



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, A SETTLEMENT HEARING PURSUANT TO
SECTION 24.4 and AN APPLICATION PURSUANT TO SECTION 24.3 OF
BY-LAW NO. 1 OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: ASL Direct Inc. and Adrian Samuel Leemhuis

Heard: April 21 and 22, 2010 (Leemhuis) and
May 18, 2010 (ASL Direct Inc.) in Toronto, Ontario
Reasons for Decision: February 8, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.
Selwyn Kossuth
Guenther Kleberg

Chair
Industry Representative
Industry Representative

Appearances:

Shelly Feld)	For the Mutual Fund Dealers Association of
)	Canada
)	
No one appearing)	For the Respondent, ASL Direct Inc.
)	
Ari Kulidjian)	For the Respondent, Adrian Samuel Leemhuis
)	

I. INTRODUCTION

1. By Notice of Hearing, dated the 17th day of October, 2008, the following Allegations were made against ASL Direct Inc. (“ASL”) and Adrian Samuel Leemhuis (“Leemhuis”) (collectively, “the Respondents”):

Allegation #1:

- (a) Commencing in March 2003, ASL failed to:
 - (i) consistently maintain minimum capital and risk adjusted capital required by MFDA Rule 3.1.1; and
 - (ii) consistently maintain the minimum amount of insurance required by MFDA Rules 4.1 and 4.4;

- (b) Commencing in March 2004, ASL failed to:
 - (i) consistently maintain risk adjusted capital to avoid triggering early warning tests set out in MFDA Rule 3.4.2(a); and
 - (ii) file monthly and annual financial questionnaires and reports on a timely basis as required by MFDA Rule 3.5.1;

- (c) Commencing in April 2008, ASL failed to:
 - (i) comply with early warning requirements that were applicable pursuant to MFDA Rule 3.4.2(b); and
 - (ii) respond to requests for information from the MFDA Compliance Department concerning its financial circumstances, contrary to s. 22 of MFDA By-law No. 1.

- (d) Since May 5, 2008 when ASL was informed by MFDA Staff of its increased insurance requirements because ASL was holding nominee name assets, ASL has failed to rectify the deficiency, contrary to MFDA Rule 4.5(b).

Allegation #2: Commencing in July 2006, the Respondents failed to deal fairly, honestly and in good faith with clients of ASL by operating a trailer fee rebate program for which clients were charged monthly fees and failing to pay or re-invest trailer fee rebates owed to clients in the

program or to maintain adequate records or take sufficient action to administer the program effectively, contrary to MFDA Rules 2.1.1 and 5;

Allegation #3: Between March 2004 and April 2008, Leemhuis conducted securities related business that was not carried out for the account of ASL, contrary to MFDA Rule 1.1.1(a);

Allegation #4: Between February 2004 and April 2008, Leemhuis was engaged in outside business activities that were not disclosed in Form 33-109F4 or on the National Registration Database as required, contrary to MFDA Rules 1.2.1(d), 2.1.1(c) and National Instrument 33-109.

Allegation #5: Between May 2006 and April 2008, in response to direct inquiries from MFDA Staff, the Respondents:

- (a) withheld relevant information;
- (b) provided false or misleading information to the MFDA;
- (c) failed to produce certain documents and information requested by MFDA investigators which the Respondents undertook to produce; and
- (d) failed to comply with the requests of MFDA Staff for production on an up to date client list and client account statements,

contrary to s. 22 of MFDA By-law No. 1 and MFDA Rules 2.1.1 and 5. Such information was relevant to, among other things, Leemhuis's involvement with off-shore mutual funds and other companies and ASL's compliance with its regulatory obligations.

Allegation #6: The Respondents have failed to operate ASL in a compliant manner in accordance with its regulatory obligations, as particularized below:

- (a) The Respondents failed to maintain adequate records of trade supervision, contrary to MFDA Rules 2.5 and 5 and MFDA Policy No. 2;
- (b) The Respondents permitted trading by mutual fund clients of ASL without first obtaining appropriately completed and approved New Account Application Forms for such clients, contrary to MFDA Rule 2.2;
- (c) Between the summer of 2004 and September 2007, the Respondents permitted an unregistered individual named Anil Jain to conduct securities related business for

- clients of ASL, contrary to MFDA Rule 1.1.5(a);
- (d) The Respondents failed to implement a system to properly distribute on a cash basis, interest earned in the Member's mutual fund trust account contrary to MFDA Rule 3.3.2(h), MFDA Policy No. 4 and National Instrument 81-102;
 - (e) A referral arrangement engaged in by the Respondents did not comply with MFDA Rule 2.4.2(b); and
 - (f) The Respondents failed to process trade orders on a timely basis, contrary to National Instrument 81-102 and MFDA Policy No. 2.

II. HISTORY OF PROCEEDINGS

2. On October 17, 2008, the Respondents were served with copies of the Notice of Hearing in accordance with Rule 4.2(1)(a) and (b) of the MFDA Rules of Procedure.
3. By letter, dated October 17, 2008, ASL sought to resign its membership in the MFDA.
4. By letter, dated October 24, 2008, Counsel for ASL was advised that "a Member's resignation does not become effective until the Member's resignation is approved by the MFDA in accordance with sub-sections 13.4 and 13.5" of MFDA By-law No. 1.
5. On November 4, 2008, the Ontario Securities Commission applied for and obtained an Order of the Ontario Superior Court of Justice appointing KPMG Inc. as Receiver over all of the assets and undertaking of ASL, pursuant to section 129 of the *Securities Act*, R.S.O. c. S.5.
6. On November 7, 2008, the Respondents filed a Reply to the Allegations in the Notice of Hearing.
7. The First Appearance was scheduled to proceed on November 24, 2008, but was adjourned to December 4, 2008, at the request of the Respondent, Leemhuis, and with the consent of Counsel for the MFDA Staff.
8. At the First Appearance, after hearing submissions made by Counsel for Leemhuis and the MFDA Staff with respect to scheduling and other procedural matters, the Hearing Panel,

inter alia, ordered that a pre-Hearing Motion by Leemhuis would be heard on March 3, 2009. It further ordered that, subject to any further Order, the Hearing on the Merits would take place on May 4 – 6, 2009.

9. On January 9, 2009, Leemhuis brought a Motion (“the Leemhuis Motion”), returnable on March 3, 2009, challenging the jurisdiction of the MFDA to continue its proceedings against him.

10. The parties agreed to postpone the hearing of the Leemhuis Motion until after the release of the Decision of the Ontario Court of Appeal “*In the Matter of The Investment Dealers Association of Canada vs. Stephen Taub*” (the “Taub Decision”).

11. Prior to the release of the Taub Decision, the Hearing Panel revised the schedule for the continuation of this proceeding by Orders dated January 14, 2009, March 19, 2009, April 7, 2009, May 29, 2009 and July 29, 2009.

12. The Taub Decision was released by the Ontario Court of Appeal on August 28, 2009.

13. On September 15, 2009, Counsel for Leemhuis and Counsel for the MFDA Staff attended before the Hearing Panel to address procedural issues and amend the schedule for the continuation of the proceedings.

14. After hearing submissions, the Hearing Panel, *inter alia*, scheduled the Hearing of the Leemhuis Motion for October 27, 2009, and ordered that the Hearing on the Merits would take place from March 1 to 5, 2010, with closing arguments on March 11, 2010.

15. By letter, dated October 5, 2009, Counsel for Leemhuis advised that the Leemhuis Motion would not be proceeded with.

16. By Notice of Motion, dated December 9, 2009, MFDA Staff brought a Motion for Directions from the Hearing Panel, returnable on December 18, 2009. The Motion was brought because of the alleged failure of Leemhuis to comply with certain provisions of the September 15, 2009 Order of the Hearing Panel.

17. On December 18, 2009, after hearing submissions by the parties, the Hearing Panel set a revised schedule for Leemhuis to deliver documentary disclosure to Staff, in accordance with Rule 10.2 of the MFDA Rules of Procedure, and, also, to complete the review of forensic images of ASL hard drives, that had been prepared by a third party, to identify potentially privileged documents before these hard drives were reviewed by Staff.

18. By Notice of Motion, dated January 15, 2010, returnable before the Hearing Panel on January 18, 2010, Leemhuis requested an extension of time, until January 22, 2010, to fulfill his disclosure obligations.

19. On January 18, 2010, Staff requested certain amendments to the Notice of Hearing, to which Leemhuis contested.

20. On January 18, 2010, after hearing submissions from the parties, the Hearing Panel granted Leave to Staff to amend the Notice of Hearing in the manner consented to by Leemhuis.

