

1. By Notice of Hearing, dated June 24, 2009, the Mutual Fund Dealers Association of Canada (“MFDA”), made the following Allegations against Ben Alden Kaley (the “Respondent”):

- (a) Allegation #1: Between February 2007 and August 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, contrary to MFDA Rules 1.1.1(a) and 2.1.1.
- (b) Allegation #2: Between February 2007 and August 2007, the Respondent carried on a dual occupation that was not properly disclosed to and approved by the Member, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

2. By Notice of Settlement Hearing, dated November 30, 2009, a Hearing Panel of the Atlantic Regional Council of the MFDA was convened on December 3, 2009, in Fredericton, New Brunswick, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept a settlement agreement (“Settlement Agreement”) entered into between Staff of the MFDA and the Respondent on November 23, 2009.

3. At the outset of the proceedings, Staff advised that the Settlement Agreement had been prepared in accordance with Section 24.4 of By-law No. 1. Staff further advised that the Notice of Settlement Hearing had been prepared and publicized in accordance with Rule 15.2(1) of the MFDA Rules of Procedure, with the exception of the 10-day notice provision referred to therein.

4. Staff and the Respondent brought a joint Motion for an Order abridging the time. They relied upon Rules 1.3(1), 1.5(1)(b) and 2.2 of the Rules of Procedure. These provide as follows:

“1.3 General Principles

- (1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.

1.5 General Powers of a Panel

- (1) A Panel may:
 - (b) waive or vary any of these Rules at any time, on such terms as it considers appropriate.

2.2 *Extension or Abridgement of Time*

- (1) The time for the performance of any obligation under these Rules may be extended or abridged:
 - (a) by a Panel, at any time on such terms as it considers appropriate;
 - (b) on consent of the parties prior to the expiration of the prescribed time.”

5. After consideration, the Hearing Panel granted the Order abridging the time. Our reasoning for doing so is as follows: On August 18, 2009, the Hearing Panel had issued an Order stating, in part, that the Hearing on the Merits was to take place on December 3, 2009, at 10:00 a.m. (Atlantic). Subsequently, on November 17, 2009, the Hearings Coordinator issued a News Release advising that the Hearing would be held in the Hearing Room, located at the Crowne Plaza Fredericton, 659 Queen Street East, Fredericton, New Brunswick. Consequently, the public was made aware of the date and location of the Hearing dealing with this matter. Subsequent to that, the parties reached a settlement of all outstanding issues and a Notice of Settlement Hearing, dated November 30, 2009, complying with all the Rules, with the exception of the time provision, was issued by the MFDA. In our view, under all of the circumstances, it was appropriate to abridge the time so that the Settlement Agreement could be considered by the Hearing Panel on the first day set for the Hearing on the Merits.

6. We also considered a joint Motion by Staff and the Respondent to move the proceedings “in-camera”. This Motion was brought pursuant to Rule 15.2(2) of the Rules of Procedure, which provides as follows:

“15.2(2) A Hearing Panel may, on its own initiative or at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8.”

7. Rule 1.8(2) of the Rules of Procedure provides as follows:

“(2) A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.”

8. We granted the Motion on the condition, which was agreeable to both Staff and the Respondent, that, should the Hearing Panel accept the Settlement Agreement, we would provide Reasons for our Decision, which, along with the record of the Settlement Hearing, would be available to the public. This is consistent with Rule 15.2(3) of the Rules of Procedure.

9. At the request of the parties, we allowed the Respondent’s father to remain in the Hearing Room throughout the “in camera” portion of the proceedings.

10. The Hearing Panel then considered the provisions of the Settlement Agreement. After hearing submissions, both as to the applicable law and as to why this particular Settlement Agreement met the appropriate criteria, we retired to consider whether we were in a position to accept the Settlement Agreement on the basis of the material before us. After consideration, the Hearing Panel unanimously accepted the Settlement Agreement and made an Order to this effect on December 3, 2009. At that time, we advised that written Reasons would follow. These are those Reasons.

