidence of both the MFDA and the Respondent that the Respondent “intentionally” failed to comply with the Member’s (Investia’s) directions regarding leveraged accounts, as articulated in the Allegation. The Respondent was given until August 31, 2009, to comply with the request of Investia; however, because he was terminated on July 14, 2009, he was not able to comply with the request.

117. The Respondent provided evidence that he was willing to discuss the leverage review request with Investia after he received Investia’s letter dated April 20, 2009, notwithstanding he sent a strongly worded letter to Investia on May 1, 2009, that he would not comply with its request and he considered the matter “closed”. The Respondent’s subsequent actions and the evidence support that he retracted the position in his letter and did provide information to the Assistance Chief Compliance Officer. The Respondent testified that he had recently completed reviews of clients’ accounts (prior to receiving the compliance directive from Investia) and had already assembled much of the information and documentation that Investia was requesting.

118. The Panel finds that the Respondent was partially in compliance with the April 20, 2009, Direction, however, the Panel also finds that his letter, and subsequent communications between himself and Investia – until after his termination, fell short of the expected standards of an Approved Person under MFDA By-laws.

119. The Panel makes this finding because the Respondent acknowledged that he knew he was obliged to comply with any and all compliance, supervisory and operational procedures as required by Investia. The Respondent could have been more responsive and proactive in ensuring that Investia was aware that he would comply by August 30 or that he required more time to comply completely.

120. The Respondent gave evidence that Investia itself was under review by the MFDA, and it was that review, not the client complaints, as alleged by the MFDA Staff, which gave rise to the letter (the “Compliance Letter”) Investia wrote to him dated April 20, 2009. The complaint of client TS, to Investia, had already been investigated by Investia and found to be without merit for further action. The Panel accepts this evidence and finds however, that the catalyst, or reason, for the Compliance Letter is not relevant to the Allegation of failure to comply because, as MFDA Counsel submits, Investia’s policies and procedures specifically required the Respondent (and

other Investia Approved Persons) to “conduct regular reviews with their clients that include the leveraged investment status, position of the loan and the clients’ financial and personal circumstances to ascertain continued suitability [of the leveraged investments]” and to comply with its directive as a Member of the MFDA, in this case to conduct the review of leveraged accounts requested in its letter dated April 20, 2009. The Panel notes that in December 2008, the Respondent signed a Compliance Acknowledge form in which he confirmed that he had received Investia’s policies and procedures manual and would abide by its terms.

121. Notwithstanding that the Respondent appeared to cooperate fully with the MFDA Enforcement Department in the summer and fall of 2009, when it began its investigation into the complaint filed by TS against the Respondent, Investia, AGF and the MFDA, the Respondent nonetheless refused to attend for an interview with the MFDA. The Respondent’s reasons for not attending are not of the nature or kind that could absolve him of his responsibility, as an Approved Person, to comply with his regulator.

122. The Panel finds the MFDA has established that the Respondent failed to attend an interview, notwithstanding repeated requests made by MFDA Staff, and thus Allegation #2 is proved.

123. The Panel does not accept that the several reasons advanced by the Respondent as to why he did not attend an interview with MFDA Staff, justify or otherwise excuse the Respondent’s failure to attend an interview.

124. The Panel finds that the evidence demonstrates that the Respondent’s attendance at an interview was necessary to allow Mr. Davis to determine the full nature and extent of the Respondent’s conduct, including:

- (a) the allegations raised by client TS and client JM regarding the Respondent’s failure to disclose margin call warning letters;
- (b) the Respondent’s leveraging practices and the suitability of the Respondent’s investment recommendations;
- (c) the Respondent’s alleged failure to comply with a compliance directive by his Member;

- (d) excessive trading in clients accounts; and
- (e) the allegations made clients PV and DP.

125. The Panel finds that by failing to attend an interview with MFDA Staff, the Respondent effectively halted the investigation and impeded MFDA Staff's ability to fulfill its regulatory duties. That the Respondent attended the Hearing, in person, on both days is commendable. However, it is not a substitute for attending for an interview as he was required to do under the By-laws and Rules of the MFDA.

126. The Panel considered the decisions submitted by MFDA Counsel and finds each is distinguishable on its facts. However, at the end of the day, the Respondent refused to attend for an interview when he was required to under:

- (a) the MFDA Rules;
- (b) MFDA By-law No. 1;
- (c) the Investia Compliance Acknowledgement – 2008; and
- (d) the Representative Agreement he signed with Investia.

127. The Panel has considered all of the evidence and all of the factors that Hearing Panels frequently consider when determining whether a proposed penalty is appropriate. With respect to Allegation #1 – failure to comply with the Member's directive, the Panel agrees with the MFDA proposed two-year prohibition, but has reduced the fine to \$10,000.

128. With respect to Allegation #2 – failure to cooperate, the Panel has again considered all of the evidence and the factors and agrees with the MFDA's proposed permanent prohibition, and a fine of \$50,000, being the minimum fine under the Penalty Guidelines. The granting of a permanent prohibition is consistent with and reflective of the seriousness with which a Hearing Panel regards a failure to cooperate.

129. In addition, costs of \$10,000 as requested by the MFDA are granted. The Panel notes that the actual costs incurred by the MFDA are much higher.

130. The Panel also notes that the Respondent came from his office in Sudbury, to Toronto, on

two separate occasions to attend the Hearing in person.

**DATED** this 12<sup>th</sup> day of July 2012.

“Kathleen J. Kelly”

Kathleen J. Kelly,  
Chair

“Simon Destrepes”

Simon Destrepes,  
Industry Representative

“Glenda Towle”

Glenda Towle,  
Industry Representative

Doc 303066