



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: Graham Charles Hoard

Heard: December 3, 2010, Calgary, Alberta
Decision and Reasons: February 23, 2011

DECISION AND REASONS

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.
Richard Sydenham
Kathleen Jost

Chair
Industry Representative
Industry Representative

Appearances:

Maria Abate) For the Mutual Fund Dealers Association of Canada
)
)

Graham Charles Hoard) In Person
)

Present:

Harold Eric Wenzel Investigator with the Mutual Fund Dealers Association
of Canada

INTRODUCTORY

1. An interview of Graham Hoard (“the Respondent”) was conducted on November 1, 2007, by Mr. Margolles and Ms. Howse, Investigators with the Mutual Fund Dealers Association (“MFDA”). It was recorded and a transcript provided to the Panel prior to the Hearing.

2. On June 4, 2010, the MFDA issued a Notice of Hearing pursuant to Sections 20 and 24 of the MFDA By-Law No. 1 in respect of a disciplinary proceeding commenced against the Respondent. The Notice of Hearing was personally served on the Respondent together with (1) a letter dated June 10, 2010, (2) the MFDA’s Rules of Procedure and (3) the MFDA’s Guide to the Disciplinary Hearing Process.

3. The first appearance in this proceeding took place by teleconference before the Hearing Panel on July 26, 2010, as set out in the Notice of Hearing. The Respondent did not participate in the first appearance. It was ordered by the Panel that the Hearing of this matter on its merits be scheduled for 10:00 a.m. (Mountain) on December 3, 2010, in Calgary, at a location to be announced. The Respondent was subsequently served by registered mail with advice of the date and venue for the Hearing and he was provided with the Affidavit of Harold Eric Wenzel, MFDA Investigator (referenced below) and the “Submissions of Staff of the MFDA”. The Respondent had been requested to advise the MFDA whether he intended to attend the Hearing. No advice was received. Shortly after the commencement of the Hearing on December 3, 2010, the Respondent attended, unrepresented.

THE ALLEGATIONS (NOTICE OF HEARING):

4. By Notice of Hearing dated June 4, 2010 (Exhibit 1) the MFDA alleged the following violations by the Respondent of the By-Laws, Rules or Policies of the MFDA:

Allegation #1: Between April 2002 and February 2007, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling, recommending or facilitating the sale of approximately \$843,500 of shares of an investment product in which he had a direct or indirect interest to 39 investors, contrary to:

- a) MFDA Rule 1.1.1 and 2.1.1.

- b) *(This subsection was subsequently withdrawn)*

Allegation #2: Between April 2002 and February 2007, the Respondent had and continued in another gainful occupation in respect of which he did not make disclosure to or obtain approval from the Member by owning, operating or participating in a limited partnership which distributed approximately \$843,500 of shares of 39 investors, contrary to MFDA Rule 1.2.1(d) and 2.1.1.

Allegation #3: Between April 2002 and February 2007, the Respondent had and continued in other gainful occupations in respect of which he did not make disclosure to or obtain approval from the Member, contrary to MFDA Rule 1.2.1(d), by:

- a) operating a blind trust on behalf of client DW; and
- b) operating a business which provided, among other things, financial and tax services to clients and other individuals.

Allegation #4: Between April 2002 and February 2007, the Respondent, through his personal corporation, borrowed \$10,000 from a client to invest in his personal business venture, thereby placing his own interests above those of his client and giving rise to an actual or potential conflict of interest which he failed to address through the exercise of responsible business judgment, contrary to MFDA Rules 2.1.4 and 2.1.1.

5. The Respondent did not file a Reply to the Notice of Hearing, nor did he participate in the first appearance, by teleconference, on July 26, 2010.

FAILURE TO REPLY

6. We have referenced, in the “Introductory” section above, the steps taken by the MFDA and the extent of participation by the Respondent in these proceedings. We are satisfied, from affidavits presented to this Panel, that all steps required to be taken were taken by the MFDA and that the Respondent was served with all necessary documents (including the Submissions of Staff of the MFDA and the MFDA Book of Authorities).

7. The Rules of Procedure of the MFDA, updated July 16, 2010, provide:

RULE 8: REPLY TO NOTICE OF HEARING

8.1 Requirement to Reply

- (1) A Respondent shall serve on every other party and file a Reply within 20 days of the effective date of service of the Notice of Hearing.