21. The Hearing Panel also set a revised schedule for Leemhuis to fulfill his disclosure obligations. It further ordered that the Hearing on the Merits was to take place from April 21 to 23, 2010, April 26 to 30, 2010, May 11 to 14, 2010, May 18, 2010, and May 20 & 21, 2010.

22. The Hearing Panel also reserved February 19, 2010, and March 30, 2010, as dates for the hearing of Motions or for attendances before the Hearing Panel for any other purpose if required to address any matters which the parties wished to raise prior to the Hearing on the Merits.

23. By Notice of Motion, dated March 25, 2010, Staff brought a Motion for further amendments to the Notice of Hearing. Leemhuis contested.

24. An Industry Member of the Hearing Panel was elected to the Board of Directors of the MFDA and was, therefore, unable to continue to serve on the Hearing Panel. While section 19.9(b) of MFDA By-law No. 1 permits the Chair of the Hearing Panel to decide whether or not to proceed with a two-member Hearing Panel, it was thought appropriate, in the circumstances of the case, to solicit the views of the parties on this issue.

25. On March 29, 2010, after hearing submissions from the parties, the Hearing Panel granted Leave to Staff to further amend the Notice of Hearing in the manner consented to by Leemhuis.

26. As requested by the parties, the Corporate Secretary's Office was ordered to appoint a second Industry Representative to the Hearing Panel, prior to the Hearing on the Merits, which was ordered to proceed in accordance with the Order of the Hearing Panel of January 18, 2010.

III. SETTLEMENT AGREEMENT

27. On April 16, 2010, Leemhuis and MFDA Staff entered into a Settlement Agreement. ASL was not a party to this Agreement.

28. On April 19, 2010, a Notice of Settlement Hearing was issued by the Office of the Corporate Secretary advising the public that a Hearing was to be held before the Hearing Panel on April 21, 2010, at 1:00 p.m., to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept the Settlement Agreement.

29. At the outset of the proceedings on April 21, 2010, Staff advised that the Settlement Agreement had been prepared in accordance with Section 24.4.2 of By-law No. 1.

30. We were, however, mindful of Rule 15.2(1) of the MFDA Rules of Procedure, which provides as follows:

“15.2 Notice and Public Access

(1) Except where a settlement is reached after the commencement of the hearing of a proceeding on its merits, a Hearing Panel shall not consider a Settlement Agreement unless at least 10 days notice of the settlement hearing has been given by the Corporation in the same manner as a notice of penalty pursuant to section 24.5 (Publication of Notice and Penalties) of MFDA By-law No. 1 specifying:

(a) the date, time and place of the settlement hearing; and

- (b) the purpose of the settlement hearing with sufficient information to identify the Member or person involved and the general nature of the allegations which are the subject matter of the settlement.”

31. The Notice of Settlement Hearing issued by the Office of the Corporate Secretary complied in all respects with Rule 15.2(1), except that it did not provide at least 10 days notice of the Settlement Hearing.

32. Rules 1.5(1)(b) and 2.2(1)(a) and (b) provide as follows:

“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.”

33. As the date and location of the Hearing on the Merits had been established by the January 18, 2010 Order of the Hearing Panel and publicized via a News Release from the Office of the Corporate Secretary on January 19, 2010 and as the Settlement Agreement was to be considered by the Hearing Panel on the date set for the commencement of the Hearing on the Merits, we felt that the public had received appropriate notice and made an Order abridging the time set out in Rule 15.2.

34. This procedure is consistent with that adopted by previous Hearing Panels in the cases of Melvin Robert Penney and Ben Alden Kaley.

Re: *Melvin Robert Penney (Re)*, [2009] MFDA File No. 200831.

Re: *Ben Alden Kaley (Re)*, [2010] MFDA File No. 200923.

35. We also considered a joint Motion by Staff and Counsel for Leemhuis 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 Notice and Public Access

- (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.”

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

“1.8 Hearings Open to the Public

- (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.”

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

38. The Hearing Panel then considered the provisions of the Settlement Agreement, the salient portions of which are as follows:

“IV. AGREED FACTS

Registration History

6. The Respondent has been registered as a mutual fund salesperson in the Province of Ontario and as an officer, director and designated compliance officer of ASL Direct Inc. (“ASL”) since November 18, 1999. He has been registered as a mutual fund salesperson, trading officer and director in the Provinces of British Columbia and Alberta since August 2004 and December 2005 respectively. The Respondent has been the owner and President of ASL since it became a mutual fund dealer. ASL has been a Member of the MFDA since March 4, 2003. The registration of ASL and of the Respondent was suspended by the Ontario Securities Commission (the “OSC”) on

May 1, 2008 as a result of a temporary cease trade orders issued against the Respondent and ASL. The registration of the Respondent and of ASL was suspended in British Columbia effective August 7, 2008 and in Alberta effective August 25, 2008.

7. On October 17, 2008, the Respondent submitted a letter to the MFDA on behalf of ASL indicating ASL's intention to resign from membership in the MFDA. ASL did not complete the resignation process.

Regulatory Proceedings

8. On April 22, 2008, the OSC issued a temporary cease trade order against the Respondent and the Future Growth Funds (described below). On May 1, 2008, the OSC issued a temporary cease trade order against ASL. On May 8, 2008, the OSC issued a Statement of Allegations against the Respondent, ASL and the Future Growth Funds in support of an amended notice of hearing to extend the cease trade orders. Between May 2008 and November 2009, the cease trade orders were extended multiple times on consent. On November 6, 2009, the cease trade orders issued against the Respondents were terminated and the OSC's Statement of Allegations against the Respondents was withdrawn.

9. On October 17, 2008, the MFDA Notice of Hearing commencing the disciplinary proceeding that gave rise to this Settlement Agreement was issued and served by Staff.

10. On October 17, 2008, the OSC brought an application for the appointment of a receiver over ASL and by order of the Superior Court of Justice dated November 4, 2008, KPMG Inc. (the "Receiver") was appointed as Receiver without security, over all of the assets and undertaking of ASL pursuant to Section 129 of the *Securities Act*, R.S.O. c. S5 (the "*Ontario Securities Act*").

Financial Compliance Deficiencies

11. From 2003 when ASL became a Member of the MFDA until November 2008 when a Receiver was appointed over ASL, ASL sustained continuous losses and had a consistently increasing retained deficit. ASL was only able to continue operations from a financial perspective during that period as a result of continual subordinated loans from the Respondent which totaled \$766,705 as of March 31, 2008.

12. Between April 30, 2004 and November 4, 2008, ASL frequently triggered early warning tests set out in MFDA Rule 3.4.2(a) for various reasons, including the fact that in some cases ASL did not maintain minimum risk adjusted capital (RAC). Consequently, ASL was designated in early warning during the following periods:

- (a) from April 30, 2004 to June 27, 2006;
- (b) from August 3, 2006 to July 31, 2007; and
- (c) from December 14, 2007 to November 4, 2008 (when the Receiver was appointed).

13. Between June 30, 2003 and April 2008, ASL did not file its financial questionnaires and reports (“FQRs”) on a timely basis 15 times, contrary to MFDA Rules 3.5.1 and 3.4.2(b)(ii)(B). During the same period, ASL was also required to correct and re-submit FQRs on 18 occasions because the FQRs were not appropriately completed.

14. On April 18, 2008, ASL submitted its audited FQR for the year ended December 31, 2007, 12 business days late. As a result of audit adjustments, the calculation of ASL’s RAC according to the audited FQR was \$53,962 lower than the RAC calculation that was submitted on the unaudited FQR for the month ended December 31, 2007. Consequently, ASL had a RAC deficiency of approximately \$42,562 as of December 31, 2007. As of July 3, 2008 when ASL submitted its most recent FQR filing, this capital deficiency had not been rectified. Consequently, ASL did not maintain RAC greater than zero, contrary to MFDA Rule 3.1.1.

15. On April 24, 2008, Staff discovered an unresolved balance in the amount of \$45,629 in ASL’s “trading” trust account. Between April 24, 2008 and November 4, 2008 (when the Receiver was appointed), ASL did not respond to a number of requests from Staff for an explanation of this unresolved balance in its trust account. ASL was required to charge the amount of this unresolved balance against regulatory capital which had the effect of increasing its capital deficiency.

16. When ASL applied for membership in the MFDA in 2003, ASL indicated its intention to be designated as a Level 3 dealer. Level 3 dealers are not permitted to hold securities in nominee name for the benefit of their clients. Therefore, in support of ASL’s request to be designated as a Level 3 dealer, ASL advised Staff that all client accounts that it held in nominee name had been converted into client name and that all new accounts would be registered exclusively in client name.

