



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: Joshua O'Brien

Heard: December 9, 2021 by electronic hearing in St. John's, Newfoundland and Labrador

Decision: December 9, 2021

Reasons for Decision: March 1, 2022

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.

Darrell Bing

Jason P. Downey

Chair

Industry Representative

Industry Representative

Appearances:

Paul Blasiak

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Senior Enforcement Counsel for the Mutual

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Fund Dealers Association of Canada

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Joshua O'Brien

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Respondent

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I. INTRODUCTION

1. By Notice of Settlement Hearing, dated August 23, 2021, the Mutual Fund Dealers Association of Canada (“MFDA”) gave notice that an electronic hearing would be held before a hearing panel of the Atlantic Regional Council of the MFDA (“Hearing Panel”) on October 6, 2021, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept the settlement agreement entered into between Staff of the MFDA and Joshua O’Brien (the “Respondent”).
2. Prior to the scheduled settlement hearing on October 6, 2021, the parties decided that they no longer wished to proceed with the settlement agreement that had been negotiated. The settlement agreement was not filed with the Hearing Panel.
3. The parties did attend an Appearance before the Hearing Panel on October 6, 2021, at which time a procedural Order was made and a further Appearance was scheduled for December 9, 2021.
4. On December 1, 2021, the parties entered into a settlement agreement (the “Settlement Agreement”). On December 3, 2021, the MFDA gave notice that the Settlement Hearing would take place before the Hearing Panel by electronic hearing on December 9, 2021.
5. Due to the existence of COVID-19, and with the consent of the parties, the Settlement Hearing was conducted electronically by videoconference on December 9, 2021.
6. At the commencement of the Settlement Hearing, the Hearing Panel granted the joint request of the parties to move the proceedings “in camera” so that the Settlement Agreement could be considered in the absence of the public. This procedure is consistent with Rule 15.2(2) of the *MFDA Rules of Procedure*.
7. 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, the Hearing Panel retired to consider whether we were in a position to accept the Settlement Agreement on the basis of the material before us.
8. After carefully considering the Settlement Agreement and the submissions of the parties, the Hearing Panel unanimously accepted the Settlement Agreement. We made an Order to this

effect on December 9, 2021. At that time, we advised that written Reasons would follow. These are those Reasons.

II. SETTLEMENT AGREEMENT

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

“IV. AGREED FACTS

Registration History

6. From November 26, 2013 to January 31, 2019, when he was terminated as a result of the events described below, the Respondent was registered in Newfoundland and Labrador as a dealing representative with Scotia Securities Inc. (the “Member”), a Member of the MFDA.

7. From December 29, 2015 to January 31, 2019, the Member designated the Respondent as a branch manager.

8. The Respondent is not currently registered in the securities industry in any capacity.

9. At all material times, the Respondent conducted business in the Labrador City, Newfoundland area.

Misconduct

10. At all materials times, the Member’s policies and procedures, among other things:

- a) stipulated that only individuals registered as dealing representatives were authorized to discuss mutual fund investments with, or accept trade orders from, clients; and
- b) prohibited stealth advising by requiring that all trades be entered and recorded in the name of the dealing representative who met with and advised the client.

11. At all material times, the Respondent carried on business from a Member branch located in Labrador City, Newfoundland, (the “Branch”). The Respondent was designated by the Member as the Branch Manager at the Branch.

12. From July 27, 2016 to June 4, 2018, TS was registered as a dealing representative with another MFDA Member. At all material times, TS was in the process of transferring his registration as a dealing representative to the Member.

13. Beginning in or about September 2018, TS worked for the Member in an unregistered capacity at the Branch. TS was not registered in the securities industry in any capacity and therefore was not permitted to engage in securities related business with clients for the account of the Member.

14. Commencing in September 2018, the Respondent allowed TS to meet with 22 clients (the “Clients”) in the absence of the Respondent. During those meetings, TS provided investment advice to Clients, recommended trades and obtained instructions and account forms from the Clients with respect to trading to be processed in their investment accounts at the Member (the “Stealth Advising Activities”).