8.4 *Effect of Failure to Deliver a Proper Reply*

- (1) Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:
 - (a) proceed with the hearing without further notice to and in the absence of the Respondent;
 - (b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1;
 - (c) order that the Respondent pay costs, at any stage of the proceeding, regardless of the outcome of the proceeding and in addition to any other penalties and costs imposed on the respondent, in an amount which reflects the extent to which, in the Hearing Panel's discretion, the hearing will be or has been unnecessarily prolonged or complicated by the failure of the Respondent to deliver a proper Reply;
 - (d) prohibit, restrict, or place terms on the right of the Respondent to call witnesses or present evidence at the hearing

8. Although the Respondent did not file a Reply, he had participated in an extensive interview by the MFDA on November 1, 2007 and did attend this Disciplinary Hearing shortly after it convened, albeit without notice. We confirmed that the Respondent had no concern about the Hearing proceeding and we advised the Respondent that he would be permitted to make some limited response to the allegations. Although the Respondent, in the course of the Hearing, made more submissions (see below under "Evidence") than his initial remarks suggested, he admitted he was "guilty". At the end of her submissions on the allegations (below), Counsel for the MFDA, Ms. Abate, quite properly pointed out that the Respondent had numerous opportunities to participate in the proceedings, failed to file a Reply, advised ten minutes before the First Appearance that he would not be appearing and, despite communications from the MFDA seeking advice on whether he intended to attend the Hearing, provided no response but now had shown up at the Hearing. She suggested that some of the Respondent's submissions, in

the nature of “defences” seemed, in the circumstances, disingenuous.

9. The unanticipated attendance of the Respondent, after failing to file a Reply, creates difficulties for the MFDA and the Panel. Under Rule 8.4(1)(d) the “may prohibit, restrict or place terms on the right of the Respondent to call witnesses or present evidence at the hearing”. The Panel asked the Respondent whether he intended to present evidence. He responded that he had given up his Mutual Fund license, he is “guilty” and did not intend to defend himself, and had suffered a heart attack and did not expect to live long. The Panel expressed sympathy for his medical condition and advised that as submissions were made by the MFDA Counsel, the Respondent would, in the interests of fairness, be permitted to make limited submissions. As the Hearing proceeded, the Respondent made more submissions than his initial position would have indicated, and on some points, was virtually denying his “guilt”. As a result, in the interests of natural justice, but with reluctance to allow too much latitude to a Respondent who had not seen fit to file a Reply, we considered ourselves obliged to assess whether the Respondent may be a victim of his own lack of involvement (for medical reasons or otherwise) and potentially be facing an unjust result. Accordingly, we have incorporated in the sections which follow, the pertinent submissions of the Respondent, and have made observations regarding those submissions in our Decision. As a cautionary note we add that it is not our intention to suggest, in adopting this course of action in this case, that panels should open the flood gates to respondents who have not seen fit to file a Reply. Each case will have to be assessed on its own circumstances in determining the latitude afforded to a respondent to “call witnesses or present evidence at the hearing” (Rule 8.4(1)(d), above).

NATURE OF THE EVIDENCE AND APPLICABLE RULES

10. The evidence submitted by the MFDA was entirely by Affidavit of Harold Eric Wenzel, an Investigator with the Enforcement Department of the Prairie Regional Office of the MFDA. The extensive Affidavit of Mr. Wenzel, with many exhibits, was entered in evidence (Exhibit 4). The Affidavit was sworn in support of the disciplinary proceedings being conducted against the Respondent. In his Affidavit Mr. Wenzel traces the registration history of the Respondent and the evidence supporting the allegations against the Respondent including acknowledgments by the Respondent in a letter he wrote to the Member and in the interview of the Respondent

conducted on November 1, 2007 by MFDA's Staff.

11. The MFDA Rules of Procedure include:

1.6 Admissibility of Evidence

- (1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.

13.4 Evidence by Sworn Statement

- (1) The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

12. We are satisfied that the Affidavit of Mr. Wenzel constitutes admissible evidence, and we advised Counsel for the MFDA, that it was not necessary to call Mr. Wenzel as a witness.

THE EVIDENCE¹

Registration History

13. The Respondent was registered as a mutual fund salesperson ("Approved Person" or "AP") with Portfolio Strategies Corporation ("PSC" or the "Member") in Alberta from April 23, 2002 until his termination on February 8, 2007 as a result of the events described in the Notice of Hearing. The Respondent is not currently registered in the securities industry in any capacity.

14. In addition to his registration as an AP, the Respondent is the President, sole director and sole shareholder of 919035 Alberta Ltd., a company incorporated on February 8, 2001 and operating under the trade name "Planned Solutions". Planned Solutions provides tax advisory and management/administrative services.

¹ The Hearing Panel has set out, in this section of its Decision, the evidence as presented in the "Submissions of Staff of the MFDA", and the evidence contained in the Affidavit of Harold Eric Wenzel (Exhibit 4)

Securities Related Business Outside the Member/Outside Business Activities

15. On May 8, 2002, the Respondent signed an agency agreement with PSC requiring him to be aware of and abide by all securities legislation in the jurisdiction in which he operates, the rules of any Self Regulatory Organizations of which the Member is or may become part of and the policies and procedures of PSC. The agreement further requires that the Respondent not engage in any other business or employment without the permission of PSC.

16. By letter dated May 1, 2003, the respondent's Branch Manager KA sent him written confirmation that APs are not permitted to sell investment products that have not been approved for sale by PSC. The letter directed the Respondent to contact PSC's President if he wanted to discuss obtaining approval to offer new investment products to clients.