17. Between 2003 and 2008, on some occasions when it came to ASL’s attention that certain securities were held in ASL’s nominee name, ASL took steps to have such securities converted into client name. However, ASL did not take sufficient steps to ensure that all client assets that it held in nominee name were converted into client name.

18. In May 2008, after a cease trade order was imposed on ASL by the OSC, Staff discovered that ASL was holding securities in nominee name for the benefit of some of its clients. On May 5, 2008, Staff requested that ASL identify and report the value of all client assets that ASL was holding in nominee name and informed the Respondent and ASL that ASL was required to comply with the minimum capital and insurance requirements of a Level 4 dealer.

19. After its appointment in November 2008, the Receiver identified asset holdings in 71 individual client accounts that remained registered in ASL’s nominee name.

20. Between April 21, 2008 when the MFDA was informed by ASL’s auditors that ASL was RAC deficient as at the December 31, 2007 year-end and November 4, 2008 when the Receiver was appointed, ASL did not:

- (a) rectify its capital deficiency according to its most recently filed FQR;
- (b) comply with early warning requirements imposed by the MFDA pursuant to MFDA Rule 3.4.2(b)(ii), (v) and (vii);

- (c) confirm in writing, its willingness to comply with restrictions applicable to it pursuant to MFDA Rule 3.4.3 during its designation in early warning; and
- (d) provide information concerning its financial circumstances in response to requests from MFDA Compliance Staff, contrary to s. 22 of the By-law.

21. On July 3, 2008, ASL submitted its FQR for the month ended April 30, 2008, 29 business days late. Between July 3, 2008 and November 4, 2008 when the Receiver was appointed, ASL did not respond to questions from Staff concerning its April 30, 2008 FQR submission and ASL did not file any FQRs to the MFDA for the months following April 2008, contrary to MFDA Rule 3.5.1.

22. In his capacity as President and designated compliance officer of ASL, the Respondent did not ensure that ASL rectified its capital deficiencies, complied with early warning requirements and provided the information concerning its financial circumstances that was requested by Staff.

The Trailer Fee Rebate Program

23. Prior to the appointment of the Receiver in November 2008, ASL offered its clients the opportunity to participate in a trailer fee rebate program (the "TFRP") by paying a monthly fee of approximately \$29.95 regardless of the size of their investment account at ASL and in return, ASL promised to pay to them or reinvest all trailer fees received by ASL for investments in their accounts (which would ordinarily be compensation for the Member and Approved Person).

24. From approximately July 2006, ASL did not have software that could reliably calculate the amount of trailer fees that were owed to participants in the TFRP. Consequently, between July 2006 and November 2008 when the Receiver was appointed, ASL was unable to make regular quarterly payments and reinvestment of the trailer fees that participants in the TFRP were entitled to receive.

25. ASL did not send a letter to all of its clients explaining the circumstances. However, if clients inquired or complained about unpaid trailer fee rebates, ASL did acknowledge that trailer fee rebates were owing and would be paid when ASL was able to calculate the amounts owed. During the period when trailer fee rebate payments were suspended, ASL continued charging clients monthly fees to participate in the TFRP, contrary to MFDA Rule 2.1.1.

26. After July 2006 and prior to the appointment of the Receiver in November 2008, ASL did not pay trailer fee rebates to participants in the TFRP except in response to some client inquiries or to resolve client complaints.

27. Prior to the fall of 2007 when Staff first discovered ASL's failure to pay trailer fee rebates to clients, the Respondent and ASL did not:

- (a) maintain adequate records with respect to:
 - (i) the administration of the TFRP;
 - (ii) its accumulating liability to clients; and

(iii) the basis for the calculations of interim payments of trailer fees to clients who inquired or complained to ASL;

(b) deposit some of the cheques received from fund companies in respect of trailer fees on a timely basis and some cheques became stale-dated; or

(c) take steps to retain required expertise or by other means develop a way to calculate its existing liability to clients and resume regular payment or reinvestment of trailer fees owed to clients in the TFRP;

contrary to MFDA Rules 2.1.1 and 5.

28. In December 2007, ASL entered into an Agreement and Undertaking with the MFDA to secure trailer fees received by ASL in a solicitor's trust account until ASL's liability to clients could be accurately calculated and a system could be implemented to regularly and reliably pay or reinvest trailer fee rebates for clients in the TFRP.

29. Although the Respondent and ASL retained a computer software development company to design software that could reliably calculate the amount of trailer fee rebates that ASL owed to participants in the TFRP, as of November 4, 2008, the software that was developed did not produce accurate and reliable calculations of ASL's TFRP liability.

30. Consequently, on November 4, 2008, the OSC applied for and obtained an order appointing the Receiver. Among other things, as part of its mandate, the Receiver conducted a court supervised claims and distribution process to determine amounts to be paid to participants in the TFRP. As a result of the claims and distribution process, participants in the TFRP were eligible to receive trailer fee rebates owed to them for the period from July 2006 to August 2008.

31. ASL did not have sufficient assets to pay trailer fee rebates owed to clients up to August 2008 after the costs necessitated by the appointment of the Receiver. Consequently, the Receiver had to make a claim against the MFDA Investor Protection Corporation (the "MFDA IPC") to cover the shortfall.

32. As of May 2009, when the Receiver issued its second report to the Court, the Receiver estimated that \$63,300 would be required from the MFDA IPC to pay 428 admitted trailer fee rebate claims totaling \$776,945.18 after administrative and professional fees necessitated by the appointment of the Receiver were paid. It is anticipated that an additional claim will be made to pay remaining costs associated with discharging the Receiver.

33. The MFDA IPC has not and will not pay any expenses relating to services provided by the Receiver to Staff in connection with this disciplinary proceeding.

Undisclosed Outside Business Activities

34. Commencing not later than March 2003, the Respondent became involved with the operation of the following companies and in some cases served as an officer and/or director of such companies:

- (a) International Financial Capital Limited (“IFCL”);
- (b) International Capital Partners Limited (“ICPL”); and
- (c) Amsterdam Management International Limited (“AMIL”).

35. Commencing not later than March 2003, the Respondent became involved with the operations of off-shore mutual funds called the Future Growth Global Fund Limited (“FGGF”) and the Future Growth Fund Limited (“FGF”) which was also known as the Future Growth World Fund Limited. On October 16, 2003, the Respondent also established the Future Growth Market Neutral [Equity] Fund Limited (“FGMNF”) (collectively, these three funds are referred to as the “Future Growth Funds”). FGF and the FGGF had been established and operated by the Respondent’s parents prior to his involvement.

36. The Respondent was the sole shareholder of IFCL. The Respondent acquired all of the common shares of FGF and FGGF from the Respondent’s parents. Since the acquisition, the Respondent has been the President of IFCL and the Future Growth Funds and had exclusive authority over the operations of the Future Growth Funds.

37. Prior to the Respondent taking over ownership and control of the Future Growth Funds, the Respondent’s father had selected and appointed a portfolio advisor located in Wilmington, Delaware to assume the primary responsibility for selecting the equity holdings of FGF and FGGF and a British Virgin Island (“BVI”) based Fund Administrator to manage the day to day operations of those funds. The Respondent continued dealing with the portfolio advisor and the Fund Administrator that his father had selected.

38. IFCL is the Investment Manager of FGMNF and initially, assets in FGMNF were primarily invested in the SciVest Offshore Market Neutral Equity Fund. The Respondent appointed the Fund Administrator of FGF and FGGF to assume administrative responsibility for the operations of FGMNF as well.

39. The Respondent’s companies ICPL and AMIL served as the Investment Managers of FGF and FGGF respectively. Subsequently, in 2006, ICPL and AMIL were merged into IFCL.

40. The Respondent:

- (a) oversaw the roles performed by the portfolio advisor and the Fund Administrator in the administration of the Future Growth Funds;
- (b) established and maintained a Future Growth Funds website;
- (c) directed other third party service providers such as the lawyers and auditors of the Future Growth Funds;
- (d) corresponded with securities regulators such as the BVI Financial Services Commission;
- (e) attended to some of the business requirements of the Future Growth Funds from the ASL office such as correspondence and telephone calls; and
- (f) received management fees paid out by the Future Growth Funds.

41. The Respondent did not report his involvement with any companies other than ASL to Canadian securities regulators, including on the National Registration Database (the “NRD”) and on the Form 33-109F4 document that was submitted in respect of his registration, contrary to his obligations under National Instrument 33-109.