15. Between September 6, 2018 and January 7, 2019, the Respondent signed trade order forms and arranged for them to be processed using his representative code and thereby facilitated the processing of 42 trades in investment accounts of the Clients based upon information that the Respondent received from TS without participating in any meetings or discussions with the Clients to provide investment advice to the Clients, obtain trading instructions from the Clients, assess the suitability of the proposed trades and ensure that the trades were authorized. Further detail about the 42 trades that the Respondent facilitated as described above is set out below:

Trade	Client	Account Type	Trade Date	Transaction Type	Amount
1.	Client #1	Registered Retirement Savings Plan (“RRSP”)	4-Dec-18	Buy PAC	\$18,008.13 \$350
2.	Client #2	Registered Education Savings Plan (“RESP”)	6-Sep-18	Sell	\$7,000.00
3.	Client #2	RESP	28-Nov-18	Sell	\$800.00
4.	Client #2	RESP	12-Dec-18	Sell	\$5,000.00
5.	Client #2	TFSA	4-Dec-18	Sell	\$25,380.51
6.	Client #3	TFSA	5-Dec-18	Buy	\$4,481.37
7.	Client #4	TFSA	14-Sep-18	Sell	\$35,000.00
8.	Client #4	Open	25-Sep-18	Buy	\$24,000.00
9.	Client #5	TFSA	25-Sep-18	Buy	\$11,000.00
10.	Client #5	RRSP	14-Sep-18	Buy	\$49,000.00
11.	Client #6	RESP	19-Sep-18	Sell	\$5,000.00
12.	Client #7	TFSA	15-Oct-18	Buy	\$30,330.58
13.	Client #7	TFSA	15-Oct-18	Buy	\$22,000.00
14.	Client #7	Open	15-Oct-18	Buy	\$11,000.00
15.	Client #8	Open	30-Oct-18	Switch	\$151,779.70
16.	Client #8	Open	30-Oct-18	Buy	\$120,000.00
17.	Client #9	RRSP	13-Sep-18	Sell	\$20,000.00
18.	Client #9	Registered Retirement Income Fund (“RRIF”)	13-Sep-18	Buy	\$20,000.00
19.	Client #10	RRSP	7-Dec-18	Buy Buy-PAC	\$12,812.7 \$100.00

Trade	Client	Account Type	Trade Date	Transaction Type	Amount
20.	Client #10	RESP	20-Dec-18	Buy	\$120.00
21.	Client #11	TFSA	25-Oct-18	Buy	\$50.00
22.	Client #12	Open	5-Dec-18	Buy	\$12,800.00
23.	Client #13	RRSP	7-Jan-19	Buy	\$2,500.00
				Buy	\$2,500.00
24.	Client #14	TFSA	7-Jan-19	Buy	\$6,000.00
25.	Client #15	TFSA	7-Jan-19	Buy	\$6,000.00
26.	Client #15	RRSP	6-Nov-18	Buy	\$20,000.00
27.	Client #16	TFSA	22-Nov-18	Buy	\$14,688.24
				Buy-PAC	\$200.00
28.	Client #17	RRSP	4-Dec-18	Sell	\$5,000.00
29.	Client #17	RRSP	4-Dec-18	Sell	\$15,000.00
30.	Client #17	RRSP	11-Dec-18	Switch	\$213,492.18
31.	Client #17	RRIF	4-Dec-18	Transfer In	\$5,000.00
32.	Client #17	RRIF	4-Dec-18	Transfer In	\$15,000.00
33.	Client #17	RRIF	28-Dec-18	Sell	\$2,630.54
34.	Client #18	RRSP	19-Sep-18	Buy	\$24,740.66
35.	Client #18	RRSP	27-Sep-18	Buy	\$150.00
36.	Client #19	RESP	7-Jan-19	Sell	\$4,000.00
37.	Client #19	RESP	7-Jan-19	Sell	\$4,000.00
38.	Client #19	RESP	30-Nov-18	Buy	\$1,000.00
39.	Client #20	RRSP	3-Dec-18	Sell	\$39,199.08
40.	Client #20	RRIF	10-Dec-18	Sell	\$1,999.25
41.	Client #21	TFSA	7-Jan-19	Sell	\$3,563.11
42.	Client #22	RRSP	9-Oct-18	Sell	\$9,738.83