1141423 Alberta Ltd. (Optimum IV Limited Partner)

17. On December 7, 2004, the Respondent incorporated 1141423 Alberta Ltd. ("ShareCo"). At all material times, the Respondent was the sole director and controlling mind of ShareCo. The Respondent established ShareCo to allow individual investors to participate in the purchase of limited partnership units of the Optimum IV Q4 Limited Partnership ("Optimum IV"). ShareCo is a limited partner in Optimum IV.

18. In mid-October to mid-November 2004, prior to the incorporation of ShareCo, the Respondent began preparing for the sale of Optimum IV shares by determining that an incorporated company would be needed to facilitate sales, determining the distribution of the fees generated by sales, including a fee of 2% paid to Planned Solutions, and providing instruction on the marketing of the shares to salespersons.

19. Optimum IV is described in its Offering Memorandum ("OM") as an investment designed to provide investors with the opportunity to own an interest in a portfolio of joint venture oil and gas wells in Western Canada. According to the OM, the limited partnership units of Optimum IV were sold at a minimum offering of \$500,000 each.

20. Shares in the Optimum IV limited partnership were offered and sold to investors in both December 2004 and December 2005 through ShareCo. Planned Solutions would complete the marketing and administrative tasks associated with the purchase of the shares as well as issue tax slips for the flow-through shares to each investor.

21. In December 2004, the Respondent sold, recommended and/or facilitated the sale of flow-through shares through ShareCo to 26 investors, including PSC clients. The issuance of these shares was approved by a Directors Resolution dated December 31, 2004 signed by the Respondent.

22. In December 2005, the Respondent sold, recommended and/or facilitated the sale of additional flow-through shares through ShareCo to 13 investors, including PSC clients. The issuance of these shares was approved by a Directors Resolution dated December 31, 2005 signed by the Respondent.

23. In an interview with Staff, the Respondent confirmed that some of the investors into the Optimum IV were PSC clients.

24. By letter dated November 21, 2007, the Respondent confirmed that share sales in Optimum IV, through ShareCo were \$573,500 in December 2004 and \$270,000 in December 2005 for total sales of \$843,500.

25. ShareCo and Optimum IV were not investment products known to or approved by PSC for sale by its APs, including the Respondent. The Respondent did not disclose to PSC that he was selling, recommending or facilitating the sale of ShareCo shares or, indirectly, units of Optimum IV to clients and other individuals.

26. On December 21, 2006, PSC conducted a Branch audit and determined that the Respondent was participating in the sale of unapproved off book transactions and undisclosed outside businesses. [*Panel's note: the Branch audit included: "Mr. Hoard is facilitating an end run around the rules. Conduct unbecoming...:"*]

27. By letter dated August 22, 2007, the Respondent acknowledged being advised that he was not permitted to sell flow-through shares except those approved by PSC.

28. In an interview with Staff conducted on November 1, 2007, the Respondent further confirmed that he was aware that he could not sell or participate in the unapproved sale of flow-through shares while an AP with PSC and that he did not seek approval for his activities until January 10, 2007.

1136251 Alberta Ltd. (“Blind Trust”)

29. On November 4, 2004, the Respondent incorporated 1136251 Alberta Ltd. (“TrustCo”). At all material times, the Respondent was the sole director and shareholder of TrustCo. The Respondent incorporated TrustCo to serve as a “blind trust” for PSC client DW.

30. In an interview with Staff conducted on November 1, 2007, the Respondent admitted to incorporating and operating a blind trust, on behalf of PSC client DW. The Respondent stated that the purpose of the blind trust was to provide loans to farmers who were unable to obtain traditional financing as a result of mad cow disease and that the trust had issued approximately 5 loans. The Respondent did not disclose or obtain approval from the Member with respect to his involvement or interest in TrustCo. *[Panel’s note: In the November 1, 2007 interview at pp. 95, 96 the Respondent advised that life insurance policies were purchased through his company (via the trade name “Partners in Planning”; he presumably meant “Planned Solutions” because there is no reference anywhere to “Partners in Planning”) and loans were then taken out against the cash value of the life insurance policies.]*

Personal Financial Dealings with client DW

31. In an interview with Staff conducted on November 1, 2007, the Respondent also admitted to receiving a personal loan in the amount of \$10,000 from TrustCo in or about February 2006. The loan proceeds were received by Planned Solutions. The Respondent stated that he repaid the loan in early 2007. The personal loan between the Respondent and DW was not disclosed to PSC.

SUBMISSIONS OF THE ASSOCIATION ON THE ALLEGATIONS

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

Allegation #1: Securities Related Business Outside the Member (Optimum IV)

33. The Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling recommending or facilitating the sale of limited partnership units of the Optimum IV Q4 Limited Partnership ("Optimum IV") to PSC clients and other individuals, through a numbered company, 1141423 Alberta Ltd., of which he was the sole director and controlling mind.

34. Shares in the Optimum IV limited partnership were offered and sold to 26 investors in December 2004 and 13 investors in December 2005. All sales in the Optimum IV were conducted through 114123 Alberta Ltd. The December 2004 share sales were \$573,500 and the December 2005 share sales were \$270,000 for combined total sales of \$843,500. Staff has also presented evidence that the Respondent's involvement in the sale of Optimum IV included determining the distribution of fees generated by sales and coaching salespersons on how to market the product for sale.