42. The Respondent also failed to properly document information about his involvement in outside business activities on the books and records of ASL contrary to MFDA Rules 1.2.1(d) and 2.1.1(c).

43. During the course of Staff’s investigation into the Respondent’s conduct, Staff discovered documents that revealed the Respondent’s involvement with the companies described above including documents that appeared to indicate that units in the Future Growth Funds were owned by Canadian investors. Staff informed the securities commissions in jurisdictions in which Canadian unit holders of the Future Growth Funds appeared to reside which led to regulatory action including the proceedings described in paragraph 8 above.

44. Since staff discovered the existence of the Future Growth Funds, Staff has not identified any ASL clients who appear to be investors in the Future Growth Funds and Staff has not received or been informed of any complaints from investors in the Future Growth Funds.

45. The Respondent states that:

- (a) most of the investors in the Future Growth Funds acquired their investments when the funds were owned and operated by the Respondent’s parents and when the investors resided in jurisdictions outside of Canada; and
- (b) since the Respondent became involved with the Future Growth Funds, transactions in the funds have been processed by the Fund Administrator in the BVI and have mostly consisted of redemptions.

Compliance Deficiencies

46. As the President and designated compliance officer of ASL, the Respondent was the primary individual responsible for supervision and regulatory compliance of ASL and he is accountable for ASL’s failure to satisfy its regulatory obligations.

Trade Supervision

47. Between January 2004 and May 2006, ASL did not maintain evidence of trade supervision contrary to MFDA Rules 2.5 and 5 and MFDA Policy No. 2 including in particular, records of any inquiries made, responses received or follow up action taken in connection with trade supervision.

48. During the 2006 MFDA Sales Compliance Examination of ASL, MFDA Compliance Staff reviewed ASL records covering the period from January 2004 to May 2006. Among the 60 ASL daily trading summary reports that were reviewed:

- (a) 21 contained no evidence of daily trade supervision and suitability review;

- (b) 22 of the trading summary reports were signed by a compliance officer but were not dated;
- (c) None contained evidence of inquiries made, responses received or follow up action taken in connection with trading shown on the reports.

49. Similar deficiencies were identified in the 2003 Sales Compliance Examination of ASL but the Respondent and ASL did not correct the deficiencies.

New Accounts

50. During the 2006 MFDA Compliance Examination of ASL, MFDA Compliance Staff examined 60 client files in which trading had occurred between January 2004 and May 2006 and identified:

- (a) 13 client accounts for which there was no NAAF on file;
- (b) 24 client files with missing or incomplete KYC information; and
- (c) 4 NAAFs that had not been signed and dated by the client,

contrary to MFDA Rules 2.2.1 and 2.2.2; and

- (d) 6 NAAFs that contained no evidence of review or approval by a compliance officer, contrary to MFDA Rules 2.2.3 and 5 and MFDA Policy No. 2.51.

51. Similar deficiencies were identified in the 2003 MFDA Sales Compliance Examination of ASL but the Respondent and ASL did not correct the deficiencies.

Securities Related Business Conducted By A Non-Registrant

52. Between the summer of 2004 and September 2007, the Respondent and ASL permitted an individual named Anil Jain to conduct securities related business for clients of ASL without registration contrary to MFDA Rule 1.1.5(a).

Trust Account Interest

53. The Respondent and ASL did not implement a system to calculate or pay interest earned on client money held in ASL's mutual fund trust account contrary to MFDA Rule 3.3.2(h), MFDA Policy No. 4 and National Instrument 81-102.

54. This deficiency was identified during the 2003 and 2006 MFDA Sales Compliance Examinations of ASL but the Respondent and ASL did not correct the deficiencies.

Referral Arrangements

55. On behalf of ASL, the Respondent entered into referral arrangements with third party entities such as Maypoint Investments Inc. and Kenartha Oil & Gas which were not permitted arrangements because the companies were not licensed, registered or regulated entities eligible to be parties to a referral arrangement with an MFDA Member according to MFDA Rule 2.4.2(b)(i).

Timely Processing Of Trades & Approval Of New Accounts

56. Between June and December 2007, on at least 15 occasions, the Respondent and ASL did not process trades for its clients to purchase securities in a timely manner contrary to National Instrument 81-102 and MFDA Policy No. 2. 12 of the 15 purchase orders were processed between 7 and 17 days after the order was placed and in one of those cases, the note offering closed before the purchase order was processed.

57. Between July 2007 and January 2008, on at least 6 occasions, the Respondent and ASL did not process redemptions for its clients on a timely basis contrary to National Instrument 81-102 and MFDA Policy No. 2. These redemption requests were processed between 5 and 17 days after the requests were made.

V. CONTRAVENTIONS

58. The Respondent admits that, in his capacity as the President and Chief Compliance Officer of ASL, he did not operate ASL in a compliant manner in accordance with its regulatory obligations as particularized below:

(a) commencing in March 2003, ASL did not comply with the requirements of a Level 3 dealer to:

- (i) consistently maintain minimum capital and risk adjusted capital; and
- (ii) convert all client assets that it held in nominee name into client name;

contrary to MFDA Rule 3.1.1;

(b) commencing in March 2004, ASL did not:

- (i) consistently maintain RAC and frequently triggered early warning tests set out in MFDA rule 3.4.2(a); and
- (ii) file monthly and annual financial questionnaires and reports on a timely basis as required by MFDA Rule 3.5.1;

(c) commencing in April 2008, ASL did not:

- (i) comply with early warning requirements that were applicable pursuant to MFDA Rule 3.4.2(b); and
- (ii) respond to requests for information from the MFDA Compliance Department concerning its financial circumstances, contrary to s. 22 of the By-law;

(d) the Respondent and ASL did not maintain adequate records of trade supervision, contrary to MFDA Rules 2.5 and 5 and MFDA Policy No. 2;

(e) the Respondent and ASL permitted trading by mutual fund clients of ASL without first obtaining appropriately completed and approved New Account Application Forms (“NAAF”) for such clients, contrary to MFDA Rule 2.2;

(f) between the summer of 2004 and September 2007, the Respondent and ASL permitted an unregistered individual named Anil Jain to conduct securities related business for clients of ASL, contrary to MFDA Rule 1.1.5(a);

(g) the Respondent and ASL did not implement a system to properly distribute on a cash basis, interest earned in the Member's mutual fund trust account contrary to MFDA Rule 3.3.2(h), MFDA Policy No. 4 and National Instrument 81-102;

(h) the Respondent and ASL engaged in referral arrangements that did not comply with MFDA Rule 2.4.2(b); and

(i) the Respondent and ASL failed to process trade orders on a timely basis, contrary to National Instrument 81-102 and MFDA Policy No. 2;

and thereby engaged in conduct contrary to MFDA Rules 2.1.1(c) and 2.5.1

59. The Respondent admits that commencing in July 2006, the Respondent and ASL did not maintain sufficient records or properly administer a trailer fee rebate program for which clients were charged monthly fees and prior to the appointment of a Receiver in November 2008, the Respondent and ASL did not accurately quantify its liability to clients or pay trailer fee rebates that were owed for periods after July 2006, contrary to MFDA Rules 2.1.1 and 5.

60. The Respondent admits that between March 2003 and April 2008, the Respondent was engaged in outside business activities that were not disclosed in Form 33-109F4 or on the National Registration Database ("NRD") as required, contrary to MFDA Rules 1.2.1(d), 2.1.1(c) and National Instrument 33-109.

VI. TERMS OF SETTLEMENT

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

- (a) The Respondent shall pay a fine in the amount of \$50,000;
- (b) The Respondent shall be prohibited from being registered or acting in the capacity of Ultimate Designated Person, Chief Compliance Officer, Compliance Officer or Branch Manager for a Member of the MFDA for a period of 5 years from the date that this Settlement Agreement is accepted by a Hearing Panel of the MFDA;
- (c) The Respondent shall pay costs in the amount of \$25,000;
- (d) The Respondent agrees that the fine and costs shall be payable as follows:
 - (i) \$25,000 of the fine and \$25,000 in costs shall be payable immediately upon acceptance of the Settlement Agreement; and
 - (ii) the remaining \$25,000 of the fine shall be paid on or before Friday, October 22, 2010;
- (e) The Respondent agrees that if he fails to pay all or part of the fine by the date when it is due in accordance with sub-paragraph 61(d) above, then automatically and without further notice, and without Staff having to again

appear before a Hearing Panel or commence any further proceeding, the Respondent shall be permanently prohibited from conducting securities related business while in the employ of, or sponsored by, any MFDA Member, pursuant to section 24.1.1(c) of MFDA By-law No. 1; and

- (f) The Respondent agrees that notwithstanding the imposition of a permanent prohibition on the Respondent in accordance with sub-paragraph 61(e) above, the Respondent shall remain required to pay the outstanding unpaid portion of the fine.

IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT

67. 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.

IV. FACTORS CONCERNING ACCEPTANCE OF A SETTLEMENT AGREEMENT

39. The Settlement Agreement was executed by the parties shortly before the scheduled commencement of the Hearing on the Merits. We were advised that it was reached after significant discussion and negotiation. It represents what the parties feel, with their knowledge and experience, is an appropriate resolution.

40. Under the circumstances, in our view, a Hearing Panel should not interfere lightly in the negotiated settlement so long as the penalties agreed upon are in the reasonable range of appropriateness given the admitted conduct of the Respondent.

Re: *Keybase Financial Group Inc. and Dax Sukhraj (Re)*, [2009] MFDA Central Regional Council, File No. 200823, Hearing Panel Decision dated June 2, 2009 at para. 16.

41. Previous MFDA Hearing Panels have determined the factors, which should be considered, in determining whether a Settlement Agreement should be accepted. These include the following:

- (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.
- (g) Whether the Settlement Agreement will foster confidence in the regulatory process itself.

Re: *Investors Group Financial Services (Re)*, [2005] MFDA Ontario Regional Council, File No. 200401, Hearing Panel Decision dated December 16, 2004 at paras. 2-3.

Re: *Professional Investments (Kingston) Inc. (Re)*, [2009] MFDA Central Regional Council, File No. 200836, Hearing Panel Decision dated March 24, 2009 at page 9.

Re: *Keybase Financial Group Inc. and Dax Sukhraj (Re)*, [2009], *supra*, at para. 17.

42. We also reviewed the factors which previous Hearing Panels have indicated should be considered when determining the appropriate penalty. These 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: *Robert Roy Parkinson (Re)*, [2009], MFDA Ontario Regional Council, File No. 200501, Hearing Panel Decision dated April 29, 2005 at page. 22.

Re: *Keybase Financial Group Inc. and Dax Sukhraj (Re)*, *supra*, at para. 18.

Re: *Donald James Cunningham (Re)*, [2010], MFDA Central Regional Council, File No. 200906, Hearing Panel Decision dated February 24, 2010 at para. 22.

43. We also considered the MFDA Penalty Guidelines (“Guidelines”). We recognize that these Guidelines are not mandatory, but simply suggest the types and ranges of penalties that might be appropriate to particular case types. In its written Submissions, Staff provided a series of useful extracts from the Guidelines relevant to the kind of misconduct set out in the Settlement Agreement.

V. CONSIDERATIONS IN THE PRESENT CASE

44. Staff submitted that the misconduct admitted by Leemhuis in the Settlement Agreement required a consideration of the following MFDA By-laws, Rules, Member Regulation Notices and Bulletins:

MFDA Rule 2.1.1(b) and (c)	Standard of Conduct
MFDA Rule 2.5	Minimum Standards of Supervision
MFDA Rule 3.1.1	Minimum Capital Requirements
MFDA Rule 3.4.2	Early Warning Requirements
MFDA Rule 3.5.1	Financial Reporting Requirements
Section 22 of MFDA By-law No. 1	Requirements to Provide Information
MFDA Rule 5	Books, Records & Reporting
Member Regulation Notice MR-0044	Member Obligations re: service providers
MFDA Policy No. 2	Minimum Standards for Account Supervision
MFDA Rule 2.2	Client Accounts
MFDA Rule 1.1.5(a)	Approved Persons Must Be Registered
MFDA Rule 3.3.2(h)	Obligation to Pay Trust Account Interest

MFDA Policy No. 4 Internal Control Policy Statement 4	Cash and Securities
National Instrument 81-102	Re: Timely Processing of Trades
MFDA Rule 2.4.2	Referral Arrangements
Member Regulation Notice MR-0030	Referral Arrangements
Member Regulation Notice MR-0043	Referrals re: Specific Securities
MFDA Rule 1.2.1(d)	Outside Business Activities
Member Regulation Notice MR-0040	Outside Business Activities
National Instrument 33-109	Information Registrants Must Disclose

45. The misconduct outlined in the Settlement Agreement is extensive and diverse. It can, however, be reviewed under the following headings:

- A. Compliance Deficiencies.
- B. Administration of ASL's Trailer Fee Rebate Program.
- C. Undisclosed Outside Business Activities.

A. Compliance Deficiencies

46. In his capacity as President and Chief Compliance Officer of ASL, Leemhuis has accepted personal responsibility for a number of serious regulatory compliance deficiencies of ASL. It was appropriate that he do so.

47. By virtue of his position with ASL, the scope of his control of or responsibility for ASL's conduct, as well as his personal connection to the contraventions, it is reasonable to conclude that Leemhuis was aware or ought to have been aware of the compliance contraventions and failed to take reasonable steps to either prevent them from occurring or, in some cases, re-occurring.

48. This is not the first occasion in which an MFDA Hearing Panel has held senior officers of a Member responsible for the compliance deficiencies of the Member. See also:

- (a) *Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill*, [2009] MFDA File No. 200834.
- (b) *Keybase Financial Group Inc. and Dax Sukhraj*, [2009] MFDA File No. 200823.
- (c) *IOCT Financial Inc. and Michelle Anne Bolhuis*, [2009] MFDA File No. 200903.

- (d) *The Investment House of Canada Inc., Sanjiv Sawh and Vlad Trkulja*, [2010] MFDA File No. 200935.
- (e) *Donald James Cunningham*, [2010] MFDA File No. 200906.

49. The admitted contraventions in this case include financial compliance deficiencies such as breaches of the obligations to:

- (a) maintain minimum capital;
- (b) convert client assets into nominee names;
- (c) file monthly and annual financial questionnaires on a timely basis;
- (d) respond to requests for information from MFDA financial compliance Staff; and
- (e) comply with early warning requirements.

50. Minimum capital requirements, financial reporting requirements and early warning requirements are fundamental safeguards which have been built into the regulatory process to enable the MFDA to closely monitor and control risk factors which might otherwise result in financial harm to clients and/or insolvency of the Member.

51. By continuously meeting minimum capital requirements, dealers demonstrate their financial viability and ensure that there is a buffer to meet the Member's ongoing liabilities without jeopardizing the interests of clients or the solvency of the Member.

52. MFDA Rule 3.4.2(a) sets out a number of early warning tests. If, as a result of these tests, a Member is designated in early warning, Rule 3.4.2(b) sets out a number of requirements. In the present case, ASL did not comply with these requirements.

53. Level 3 dealers, like ASL, are prohibited from holding client assets in the dealer's nominee name. If client assets are held in the dealer's nominee name, the assets are held in trust for the benefit of the client. However, there is an increased risk of harm to clients because, as the legal owner of the assets, the dealer can exercise trading authority over the assets without a client signature. Also, the client must rely on the dealer to facilitate all dealings with the assets.

54. Leemhuis, in the Settlement Agreement, has also appropriately accepted responsibility

for several general compliance deficiencies of ASL. These included the fact that ASL repeatedly did not:

- (a) maintain adequate evidence of supervision;
- (b) maintain required Know-Your-Client information for all clients and ensure that evidence was maintained of approval of all new accounts; and
- (c) implement a system to calculate or pay interest earned on client money held in ASL's mutual fund trust account.

55. Leemhuis also accepted personal responsibility for the fact that ASL:

- (a) did not process all trades for its clients in a timely manner;
- (b) permitted trading by an unregistered individual; and
- (c) entered into referral arrangements with third party entities that were not permitted according to MFDA Rule 2.4.2(b).

B. Administration of ASL's Trailer Fee Rebate Program

56. As outlined in detail in paragraphs 23 to 29 and 59 of the Settlement Agreement, ASL offered clients the opportunity to participate in a trailer fee rebate program ("TFRP") in which clients who paid a monthly fee of approximately \$29.95 received a promise from ASL to rebate to them all trailer fees received by ASL for investments in their accounts. However, from July of 2006 to when the Receiver was appointed in November of 2008, ASL did not maintain adequate records or software to reliably calculate the trailer fees owed to participants in the TFRP.

57. During this period, ASL suspended payment of trailer fee rebates to clients, except in response to inquiries or complaints. However, it continued to charge the monthly fees. ASL did not send a letter to all of its clients explaining the circumstances.

58. In December of 2007, ASL did transfer funds into a solicitor's trust account to secure the funds for the benefit of clients until its liability to these clients could be accurately calculated.