11. The salient portions of the Settlement Agreement are as follows:

“II. JOINT SETTLEMENT RECOMMENDATION

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

IV. AGREED FACTS

6. The Respondent was registered in New Brunswick as a mutual fund salesperson with Investia Financial Services Inc. (“Investia”) from August 20, 2004 until his resignation on August 19, 2008. During the period of registration, the Respondent had 1 client and completed only 1 transaction.

7. The Respondent is a co-owner (along with three other individuals) of a fishing camp called The Ledges Fishing Corp. (“The Ledges”). The Ledges is a company incorporated pursuant to the laws of New Brunswick. The Respondent is listed on corporate documents of The Ledges as its Vice-President.

8. On March 31, 2006, the Respondent became a Director of The Ledges.

9. On May 11, 2006, the Respondent completed and submitted Investia’s “Annual Review of Professional Activities” form. The Respondent did not disclose on the form his status as a co-owner of The Ledges and his position as Vice-President and Director of The Ledges.

10. Shortly thereafter, The Ledges offered for sale 18 preferred shares priced at \$150,000 CDN per share. The preferred shares were offered for sale pursuant to an exemption from prospectus and registration requirements of the New Brunswick *Securities Act*. Ownership of a preferred share entitled the shareholder to specified fishing rights at The Ledges.

11. Between February 2007 and August 2007, The Ledges sold 13 of the 18 preferred shares. Twelve of the preferred shares were purchased by members of the public. The thirteenth share was purchased by another co-owner of The Ledges, Alden M. Kaley, the Respondent’s father. None of the investors was a client of Investia. A total of \$1,950,000 was raised through the sale of the preferred shares. As far as the MFDA is aware, the remaining five preferred shares have yet to be sold.

12. The Respondent, in his capacity as Vice-President and a Director of The Ledges, was involved in explaining the details and terms of the preferred share offering to prospective investors. Thereafter, individuals who expressed interest in purchasing a preferred share were directed to counsel for The Ledges, which handled the preparation and execution of the legal documentation associated with the purchase.

13. In addition to meeting with prospective investors, the Respondent, in his capacity as Vice-President and a Director of The Ledges, signed, on behalf of The Ledges, all but one of the Subscription Agreements or Buy-Sell agreements completed by the investors.

14. The preferred shares were offered for sale pursuant to exemptions from the prospectus and registration requirements of the New Brunswick *Securities Act* and, as such, the distribution of the preferred shares was required to be reported by The Ledges to the New Brunswick Securities Commission (“NBSC”). The Respondent, on behalf of

The Ledges, signed the requisite Exempt Distribution Form (Form 45-106F1) filed with the NBSC in respect of the distribution of the preferred shares.

15. Upon receipt of the Form 45-106F1 filed by The Ledges with the NBSC, NBSC Staff contacted Investia by letter dated May 28, 2007 to advise Investia of the involvement of the Respondent in the distribution of the preferred shares. Prior to receiving this notification from NBSC Staff, Investia was aware of the Respondent's status as co-owner of The Ledges, but was not aware of his position a Vice-President and Director and his involvement in the sale of the preferred shares.

16. On October 9, 2007, the Respondent completed and submitted an Investia "Outside Business Activity Approval Form". On the form, the Respondent disclosed his position as Vice-President of The Ledges but did not disclose the fact that The Ledges had sold preferred shares to members of the public or the nature and extent of his involvement in the sale of the preferred shares.

V. CONTRAVENTIONS

17. The Respondent admits that his participation in the sale of the 13 preferred shares of The Ledges to the public constituted securities related business that was not carried on for the account of the Member or through the facilities of the Member, contrary to MFDA Rules 1.1.1(a).

18. The Respondent admits that between February 2007 and August 2007, he carried on another gainful occupation that was not properly disclosed to and approved by the Member in his role as co-owner, Vice-President and Director of The Ledges, contrary to MFDA Rules 1.2.1(d).

VI. TERMS OF SETTLEMENT

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

- (a) the Respondent will attend, in person, on the date set for the settlement hearing;
- (b) the Respondent shall pay a fine in the amount of \$10,000;
- (c) the Respondent shall be suspended from acting as a mutual fund salesperson for a period of 6 months commencing immediately upon the approval of the settlement agreement by the Hearing Panel; and
- (d) the Respondent shall pay legal costs in the amount of \$2,500.