16. The Member was not aware of the Stealth Advising Activities that TS was engaging in or that the Respondent was not obtaining instructions directly from the Clients with respect to the 42 transactions listed in paragraph 15 above and, as a consequence, the Member was not aware that no Approved Person of the Member had provided advice, received instructions or taken steps to ensure the suitability of the trades processed on behalf of the Clients that are listed in the chart in paragraph 15 above.

17. By signing trade order forms to facilitate the processing of the trades listed above in paragraph 15, without communicating with the Clients concerning the trades or the content of those trade order forms, the Respondent failed to fulfill his obligations to use due diligence to:

- a) learn the essential facts relative to each Client and each order or account accepted;
- b) ensure that the acceptance of each order was within the bounds of good business practice;

- c) ensure that each order accepted or recommendation made for each account was suitable for the Client, in keeping with the Client's investment objectives and authorized by the Client; and
- d) explain to the Clients the features and risks of the securities transactions that were processed on their behalf.

18. The Respondent did not report to the Member that TS, an unregistered individual, was meeting with clients to provide investment advice, recommend trades and accept client instructions with respect to clients and their investment accounts at the Member, as described above.

The Respondent Facilitated Stealth Advising

19. By allowing TS to meet with clients to provide investment advice and trade recommendations to Clients and accept instructions from Clients with respect to their investment accounts at the Member, as described above, the Respondent facilitated securities related business that was carried on for the account of the Member and through the facilities of the Member by an unregistered individual.

20. As noted above in paragraph 13, TS was not an Approved Person of the Member and was not in an employer-employee relationship, a principal-agent relationship or an introducing dealer-carrying dealer relationship with the Member as required by MFDA Rule 1.1.1(c).

21. By allowing TS to meet with clients in the absence of the Respondent for the purpose of engaging in securities related business with clients and by signing trade forms to facilitate the processing of trades recommended to Clients by TS or trade instructions received from Clients by TS without personally communicating with the Clients or otherwise using the necessary due diligence to ensure that the recommendations were suitable and authorized, the Respondent facilitated stealth advising by TS.

Branch Manager Supervision

22. By allowing TS to meet with clients, as described above, and by failing to ensure that an Approved Person of the Member was advising the Clients and obtaining instructions from the Clients with respect to trades being processed in their investment accounts at the Member, the Respondent, in his capacity as branch manager, failed to adequately supervise the activities at the Branch to ensure compliance with MFDA Rules and with applicable securities legislation by the Member and its Approved Persons.

Additional Factors

23. In September 2018, the Member discovered the Respondent's misconduct described above when another dealing representative at the Branch informed it that the Respondent was permitting and facilitating Stealth Advising Activities by TS.

24. The Member contacted each Client and confirmed that the Clients had authorized the trades that were recommended by TS and processed in their investment accounts at the Member as described above, and also reviewed and confirmed the accuracy of Know-Your-Client information that was recorded in respect of their accounts.

25. No Clients complained to the Member or the MFDA about the Respondent or TS relating to the misconduct described herein.

26. There is no evidence of financial harm to Clients as a result of the Respondent's misconduct described above.

27. On January 31, 2019, the Member terminated the Respondent as a result of the misconduct described above.

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

29. The Respondent has cooperated with MFDA Staff throughout the investigation and the disciplinary proceedings herein.

30. The Respondent states that he has limited financial means and as a result he is unable to pay a monetary penalty that is greater than the total of the fine and costs amounts set out in this Settlement Agreement. The Respondent has provided evidence to MFDA Staff which confirms that he is currently unemployed, has high levels of personal debt, has effectively no borrowing room available on his line of credit, has a Locked-In Retirement Account that contains a modest balance and has negligible other personal savings.