59. Subsequent to November 4, 2008, the Receiver conducted a court supervised claims and

distribution process that resulted in 428 admitted transfer fee rebate claims totaling \$776,945.18 payable to ASL clients.

60. In order to pay the admitted claims and administrative and professional fees necessitated by the appointment of the Receiver, the MFDA IPC has had to pay in excess of \$63,000.00.

C. Undisclosed Outside Business Activities

61. As detailed in paragraphs 34 to 45 and 60 of the Settlement Agreement, commencing not later than March 2003 (when ASL became a Member of the MFDA), Leemhuis became involved with the operation of three companies that served as Investment Managers of two off-shore mutual fund companies. In October of 2003, he established a third off-shore mutual fund company.

62. Leemhuis acquired all of the shares of these companies, was named President of the companies and had exclusive control over the operation of the funds.

63. Leemhuis did not report his involvement with any companies, other than ASL, to Canadian securities regulators, including the MFDA, and did not document his involvement in outside business activities on the books and records of ASL.

64. It is clear that Leemhuis had a regulatory obligation to disclose his involvement in outside business activities to securities regulators on the Form 33-109F4 that was submitted in respect of his registration as an Approved Person and on the books and records of ASL in accordance with MFDA Rule 1.2.1(d).

65. His failure to do so is a breach of MFDA Rule 2.1.1(c), which provides that:

“2.1 GENERAL

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

(c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest;”

VI. PENALTY CONSIDERATIONS

66. Staff made, *inter alia*, the following submissions with respect to the appropriateness of the proposed penalties:

“Seriousness of the Contraventions

The breaches of the rules and regulations by the Respondent indicate a certain irresponsibility and lack of reasonable care in his attempts to meet the requirements and to obey the rules and regulations of the MFDA. Mutual fund dealers carry on a business which is based upon the trust of their clients. Their clients rely upon the dealer for care and maintenance of the funds that they invest with them and rely upon them to act in compliance with MFDA rules and regulations. The punishments that are imposed must reflect the gravity of the breaches and the importance of the maintenance of the trust of clients and members of the public generally in the work of MFDA dealers.

Industry Experience and Past Conduct

Leemhuis has been the President, the Chief Compliance Officer and a director of ASL since ASL became a mutual fund dealer in 1999. He has been an Approved Person of the MFDA since ASL became a Member on March 4, 2003.

Leemhuis has no disciplinary history prior to the regulatory proceedings described in the Settlement Agreement, which all arose as a result of the contraventions addressed by the Settlement Agreement.

The Respondent’s Recognition Of The Seriousness Of His Misconduct

By admitting to the contraventions set out in the Settlement Agreement Leemhuis has demonstrated that he recognizes the seriousness of the misconduct. By entering into this Settlement Agreement, Leemhuis has also accepted responsibility for the misconduct and avoided the need for a lengthy hearing.

Harm Caused By The Respondent’s Misconduct

Many participants in the TFRP experienced considerable delays in receiving trailer fee rebates owed for the period from July 2006 to August 2008 and all trailer fee rebates ceased for periods after August 2008. In order to pay admitted claims and costs necessitated by the appointment of the Receiver, the Receiver also had to submit a claim for at least \$63,300 to the MFDA IPC.

Multiple securities regulators also expended considerable resources to address the contraventions described in the Settlement Agreement.

However, as a result of the work of the Receiver and the contribution made by the MFDA IPC, all admitted claims for trailer fee rebates were paid in full.

Staff is not aware of any complaints from or losses sustained by investors in the Future Growth Funds.

Benefits Received By The Respondent As A Result Of The Misconduct

Leemhuis supported the operations of ASL by means of subordinated loans that totaled \$766,705 as of March 31, 2008. As ASL is now in receivership and all the available assets of the dealer were used to pay admitted TFRP claims and costs necessitated by the appointment of the Receiver, it appears that losses sustained by Leemhuis as a result of the misconduct have substantially exceeded benefits (if any).

Deterrence

The financial penalties imposed on Leemhuis in this case are at the high end of the range of penalties imposed on individuals for the types of misconduct that Leemhuis has admitted to in the contravention section of the Settlement Agreement. In addition, Leemhuis has lost the business that he established and the substantial amount of money that he invested to fund the operations. Staff is satisfied that the penalties imposed will deter others from engaging in similar misconduct in the future.”

67. The MFDA Penalty Guidelines, in matters concerning Approved Persons, recommend a minimum fine of \$5,000 in cases involving contraventions with respect to books and records, the standard of conduct, the policies and procedures of the Member and provincial securities requirements. Minimum fines of \$10,000 are recommended in cases involving contraventions of supervision obligations, financial requirements and rules with respect to outside business activities and referral arrangements. Other penalties which may sometimes be appropriate include course requirements, periods of heightened supervision, suspensions and, in egregious cases, permanent prohibition from the industry.

68. In the case before us, Leemhuis has admitted to numerous breaches of the Rules. If the minimum recommended penalty was applied to each of the admitted breaches, the suggested figure of \$50,000.00 would be reached or exceeded. Thus, we disagree with Staff’s submission that the suggested financial penalty is at the high end of the range.

69. However, we do believe that the proposed penalties will deter future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster confidence in the mutual fund industry.

70. We also note the nature of these proceedings, the fact that they are public and the effect

that this has had, and will have, on Leemhuis.

71. During the course of the proceedings, we discussed with the parties certain proposed amendments to the language of the draft Order attached to the Settlement Agreement as Schedule “A”. The parties were amenable to the suggested changes.

72. After a careful consideration of all of the above factors and submissions, we unanimously concluded that the Settlement Agreement was reasonable and in the public interest and should be accepted by this Hearing Panel.

VII. PENALTIES IMPOSED

73. In summary, the penalties, which we impose on the Respondent Leemhuis, are the following:

- (a) The Respondent shall pay a fine in the amount of \$50,000.00, pursuant to section 24.1.1(b) of MFDA By-law No. 1.
- (b) The Respondent is prohibited from being registered or acting in the capacity of Ultimate Designated Person, Chief Compliance Officer, Compliance Officer or Branch Manager for a Member of the MFDA for a period of 5 years from the date of this Order, pursuant to section 24.1.1(e) of MFDA By-law No. 1.
- (c) The Respondent shall pay costs of the investigation and prosecution in the amount of \$25,000.00, pursuant to section 24.2 of MFDA By-law No. 1.
- (d) The fine and costs prescribed in this Order are payable as follows:
 - (i) \$25,000.00 of the fine and \$25,000.00 in costs is payable immediately; and
 - (ii) \$25,000.00 of the fine shall be paid on or before Friday, October 22, 2010.
- (e) If the Respondent fails to pay all or part of the fine by the date when it is due in accordance with paragraph (d), then the unpaid portion of the fine shall remain payable in accordance with the Order and, in addition, automatically and without further notice, and without Staff having to again appear before a Hearing Panel or commence any further proceedings, the Respondent shall be permanently prohibited from conducting securities related business while in the employ of, or sponsored by, any MFDA Member, pursuant to section 24.1.1(c) of MFDA By-law No. 1.

74. A copy of the Order, as issued, is attached as Appendix “A” to this Decision and Reasons.

VIII. ASL

75. In the last paragraph of our Order, dated May 4, 2010, dealing with Leemhuis, we ordered that the Hearing on the Merits of the case against ASL would commence on May 18, 2010, and continue, if necessary, on May 20 and 21, 2010.

76. On May 13, 2010, the MFDA issued a Notice of Application pursuant to section 24.3 of MFDA By-law No. 1 for an Order terminating the membership of ASL in the MFDA and for a Stay of the disciplinary proceedings which were commenced against, *inter alia*, ASL by the Notice of Hearing issued on October 17, 2008.