35. The Respondent confirmed that some of the investors in Optimum IV were PSC clients and that neither the shares being sold nor Optimum IV were investment products known to or approved for sale by PSC by its Approved Persons.

36. MFDA Rule 1.1.1(a) prohibits an Approved Person from engaging in securities related business in any form that is not carried on for the account of the Member, through the facilities of the Member, and in accordance with MFDA By-laws and Rules. Rule 1.1.1(a) provides:

1.1 BUSINESS STRUCTURES

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

- a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than: *(not applicable in this case)*

37. MFDA Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry. MFDA Rule 1.1.1(a) creates a regime whereby an Approved Person is only permitted to sell investment products that have first been approved for sale by the Member (following appropriate product due diligence) and which are sold through the facilities of the Member (thereby ensuring the trading activity is subject to appropriate review and supervision). By limiting the authority of an Approved Person to trade only in securities approved for sale by the Member and through the facilities of the Member, MFDA Rule 1.1.1(a) protects primarily the interest of Member clients, but also the interests of Members and Approved Persons.

Thomson [2004] I.D.A.C.D. No. 49 (Pacific District Council) at paras. 58-60

Larson [2009] Hearing Panel of the Prairie Regional Council, MFDA File No. 200826, Panel Decision dated October 14, 2009.

38. It is submitted that by engaging in the conduct described above, the Respondent engaged in securities related business that was not carried on for the account of and through the facilities of the Member, contrary to MFDA Rule 1.1.1 and MFDA Rule 2.1.1. Rule 2.1.1 provides:

Standard of Conduct. Each Member and each Approved Person of a Member shall:

- (a) deal fairly, honestly and in good faith with its clients;
- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
- (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

Allegation #2 - Undisclosed Dual Occupation (Optimum IV)

39. As alleged in the Notice of Hearing, it is submitted that, in the event the Respondent's activities as described in Allegation #1 did not constitute securities related business, by engaging in those same activities, the Respondent engaged in another gainful occupation that was not disclosed to and approved by the Member, contrary to MFDA Rule 1.2.1(d) and MFDA Rule 2.1.1. (both above).

40. In Staff's submission, on the facts of this case, the Respondent's activities in relation to Optimum IV were sufficient to constitute *both* securities related business conducted outside the Member (contrary to MFDA Rule 1.1.1) and an undisclosed dual occupation (contrary to MFDA Rule 1.2.1(d) in so far as the Respondent's activities pertained to both the distribution of a security (the sale of the units of the Optimum IV limited partnership) and the operation of the Optimum IV limited partnership itself (an undisclosed gainful occupation). However, it is submitted that a finding in respect of Allegation #1 is the more appropriate and, sufficient, finding with respect to the specific issue of the Respondent's facilitation of the distribution of the shares of Optimum limited partnership; the Respondent's involvement in the management aspects of operating the Optimum IV limited partnership are addressed in Allegation #3 below. As a consequence, in Staff's submission, it is not necessary for the Hearing Panel to make a finding in respect of Allegation #2 if it is satisfied that Allegation #1 has been established.

Allegation #3 - Dual Occupations (Planned Solutions and Optimum IV)

41. The Respondent is the President, sole director and sole shareholder of 919035 Alberta Ltd., a company incorporated on February 8, 2001 and operating under the trade name "Planned Solutions". Planned Solutions provides tax advisory and management/administrative services.

42. The Respondent presented Planned Solutions as a company set up to provide tax advisory, management and/or administrative solutions to clients. Planned Solutions counted Optimum IV (1141423 Alberta Ltd.) as one of its clients and received 2% of the fees generated by sales of the Optimum IV. Planned Solutions would also issue tax slips for the flow through shares to investors who purchased the Optimum IV offerings in December 2004 or December

2005.

43. As far as Staff is aware, the Respondent did not disclose or obtain the approval of PSC to carry on and continue his employment with his Planned Solutions and it does not appear on his NRD record.

44. The Respondent was also the sole director and shareholder of 1136251 Alberta Ltd. (“blind trust”). 1136251 Alberta Ltd. was incorporated by the Respondent on November 4, 2004 to serve as a blind trust for PSC client DW. The purpose of the blind trust was to provide loans to farmers who were unable to obtain traditional financing and had issued approximately 5 loans. The Respondent was the shareholder acting for client DW and held signing authority on the bank account that issued the loans.

45. Again, the Respondent did not disclose to or obtain approval from PSC regarding the creation of or his participation in 1136251 Alberta Ltd. and it does not appear on the Respondent’s NRD record.

46. MFDA Hearing Panels have consistently found that engaging in undisclosed dual occupations contrary to MFDA Rule 1.2.1.(d)(iii) is a serious offence. This Rule seeks to ensure that securities legislation and internal procedures are being complied with; clients are aware that the outside activity is not the business or responsibility of the Member (this is particularly true where, as here, the client or investor might reasonably conclude that the investment product being offered by an Approved Person has been reviewed and approved for sale by the Member); any actual or potential conflicts of interest are dealt with appropriately; and the MFDA, its Members, and the mutual fund industry are not being brought into disrepute by way of improper or inappropriate outside business activities carried on by Approved Persons.