V. CONTRAVENTIONS

31. The Respondent admits that:

- a) between September 6, 2018 and January 7, 2019, he:
 - i. allowed an unregistered individual to meet with clients in the absence of the Respondent in order to discuss and recommend trades to the clients; and
 - ii. signed trade forms to process the trades recommended to 22 clients by the unregistered individual without communicating with the clients or otherwise using the necessary due diligence to ensure that the recommendations were suitable and authorized;

thereby facilitating stealth advising by the unregistered individual, contrary to the Member's policies and procedures and MFDA Rules 1.1.1(c), 2.2.1, 2.1.1, 2.5.1 and 1.1.2; and

- b) between September 6, 2018 and January 7, 2019, in his capacity as branch manager, he failed to adequately supervise the activities at a branch to ensure compliance with the By-laws, Rules and Policies and with applicable securities legislation by the Member and its Approved Persons, contrary to MFDA Rules 2.5.5(f) and 2.1.1.

VI. TERMS OF SETTLEMENT

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

- a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of 2 years from the date that this Settlement Agreement is accepted by a Hearing Panel, pursuant to section 24.1.1(e) of MFDA By-law No.1;
- b) the Respondent shall pay a fine in the amount of \$5,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1, which shall be payable by post-dated cheques as follows:
 - (i) \$833.34 on June 9, 2022;
 - (ii) \$833.34 on July 9, 2022;
 - (iii) \$833.33 on August 9, 2022;
 - (iv) \$833.33 on September 9, 2022;
 - (v) \$833.33 on October 9, 2022; and
 - (vi) \$833.33 on November 9, 2022;
- c) the Respondent shall pay costs in the amount of \$5,000, pursuant to s. 24.2 of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by a Hearing Panel;
- d) the Respondent shall in the future comply with MFDA Rules 1.1.1(c), 2.2.1, 2.1.1, 2.5.1, 1.1.2 and 2.5.5(f); and
- e) the Respondent will attend by videoconference on the date set for the Settlement Hearing.”

III. THE LAW

10. MFDA Rule 2.1.1 states, in part, as follows:

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

- a) deal fairly, honestly and in good faith with its clients;
- b) observe high standards of ethics and conduct in the transaction of business;

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

11. Rule 1.1.1(c) provides that no Member or Approved Person shall, directly or indirectly, engage in any securities related business except in accordance with the following:

- c) the relationship between the Member and any person conducting securities related business on account of the Member is that of:
 - i. an employer and employee, in compliance with Rule 1.1.4,
 - ii. a principal and agent, in compliance with Rule 1.1.5, or
 - iii. an introducing dealer and carrying dealer, in compliance with Rule 1.1.6;

12. Pursuant to Rule 1.1.1(e), securities related business may only be conducted by an Approved Person with the permission, and under the supervision, of a Member.

13. “Stealth advising” is a practice whereby an individual who is not registered and may not have fulfilled the requirements necessary to engage in securities related business, holds him/herself out as a qualified investment advisor. The dangers of stealth advising are fully explored in MFDA Staff Notice #MSN-0067.

14. MFDA Approved Persons are prohibited from facilitating stealth advising by unregistered individuals. Such conduct is clearly contrary to the requirements in Rule 1.1.1(c) and contrary to the standard of conduct in Rule 2.1.1.

15. As stated by the Hearing Panel in *Hagerman (Re)*:

[Stealth advising] arrangements prevent the Member from adequately supervising trading activity conducted on behalf of clients. They lead to clients receiving investment advice from unregistered and unqualified individuals. The clients are left unprotected.

Hagerman (Re), [2020] Hearing Panel of the Central Regional Council, MFDA
File No. 202021, Panel Decision dated September 25, 2020, at para. 14.

16. MFDA Rule 2.2.1 states:

2.2.1 “Know-Your-Client”

Each Member and Approved Person shall use due diligence:

- a) to learn the essential facts relative to each client and to each order or account accepted;
- b) to ensure that the acceptance of any order for any account is within the bounds of good business practice;
- c) to ensure that each order accepted or recommendation made, including recommendations to borrow to invest, for any account of a client is suitable for the client based on the essential facts relative to the client and any investments within the account;

[. . .]