77. The Application was made returnable before the Hearing Panel on May 18, 2010.

78. Section 24.3.2 of MFDA By-law No. 1 provides, in part, as follows:

“24.3.2 *Members*

Notwithstanding anything in Section 20 or Section 24,

- (a) a Hearing Panel of the applicable Regional Council may, upon application by the Corporation made with or without notice to a Member, impose any of the penalties provided for in Section 24.3.3 upon the Member in the event that:
 - i. the registration of the Member as a mutual fund dealer under any securities legislation in any jurisdiction inside or outside Canada is cancelled, suspended, terminated, subjected to terms and conditions or the Member fails to renew any such registration which has lapsed;
 - ii. the Member makes a general assignment for the benefit of its creditors or is declared bankrupt or makes an authorized assignment or a proposal to its creditors under the Bankruptcy and Insolvency Act, or a winding-up order is made in respect of the Member or a receiver or other officer with similar powers is appointed in respect of all or any part of the undertaking and property of the Member;

- iv. the Member has failed to maintain the minimum capital required under any By-law, Rule, Form or Policy of the Corporation;
- v. the Member has failed to file with the Corporation a copy of a financial report of the Member as at the end of each fiscal month as required under any By-law, Rule or Policy of the Corporation;
- viii. the Member has failed to rectify the circumstances causing the Member to be designated in early warning by the Corporation or has failed to comply with terms and conditions imposed on the Member after it was designated in early warning by the Corporation;
- xi. the Member has failed to comply with the provisions of any By-law, Rule or Policy of the Corporation;
- xii. the Member is in such financial or operating difficulty that a Hearing Panel determines that the Member cannot be permitted to continue to operate without risk of imminent harm to the public, to other Members or Approved Persons, or to the Corporation;
- xiv. the Member has given notice of its intention to resign or is not carrying on business as a mutual fund dealer.”

79. The Application was supported by an Affidavit of Karen McGuinness, Vice-President of Compliance at the MFDA, sworn on May 13, 2010.

80. The Affidavit revealed the following:

“Registration History

(a) ASL has been a Member of the MFDA since March 4, 2003. It is registered as a mutual fund dealer in Ontario, Alberta and British Columbia and its registration is currently suspended in each of those provinces.

(b) ASL was first registered as a mutual fund dealer in Ontario in November 1999. ASL was subsequently registered as a mutual fund dealer in British Columbia in August 2004 and in Alberta in December 2005. ASL’s registration in Ontario was suspended on May 1, 2008 when a cease trade order was issued against ASL by the Ontario Securities Commission (the “OSC”). Subsequently, ASL’s registration was suspended in British Columbia effective August 7, 2008 and in Alberta effective August 25, 2008.

(c) The founder, president and sole shareholder of ASL is Adrian Samuel Leemhuis. The name ASL is derived from the initials of Leemhuis. Leemhuis became an Approved Person of ASL when ASL became a Member of the MFDA. Leemhuis was registered as a mutual fund salesperson in Ontario and as an officer, director and designated compliance officer of ASL from November 18, 1999 until his registration was suspended

along with the registration of ASL on May 1, 2008. Since May 2008, Leemhuis has been the only Approved Person of ASL.

Compliance Deficiencies

(d) The MFDA Compliance department conducts regular compliance examinations of Members. Following the 2006 compliance examination of ASL, the Compliance department referred a number of compliance deficiencies to the Enforcement department for further investigation.

(e) The Financial Compliance department was also closely monitoring ASL because ASL had sustained continuous losses and had reported a consistently increasing retained deficit from the time that ASL became a Member in 2003. ASL was only able to continue to satisfy its regulatory capital requirements as a result of continual subordinated loans from Leemhuis, which totaled \$766,705 as of March 31, 2008.

(f) Commencing April 30, 2004, ASL frequently triggered early warning tests set out in MFDA Rule 3.4.2(a) and was designated in early warning for extended periods, as follows:

- (a) from April 30, 2004 to June 27, 2006;
- (b) from August 3, 2006 to July 31, 2007; and
- (c) from December 14, 2007 to the present.

ASL's Trailer Fee Rebate Program

(g) After July 2006, ASL was unable to reliably calculate the amount of trailer fees that were owed to participants in the TFRP. Consequently, ASL was designated in early warning and ASL entered into an Agreement and Undertaking with Staff that required ASL to deposit all trailer fees that the Member received into the Trust Account of ASL's lawyer until ASL was able to demonstrate to the satisfaction of Staff that it was able to reliably calculate its liability to clients.

ASL's Risk Adjusted Capital Deficiency

(h) On April 18, 2008, ASL submitted its audited Financial Questionnaire & Report ("FQR") for the year ended December 31, 2007. As a result of audit adjustments, the calculation of ASL's risk adjusted capital ("RAC"), according to the audited FQR, was \$53,962 lower than the RAC calculation that was submitted on the unaudited FQR for the month ended December 31, 2007. Consequently, ASL had a RAC deficiency of approximately \$42,562 as of December 31, 2007.

Cease Trade Orders

(i) On April 22, 2008, the OSC issued cease trade orders against Leemhuis. On May 1, 2008 the OSC issued a cease trade order against ASL.

(j) The cease trade orders were extended multiple times on consent. On November 6, 2009, the OSC issued an order terminating the cease trade orders.

Appointment Of a Receiver

(k) In October 2008, the OSC brought an application before the Ontario Superior Court of Justice, pursuant to Section 129 of the *Securities Act*, requesting the appointment of a receiver over all of the assets and undertaking of ASL. On November 4, 2008, an Order was issued by the court appointing KPMG Inc. (the “Receiver”) as a Receiver over ASL.

(l) In May 2009, the Receiver issued a report, which indicates that ASL did not have sufficient assets to pay all admitted claims for trailer fee rebates owed to clients up to August 2008 after the costs necessitated by the appointment of the Receiver were paid. Consequently, the Receiver had to make a claim against the MFDA IPC to cover the shortfall.

(m) The fact that the Receiver had to submit a claim against the MFDA IPC in order to pay all admitted trailer fee rebate claims reflects the fact that ASL has no remaining assets of material value available to satisfy its liabilities.

(n) The Receiver advised that all customers of ASL were informed that their accounts had to be transferred to a new mutual fund dealer. The Receiver also stated that ASL’s client list was sold on January 30, 2009.”

81. MFDA Rule 3.1.1 establishes minimum levels of risk adjusted capital to be maintained by Members.

82. MFDA Rule 3.4.2(b) sets out a series of provisions, which apply when a Member is designated in early warning.

83. MFDA Rule 3.5.1 establishes monthly financial reporting requirements.

84. The admissible evidence before the Hearing Panel reveals that the following provisions of Section 24.3.2 of MFDA By-law No. 1 are applicable when considering the conduct of ASL:

- (a) ASL’s registration is suspended; [s. 24.3.2(a)(i)]
- (b) A Receiver has been appointed over all of the assets and undertaking of ASL; [s. 24.3.2(a)(ii)]
- (c) ASL has failed to maintain minimum risk adjusted capital or rectify its capital deficiency, contrary to MFDA Rule 3.1.1; [s. 24.3.2(a)(iv)]

- (d) For all months following April 2008, ASL failed to comply with monthly financial reporting requirements to the MFDA, contrary to MFDA Rule 3.5.1; [s. 24.3.2(a)(v)]
- (e) ASL failed to rectify the circumstances that caused it to be designated in early warning and failed to comply with early warning requirements that were imposed after it was designated in early warning, contrary to MFDA Rule 3.4.2(b); [s. 24.3.2(a)(viii)]
- (f) ASL failed to comply with MFDA Rules as noted above; [s. 24.3.2(a)(xi)]
- (g) As the only Approved Person of ASL is Leemhuis and as his registration has been suspended in all Canadian jurisdictions since August 25, 2008 and as ASL has no remaining assets of material value, ASL has no means of resuming operations as a mutual fund dealer; [s. 24.3.2(a)(xii)]
- (h) By letter, dated October 17, 2008, ASL submitted a letter of resignation from the MFDA but the resignation process was never completed; [s. 24.3.2(a)(xiv)]

85. We were advised that Counsel for the Receiver, as well as Counsel for Leemhuis, were provided with copies of both the Notice of Application and the Application Record. On behalf of their respective clients, neither Counsel opposed the relief sought.

86. In our view, any of the grounds listed in paragraph 84 could, by itself, provide sufficient justification, in appropriate circumstances, for the Hearing Panel to issue an Order terminating the Membership of ASL pursuant to Section 24.3.3(e) of MFDA By-law No. 1.

87. When the grounds were considered together, it was our unanimous view that the only appropriate course of action was to issue an Order terminating ASL's Membership in the MFDA. We did so.

88. After the Hearing Panel had made its Order terminating ASL's Membership in the MFDA, Counsel for the MFDA requested an Order staying the disciplinary proceedings against ASL as set out in the Notice of Hearing, issued on October 17, 2008.

89. Counsel's reasons for the request included:

- (a) the Allegations of misconduct against both ASL and Leemhuis, set out in the Notice of Hearing, have been sufficiently addressed in the Settlement Agreement between Staff and Leemhuis;
- (b) the Settlement Agreement included certain Allegations in addition to those referred to in the current proceeding against ASL;
- (c) the Hearing Panel's Order of May 4, 2010, imposed certain penalties on Leemhuis, pursuant to Sections 20 and 24 of MFDA By-law No. 1;
- (d) in light of the May 4, 2010 Order, as well as the Order terminating the Membership of ASL in the MFDA, the cost of continued prosecution of the Allegations of misconduct against ASL would be disproportionate to the incremental regulatory objectives to be achieved.