Jawad Rathore [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200504, Hearing Panel Decision dated May 31, 2005, at p. 14.

Lip Fee Chan (also known as Philip Chan) [2007] Hearing Panel of the Central Regional Council, MFDA File No. 200607, Hearing Panel Decision dated February 28, 2007, at p. 4.

Allegation #4 - Conflict of Interest

47. The Respondent borrowed \$10,000 from PSC client DW, through the blind trust established to assist cattle farmers, to invest in Planned Solutions. By borrowing funds from PSC client DW to invest in his personal business venture, the Respondent placed his own interest above those of his client which gave rise to an actual or potential conflict of interest which was not addressed through the exercise of responsible business judgment.

48. In an interview with Staff conducted on November 1, 2007, the Respondent admitted to receiving a personal loan in the amount of \$10,000 from 1136251 Alberta Ltd. (the blind trust set up by PSC client DW). The loan was received by Planned Solutions and was not disclosed to PSC.

49. A conflict of interest exists where Approved Persons solicit and accept loans from clients to fund personal business activities. By failing to disclose the existence of the loan to PSC, and also importantly, failing to disclose the existence of the blind trust entered into with DW to PSC, the Respondent did not take any steps to protect the interest of his client (such as directing the client to obtain independent legal or other advice) and PSC was unable to ensure that the client received written notice of the conflict of interest and that the conflict of interest was addressed by the exercise of responsible business judgment influenced only by the best interests of the client (assuming that PSC concluded that the conflict of interest could be adequately addressed at all).

Arnold Tonnies [2005] MFDA Prairie Regional Council, Hearing Panel Decision dated June 27, 2005, File No. 200503 at p. 13 - 16.

Ronald Freynet [2007] MFDA Prairie Regional Council, Hearing Panel Decision dated August 14, 2007, File No. 200704.

SUBMISSIONS OF THE RESPONDENT ON THE ALLEGATIONS (INCLUDING REFERENCE BY THE PANEL TO THE INTERVIEW OF THE RESPONDENT)

50. As stated above, although he admitted “guilt”, the Respondent proceeded to make submissions which, if accepted, were potentially in the nature of partial defences to the allegations. He said McPherson Financial Group was the mutual fund office through which he carried on his mutual fund business, which was less than 10% of his total business (mainly life

insurance and tax planning). McPherson Financial Group became a Branch Office of Portfolio Strategies Corporation (“PSC”) in April 2002. His office was located next to, and then upstairs of, McPherson Financial Group. The Respondent was referred by MFDA counsel to an “Alberta Representative Agreement” between PSC (The Mutual Fund Dealer) and Graham Hoard (The Representative), dated May 8, 2002, (Tab C of Mr. Wenzel’s Affidavit), signed by the Respondent, which included:

The sales representative shall not engage in any other business or employment, unless Portfolio Strategies Corporation determines, at its sole discretion, said business or employment is allowed under the applicable securities legislation, rules, regulation, and policy as they are issued and amended from time to time.

51. The Respondent was also referred to a letter from Ms. Allard, Branch Manager of PSC to Mr. Hoard (the Respondent) dated May 1, 2003 (Tab D of Mr. Wenzel’s Affidavit) which included:

Further to our conversation, this letter serves to confirm that as a registered representative of the Portfolio Strategies and under the Alberta Securities Commission Guidelines (Policy 3, 10) and Portfolio Strategies Corporation’s “Exempt Market” and “off book transaction” guidelines you must not be actively involved in any investment transaction that has not been approved by Portfolio Strategies Corporation as one of their approved products.

For those transactions that you are interested in pursuing, please contact Mark Kent at Portfolio Strategies Corporation to discuss whether or not these investment transactions can be brought forward as a product that can be sold

52. The Respondent said “this is the first time I have seen this letter”. He was reminded that he had been shown the letter in his interview of November 1, 2007 (when he stated that he had not signed the letter and he did not recall seeing it before). The Respondent had explained in his interview that he knew, from extensive discussions with Ms. Allard, that he could not “sell” flow-through shares (one of the subjects of these Disciplinary Proceedings) but he said he did not sell the flow-through shares because they were sold, in part, by people associated with his company who were paid commissions by his company. He seemed to be saying, both at the

Hearing and in the interview, that his company was a “separate entity” and that Ms. Allard, as Branch Manager of McPherson Financial Group, Branch Office of PSC and Mr. Neil McPherson, knew of his company’s involvement in the flow-through shares.

RESPONSE OF THE MFDA TO THE RESPONDENT’S SUBMISSIONS ON THE ALLEGATIONS

53. The Respondent comes here without filing a Reply and without even indicating he would be attending this Hearing, and makes unsworn allegations about how he thought he was doing little wrong. He casts blame on Ms. Allard while acknowledging that he had no communications with, or approval from, PSC. He has produced no documents and brings no witness to corroborate his statements. The Panel can refer to the interview of the Respondent and the documents which are part of the records such as Tab N of Mr. Wenzel’s Affidavit (letter from PSC terminating the relationship with the Respondent). While the MFDA sympathizes with the Respondent’s medical issues, his responses in the interview and his allegations at this Hearing leave the MFDA with concerns about his forthrightness.