VII. STAFF COMMITMENT

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

Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the facts and contraventions set out in Parts IV and V, whether known or unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT

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

FACTORS CONCERNING ACCEPTANCE OF A SETTLEMENT AGREEMENT

12. Previous MFDA Hearing Panels have taken into account the following considerations when determining whether a proposed Settlement Agreement should be accepted:

- (a) whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
- (b) whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
- (c) whether the Settlement Agreement addresses the issues of both specific and general deterrence;
- (d) whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
- (e) whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;
- (f) whether the Settlement Agreement will foster confidence in the integrity of the MFDA; and
- (g) whether the Settlement Agreement will foster confidence in the regulatory process itself.

Re: *Melvin Robert Penney (Re)*, [2009] MFDA Atlantic Regional Council, File No. 200831, Panel Decision dated May 13, 2009, at pp. 7-8.

Re: *Alden M. Kaley (Re)*, [2009] MFDA Atlantic Regional Council, File No. 200911, Panel Decision dated September 28, 2009, at p. 6.

FACTORS CONCERNING THE APPROPRIATENESS OF PENALTY

13. We also reviewed the factors that previous Hearing Panels have indicated should be considered when determining whether a penalty is appropriate. These factors 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.

Re: *Penney, supra* at p. 8.

Re: *Kaley, supra* at pp. 6-7.

14. We also considered the MFDA Penalty Guidelines ("Guidelines"), recognizing, as stated in the introduction, that:

"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."

15. The Guidelines recommend a minimum fine of \$10,000.00 and a variety of other penalties in cases where there is a securities-related business activity outside the facilities of the Member, contrary to MFDA Rule 1.1.1(a). The other penalties range from periods of increased supervision and suspension to permanent prohibition in egregious cases.

16. The Guidelines recommend the same fine and range of penalties for non-securities related outside business activities and continuing in an undisclosed, dual occupation contrary to MFDA Rule 1.2.1(d).

CONSIDERATIONS IN THE PRESENT CASE

17. It was submitted to us that we should accept the Settlement Agreement and the proposed penalties, as amended, for, *inter alia*, the following reasons:

- (a) The nature of the agreed upon misconduct;
- (b) The Respondent has no past disciplinary history with the MFDA;
- (c) The Respondent has never been the subject of a client complaint made to the MFDA;
- (d) The Respondent's admission to the misconduct described in the Settlement Agreement indicates that he recognizes the seriousness of the misconduct;
- (e) By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring further time and expense conducting a Hearing;
- (f) There is no evidence of client harm;
- (g) None of the investors in The Ledges was a client of Investia;
- (h) There is no evidence that the Respondent benefited personally from the sale of the preferred shares (i.e. through commissions, fees, etc.), although the proceeds from the sales of the preferred shares were used to finance a venture in which the Respondent was a co-owner;
- (i) The penalties proposed in the Settlement Agreement are consistent with previous decisions made in similar circumstances;

Re: *Penney, supra* at pp. 9-11.

Re: *Kaley, supra* at pp. 6-7.

18. In addition, we believe that the Settlement Agreement and the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian Mutual Fund industry by ensuring high standards of conduct by its Members and Approved Persons.

19. We also believe that the proposed penalties will deter misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by Mutual Fund industry participants and foster public confidence in the Mutual Fund industry.

20. We considered the nature of these proceedings, the fact that they are public and the effect that this has had, and will have, on the Respondent.

21. Finally, we also considered that this was a Settlement Agreement that was reached by the parties after significant discussions and negotiations. It represents what they feel, with their knowledge and experience, is an appropriate resolution.

22. Taking all these factors into consideration, we unanimously concluded that the Settlement Agreement was reasonable and in the public interest and should be accepted by this Hearing Panel.

DATED this 23rd day of January, 2010.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.,
Chair

“Ann Etter”

Ann Etter
Industry Representative

“Remy Richard”

Remy Richard
Industry Representative