90. We agreed with Counsel's submissions and granted the Stay Order.

DATED this 8th day of February, 2011.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.
Chair

“Selwyn Kossuth”

Selwyn Kossuth,
Industry Representative

“Guenther Kleberg”

Guenther Kleberg,
Industry Representative



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Adrian Samuel Leemhuis

ORDER

WHEREAS on Monday April 19, 2010, the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Settlement Hearing pursuant to section 24.4 of By-law No. 1 in respect of Adrian Samuel Leemhuis (the "Respondent");

AND WHEREAS a proceeding had been commenced by Staff of the MFDA ("Staff") against the Respondent and ASL Direct Inc. ("ASL"), a Member of the MFDA, by Notice of Hearing issued on October 17, 2008;

AND WHEREAS by order of the Superior Court of Justice dated November 4, 2008, KPMG Inc. (the "Receiver") was appointed as Receiver without security, over all of the assets and undertaking of ASL pursuant to Section 129 of the *Securities Act*, R.S.O. c. S5;

AND WHEREAS the hearing of the proceeding against the Respondent and ASL had previously been scheduled to proceed on its merits commencing on Wednesday, April 21, 2010 by Order of the Hearing Panel dated January 18, 2010;

AND WHEREAS the Respondent entered into a settlement agreement with Staff of the MFDA, dated Friday, April 16, 2010 (the "Settlement Agreement"), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

AND WHEREAS the Respondent and Staff requested that the Hearing Panel proceed with a Settlement Hearing on Wednesday, April 21, 2010 in light of the fact that notice had been give to the public that a hearing would take place on that date notwithstanding the fact that 10 days notice of a Settlement Hearing had not been given to the public in accordance with Rule 15.2(1) of the MFDA Rules of Procedure;

AND WHEREAS pursuant to Rule 1.5(1) and 2.2 of the MFDA Rules of Procedure, the Hearing Panel has the authority to abridge the time for the performance of any obligation and the Hearing Panel was of the opinion that it was in the public interest to proceed with the Settlement Hearing on Wednesday, April 21, 2010;

AND WHEREAS Staff agreed to postpone the proceeding against ASL until after the Hearing Panel determined whether the Settlement Agreement would be accepted;

AND UPON READING the Settlement Agreement, the Notice of Settlement Hearing, the Amended Amended Notice of Hearing previously issued on March 29, 2010, the previously filed Amended Reply of the Respondent dated October 19, 2009, the written submissions of Staff of the MFDA and upon hearing the oral submissions of Staff of the MFDA and counsel for the Respondent;

AND WHEREAS on consent of Staff and counsel for the Respondent, the contraventions that the Respondent admitted to in the Settlement Agreement were disclosed to counsel for the Receiver and counsel for the Receiver does not oppose findings consistent with the contraventions admitted to by the Respondent to the extent that such findings reflect upon the conduct of ASL;

AND WHEREAS Staff and the Respondent consent to amendments to the language of the Order attached to the Settlement Agreement as Schedule "A";

AND WHEREAS on the basis of the admissions of the Respondent, the Hearing Panel is of the opinion that:

The Respondent, in his capacity as the President and Chief Compliance Officer of ASL, did not operate ASL in a compliant manner in accordance with its regulatory obligations as particularized below:

- (a) commencing in March 2003, ASL did not comply with the requirements of a Level 3 dealer to:
- (i) consistently maintain minimum capital and risk adjusted capital (“RAC”); and
 - (ii) convert all client assets that it held in nominee name into client name;
- contrary to MFDA Rule 3.1.1;
- (b) commencing in March 2004, ASL did not:
- (i) consistently maintain RAC and frequently triggered early warning tests set out in MFDA rule 3.4.2(a); and
 - (ii) file monthly and annual financial questionnaires and reports on a timely basis as required by MFDA Rule 3.5.1;
- (c) commencing in April 2008, ASL did not:
- (i) comply with early warning requirements that were applicable pursuant to MFDA Rule 3.4.2(b); and
 - (ii) respond to requests for information from the MFDA Compliance Department concerning its financial circumstances, contrary to s. 22 of MFDA By-law No. 1;
- (d) the Respondent and ASL did not maintain adequate records of trade supervision, contrary to MFDA Rules 2.5 and 5 and MFDA Policy No. 2;
- (e) the Respondent and ASL permitted trading by mutual fund clients of ASL without first obtaining appropriately completed and approved New Account Application Forms (“NAAF”) for such clients, contrary to MFDA Rule 2.2;
- (f) between the summer of 2004 and September 2007, the Respondent and ASL permitted an unregistered individual named Anil Jain to conduct securities related business for clients of ASL, contrary to MFDA Rule 1.1.5(a);
- (g) the Respondent and ASL did not implement a system to properly distribute on a cash basis, interest earned in the Member’s mutual fund trust account contrary to MFDA Rule 3.3.2(h), MFDA Policy No. 4 and National Instrument 81-102;
- (h) the Respondent and ASL engaged in referral arrangements that did not comply with MFDA Rule 2.4.2(b); and

(i) the Respondent and ASL did not process trade orders on a timely basis, contrary to National Instrument 81-102 and MFDA Policy No. 2.

and thereby engaged in conduct contrary MFDA Rules 2.1.1(c) and 2.5.1.

AND WHEREAS on the basis of the admissions of the Respondent, the Hearing Panel is of the opinion that commencing in July 2006, the Respondent and ASL failed to maintain sufficient records or properly administer a trailer fee rebate program for which clients were charged monthly fees and prior to the appointment of a Receiver in November 2008, the Respondent and ASL did not accurately quantify its liability to clients or pay trailer fee rebates that were owed for periods after July 2006, contrary to MFDA Rules 2.1.1 and 5.

AND WHEREAS on the basis of the admissions of the Respondent, the Hearing Panel is of the opinion that between March 2003 and April 2008, the Respondent was engaged in outside business activities that were not disclosed in Form 33-109F4 or on the National Registration Database (“NRD”) as required, contrary to MFDA Rules 1.2.1(d), 2.1.1(c) and National Instrument 33-109.

IT IS HEREBY ORDERED THAT the time required for publication of a Notice of Settlement Hearing is abridged pursuant to Rules 1.5(1) and 2.2 of the MFDA Rules of Procedure and the Settlement Agreement is accepted, as a consequence of which:

1. The Respondent shall pay a fine in the amount of \$50,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1.
2. The Respondent is prohibited from being registered or acting in the capacity of Ultimate Designated Person, Chief Compliance Officer, Compliance Officer or Branch Manager for a Member of the MFDA for a period of 5 years from the date of this Order, pursuant to section 24.1.1(e) of MFDA By-law No. 1.
3. The Respondent shall pay costs of the investigation and prosecution in the amount of \$25,000, pursuant to section 24.2 of MFDA By-law No. 1.
4. The fine and costs prescribed in this Order are payable as follows:
 - a. \$25,000 of the fine and \$25,000 in costs is payable immediately; and
 - b. \$25,000 of the fine shall be paid on or before Friday, October 22, 2010.

5. If the Respondent fails to pay all or part of the fine by the date when it is due in accordance with paragraph 4 of this Order, then the unpaid portion of the fine shall remain payable in accordance with this Order and in addition, automatically and without further notice, and without Staff having to again appear before a Hearing Panel or commence any further proceeding, the Respondent shall be permanently prohibited from conducting securities related business while in the employ of, or sponsored by, any MFDA Member, pursuant to section 24.1.1(c) of MFDA By-law No. 1.

IT IS ALSO ORDERED that the hearing on the merits of the case against ASL will take place in the Hearing Room located at the offices of the MFDA at 121 King Street West, Suite 1000 in Toronto, Ontario commencing at 9:00 a.m. on Tuesday, May 18, 2010 or as soon thereafter as the appearance can be held and if additional time is required, the hearing will continue on Thursday, May 20, 2010 at 2 p.m. and Friday, May 21, 2010 at 10:00 a.m.

DATED this 4th day of May, 2010.

Per: “Thomas J. Lockwood”
Thomas J. Lockwood, Q.C., Chair

Per: “Selwyn Kossuth”
Selwyn Kossuth, Industry Representative

Per: “Guenther Kleberg”
Guenther Kleberg, Industry Representative