SUBMISSIONS OF THE MFDA ON PENALTY AND COSTS

54. MFDA Staff seeks penalties against the Respondent as follows:

- permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member;
- a global fine in the range of at least \$75,000 to \$100,000 with respect to Allegation #1 (securities related business outside the Member) [or alternatively, Allegation #2 (undisclosed dual occupation)], Allegation #3 (undisclosed and unapproved outside business activities) and Allegation #4 (conflict of interest).

Factors Concerning the Appropriateness of the Penalty

55. 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. (Supreme Court of Canada) at paras, 59 and 68

Tonnies, above, at p. 21.

56. It is submitted that when determining the appropriate sanctions to impose, a Hearing Panel should consider:

- 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.

Tonnies, above, at p. 22.

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

- the seriousness of the allegations proved against the Respondent;
- the Respondent's past conduct, including prior sanctions;
- the Respondent's experience and level of activity in the capital markets;
- whether the Respondent recognizes the seriousness of the improper activity;
- the harm suffered by investors as a result of the Respondent's activities;
- the benefits received by the Respondent as a result of the improper activity;
- the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- 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;
- the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- Previous decisions made in similar circumstances.

Lamoureux, [2002] A.S.C.D. No. 125 at para. 11.

Tonnies, above at p. 23.

Penalty Guidelines

58. An additional source of factors to be taken into account when determining the appropriate penalties to be imposed in disciplinary proceedings 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.

59. The MFDA Penalty Guidelines recommend for:

- Securities Related Business: minimum fine of \$10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; and permanent prohibition;
- Outside Business Activity: minimum fine of \$10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; and permanent prohibition;
- Conflict of Interest: minimum fine of \$5,000; write or rewrite an appropriate industry course; suspension; and permanent prohibition; and
- Standard of Conduct: minimum fine of \$5,000; write or rewrite an appropriate industry course; suspension and permanent prohibition.

Considerations in the Present Case

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

- Seriousness of Misconduct: Engaging in securities related business and other gainful occupations outside the Member are serious offences in that they may result in significant harm to clients and other individuals. The scope of the Respondent's misconduct in this case was extensive (at least 39 individuals invested a total of \$843,500). There is no evidence that the shares in Optimum IV were ever subject to a proper due diligence review prior to being offered for sale by the Respondent or that the purchase of these securities by the individuals was ever subject to proper trade supervision and review. The Respondent's activity occurred on a number of occasions and extended throughout the duration of the Respondent's registration. The minimum penalties would not be appropriate in this case. The importance of deterring others from engaging in activity of this nature is high in order to protect clients and others who might be persuaded to purchase securities in this type of situation.

61. It is submitted that a fine in the range of at least \$75,000 to \$100,000 for the securities related business, outside business activity and conflict of interest allegations (or the outside business allegations and conflict of interest allegations), in addition to a permanent prohibition, is appropriate for the following reasons:

- The Respondent has not Recognized the Seriousness of his Conduct: The Respondent has filed no Reply and has not participated in this proceeding. The Respondent has not shown that he recognizes the seriousness of his misconduct, nor has he accepted any responsibility.
- The Respondent's Past Conduct & Level of Activity in the Capital Markets: Although the Respondent has no past disciplinary history with the MFDA, it is submitted that this factor should be given very little weight in light of the serious nature of his misconduct.
- Previous Decisions Made in Similar Circumstances: Generally, Hearing Panels have imposed similar sanctions to those sought in the present case in cases involving the Respondent engaging in securities related business or a dual occupation outside the Member.

Chan, above at pp. 4-5.

Kent Owen Westgard [2010] Hearing Panel of the Prairie Regional Council, MFDA File No. 200937, Panel Decision dated July 15, 2010, pp. 16-18

Van der Velden and Stokman [2005] Hearing Panel of the Central Regional Council, MFDA File No. 200507, Panel Decision dated October 14, 2005, p. 3.

Summary on Penalty

62. 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.

63. It is submitted that the proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the securities industry.

64. 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 Respondent and the circumstances of this case.

Costs

65. MFDA Staff also request that an order for costs be made against the Respondent in the amount of \$7,500. This amount 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. This amount of costs is also within the range of amounts awarded by MFDA Hearing Panels in the decisions listed above.

SUBMISSIONS OF THE RESPONDENT ON PENALTY AND COSTS

66. The Respondent said that, given his medical condition and the state of his finances, the "penalty is immaterial – I have no capability to pay". He also said that he has no intention of engaging again in the securities business so that the prohibition does not matter.

DECISION ON THE ALLEGATIONS

67. The MFDA has presented Allegations #1 and #2 in the alternative. We agree with, and adopt, the submissions of Enforcement Counsel for the MFDA (above), including the submission that it is not necessary for the Panel to make a finding in respect of Allegation #2 if it is satisfied that Allegation #1 has been established.

68. We unanimously find that the MFDA has proven Allegations #1, #3 and #4.

69. With respect to Allegation #1 the Hearing Panel in *Thomson*, above, referred to the Conduct and Practices Handbook (“CPH”) in the course offered by the Canadian Securities Institute, and stated, at paras, 59, 60:

59 In explaining the purpose behind this standard, the CPH observes that such activities done by a registered representative employee without the knowledge of the member firm employer prevents the effective supervision of the handling of client accounts by the member firm and may expose the member firm to vicarious liability for the suitability of the transaction for the investor.

60 This provision is for the protection of the investors, as well as member firms. When a transaction is done off the books, the Association member loses the ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor.

To the same effect is para. 87 in *Larson*, above.

70. With respect to Allegation #2, the Hearing Panel in *Rathore*, above, stated at p. 14:

...Turning first to the charge of engaging in gainful occupation outside the business of the Member without so advising the Member and obtaining the approval of the Member, contrary to MFDA Rule 1.2.1(d)(iii), we agree with counsel for MFDA that this is a serious offence. Where an Approved Person is engaged in an outside business activity, the Approved Person must disclose that activity to the Member so as to permit the Member to meet the requirements imposed by Rule 1.2.1(d). As counsel for MFDA pointed out, without disclosure of the dual occupation, the MFDA and the Member cannot ensure that securities legislation and internal procedures are being complied with, that the MFDA and its Members or the mutual fund industry are not being brought into disrepute, that clients are aware that the outside activity is not the business or responsibility of the Member and that any actual or potential conflicts of interest are dealt with appropriately.

71. With respect to Allegation #4, the Hearing Panel in *Tonnies*, above, stated at pp. 13, 14:

The phrase “responsible business judgment”, which is contained in the Rule, is not defined in the Rules. However, a reasonable interpretation would suggest that it requires the exercise of care and diligence in the circumstances to address the conflict of potential conflict of interest always subject to the best interest of the client. The exercise of responsible business judgment may...vary depending on the nature of the conflict of interest and the characteristics of the client. In cases involving a significant conflict of interest, the exercise of responsible business judgment may require a blanket prohibition on, or refusal to proceed with, the type of transaction giving rise to the conflict

72. While we have accepted that the MFDA has proven Allegations #1, #3 and #4, questions and concerns have been raised about the extent of knowledge of PSC, through its Branch Office, regarding the conduct of the Respondent resulting in Allegations #1 and #2. There can be little doubt that, with the relationship between the Respondent and McPherson Financial Group, and their close proximity on the same floor and then in the same building, the people at that Branch Office of PSC must surely have known of the Optimum IV flow-through shares. The Respondent asserts that Mr. McPherson or a corporation in which he was involved was an investor in the shares; if that is factual, he at least in his personal capacity would have “known” of the investment. In fact, there can be little doubt of that; the Respondent sent an email to Mr. McPherson on November 18, 2004, regarding “the sale of flow-through shares”, with details of the proposed structure (Mr. Wenzel’s Affidavit, Tab F). It seems from the “evidence” of the Respondent, that McPherson Financial Group would have known of the “Planned Solutions” business he was carrying on.

73. However, there is nothing to establish that PSC, whether through its McPherson Financial Group Branch Office, or otherwise, gave approval to the Respondent to be involved in the marketing of the flow-through shares or to operate his other business. There is no evidence that McPherson Financial Group or PSC knew of the blind trust and the loan, and certainly nothing to indicate McPherson Financial Group or PSC approved of those activities.

74. The Respondent acknowledges that he signed the “Alberta Representative Agreement” (para. 50 above) with its prohibition against engaging “in any other business or employment

unless PSC determines, at its sole discretion, said business or employment is allowed under the applicable securities legislation, rules, regulation and policy...”.

75. It is perhaps noteworthy that the “Alberta Representative Agreement” also includes:

Although *The Representative* is paid commissions, and not salary, *The Representative’s* sales activity is under the control and direction of ***Portfolio Strategies Corporation’s*** branch manager.

“Sales activity” would not, by our interpretation, involve approval of off-book activities. Ms. Allard, the Branch Manager of PSC directed the May 1, 2003 letter (para. 51 above) to the Respondent which the Respondent denies having seen. We do not have the benefit of her evidence (she could have been called by the Respondent) but the letter refers to conversations, and the Respondent said he had numerous conversations with Ms. Allard about business activities. The letter purports to confirm conversations about needing approval from PSC for “off book” transactions and directs the Respondent to contact Mr. Kent of PSC “to discuss whether or not these investment transactions can be brought forward as a product that can be sold”. Obviously Ms. Allard did not believe that she, as Branch Manager, could give the requisite approval, and we doubt that the Respondent believed she had that authority.

76. While we are left with some concerns about the interaction of McPherson Financial Group and the Respondent, and while we have sympathy for the Respondent because of his health problems, the fact remains that the Respondent recognizes, despite his rationalizations, that he did not properly inform, or get approval from, “the Mutual Fund Dealer” for his activities. A reading of the transcript of his interview and of the extensive reasons for termination of the Respondent’s relationship, in a February 8, 2007 letter from Mr. Kent of PSC (Tab N of Mr. Wenzel’s Affidavit) mitigates our concern about whether the allegations against the Respondent are fully supportable. Despite his apparent business acumen, the Respondent seems to take the position that his activities were not carried on by him but by his corporation(s) and by employees or agents of the corporation. Yet he was the controlling mind of the corporation. He also sought to deflect blame to Ms. Allard in his letter of April 22, 2007, to the MFDA (Tab O in Mr. Wenzel’s Affidavit). If he truly believes he could avoid responsibility by operating through a corporation he shows remarkable naivety. The Respondent stated, in his

August 22, 2007 letter to the MFDA (Tab O):

I had utilized office space in the offices of McPherson Financial, the Portfolio Strategies branch office through which I dealt with Portfolio Strategies, up to February, 2006. The branch manager was well aware of all of my business activities. She advised me that I could not sell flow through shares except those promoted by Portfolio Strategies. However, she did not advise me that I needed approval from Portfolio Strategies for a company of which I was the sole shareholder and director to provide administrative services to the limited partner companies. I did not approach Portfolio Strategies directly on this as they had advised me unequivocally that I should deal with the branch office on matters such as this. One of the flow through share limited partners was the McPherson Financial Flow Through Share Issue.

77. A review by the Panel of admissions made by the Respondent during the PSC Branch audit on December 21, 2006 (Tab M of Mr. Wenzel's Affidavit) and the answers given by him in his interview by MFDA Staff on November 1, 2007, leads us to agree with the characterization by MFDA Counsel that his rationalization and explanations at the Hearing were somewhat disingenuous. We found a considerable portion of his answers in the interview to be an exercise in obfuscation and an unwillingness to accept responsibility for his actions. Confirmatory of the Respondent's propensity to provide differing explanations, is the following portion of the PSC letter of termination to the Respondent dated February 8, 2007 (Tab N in Mr. Wenzel's Affidavit):

Beyond the issues of outside business activities and your refusal to provide basic information is the matter of your responses to our enquiries. You have not been forthright with PSC. We refer in particular to your changing description of the role and place of Liz Toerper in your outside businesses. We also refer to the changing description of your role in relation to the sale of flow through shares. On one hand you deny selling flow through shares, but you told us during the audit interview that you presented such investments to potential purchasers. More recently in your written submissions you say that your involvement was "limited to tax and administrative services". You also appear to assert that Burnet Duckworth had a role in the determination of "accredited investor status" for individuals. We are aware of no evidence to substantiate that whatsoever. Your statements have been inconsistent and misleading and demonstrate a serious lack of candor. Your lack of co-operation with our investigation is an additional basis for the termination of your relationship with PSC.

In addition to all of the foregoing, we consider the numerous audit deficiencies including your admission that you failed to use signage and other required means to notify clients that you were with PSC, that you failed to provide clients with

privacy documents, leverage disclosure and client complaint information, and your failure to follow prescribed processes for placing orders, to be an additional basis for the termination of your relationship with PSC.

Overall, your conduct is and has been violative of firm and industry requirements and inconsistent with the proper conduct of the business of PSC. It is our conclusion that you can no longer be trusted to conform to PSC's reasonable requirements and that you are unsuitable for registration with PSC.

Overall, the Respondent's attitude was to deflect blame, discredit others, claim unawareness or an incorrect understanding, and not intending any wrongdoing.

78. Therefore, despite some initial reservations, we unanimously accept that the Respondent is, as he acknowledged, "guilty" of Allegations #1, #2 and #3. If the issues should have been fully explored in a hearing, the Respondent has no one to blame but himself for failing to file a Reply and to present proper evidence at a hearing.

DECISION ON PENALTY AND COSTS

79. We accept and adopt the submissions of Enforcement Counsel for the MFDA including the factors which a Hearing Panel should consider in exercising its discretion to impose penalties. We also view the claim for costs as being very reasonable considering the extensive effort of the MFDA required for this case.

80. Many decisions of Hearing Panels, in circumstances similar to those in the present case, support the penalties proposed, and the costs sought, by the MFDA in this case. 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. We recognize that the Respondent has no disciplinary history but do not consider that it mitigates against the imposition of severe penalties in the circumstances of this case.

81. The Panel's unanimous decision on penalty is as follows:

- a) A permanent prohibition from conducting securities related business in any capacity

- while in the employ of or associated with any MFDA Member;
- b) A global fine of \$100,000 with respect to Allegation #1 (securities related business outside the Member), Allegation #3 (undisclosed and unapproved outside business activities) and Allegation #4 (conflict of interest).
 - c) Costs of \$7,500.

DATED this 23rd day of February 2011.

“Alan Beattie”

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

“Richard Sydenham”

Richard Sydenham,
Industry Representative

“Kathleen Jost”

Kathleen Jost,
Industry Representative

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