17. Previous MFDA Hearing Panels have held that where an Approved Person opens a client account, updates the client's Know-Your-Client information and/or processes trades in the client's account without communicating directly with the client, the Approved Person has violated the Know-Your-Client obligation in Rule 2.2.1 and the standard of conduct in Rule 2.1.1.

Hagerman (Re), supra, at para.11.

18. In order to fulfill the Know-Your-Client obligation, an Approved Person is required to learn the essential facts about his or her client directly from the client.

Hagerman (Re), supra, at para.12.

19. MFDA Rule 2.5.1 requires Members to establish, implement and maintain policies and procedures to ensure compliance with the By-laws, Rules and Policies of the MFDA and applicable securities legislation.

MFDA Rule 2.5.1.

20. MFDA Rule 1.1.2 requires each Approved Person who participates in any securities related business in respect of a Member, to comply with the By-laws and Rules as they relate to the Member or Approved Person.

MFDA Rule 1.1.2.

21. MFDA Hearing Panels have held that an Approved Person's failure to comply with the Member's policies and procedures is conduct which is contrary to MFDA Rules 2.5.1 and 1.1.2, and also the standard of conduct set out in Rule 2.1.1.

O'Connor (Re), [2018] Hearing Panel of the Prairie Regional Council, MFDA File No. 201756, Panel Decision dated October 31, 2018, at paras. 139-144.

Phillips (Re), [2020] Hearing Panel of the Atlantic Regional Council, MFDA File No. 2018117, Panel Decision dated March 16, 2020.

Roche (Re), [2014] Hearing Panel of the Prairie Regional Council, MFDA File No. 201420, Panel Decision dated November 17, 2014.

22. MFDA Rule 2.5.5(f) requires a branch manager to supervise the activities of the Member at a branch or sub-branch that are directed towards ensuring compliance with the By-laws, Rules and Policies of the MFDA.

MFDA Rule 2.5.5(f).

23. The prohibited actions of the Respondent, as well as his admissions, are exhaustively detailed in the Settlement Agreement.

24. In short, commencing in or about September of 2018, the Respondent permitted an unregistered individual to meet with some 22 clients, in the absence of the Respondent, provide investment advice to the clients, recommend trades and obtain instructions and account forms from the clients with respect to trading to be processed in their investment accounts at the Member. The Respondent signed some 42 trade order forms and arranged for them to be processed using his representative code without participating in any meetings or discussions with the clients and without providing investment advice, obtaining trading instructions from the clients and without assessing the authenticity of the proposed trades and ensuring that the trades were authorized.

25. The Respondent admitted that, in his capacity as Branch Manager, he failed to adequately supervise the activities at the Branch to ensure compliance with MFDA Rules and with applicable securities legislation by the Member and its Approved Persons.

26. When an Approved Person who is a branch manager allows an unregistered individual to engage in securities related business at the branch, the Approved Person has failed to fulfill his/her responsibilities as a branch manager as set out in Rule 2.5.5(f).

Badasha (Re), [2015] Hearing Panel of the Pacific Regional Council, MFDA File No. 201424, Panel Decision dated June 9, 2015.

IV. PRINCIPLES AND FACTORS REGARDING THE ACCEPTANCE OF SETTLEMENT AGREEMENTS

27. Investor protection is the primary goal of securities regulation. Settlements play an important and necessary role in meeting this objective.

28. In our view, the role of a Hearing Panel in a Settlement Hearing is not the same as its role in making a penalty determination after a contested Hearing. In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

29. 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:

- i. Whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
- ii. Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
- iii. Whether the Settlement Agreement addresses the issues of both specific and general deterrence;
- iv. Whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
- v. Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;
- vi. Whether the Settlement Agreement will foster confidence in the integrity of the MFDA;
- vii. Whether the Settlement Agreement will foster confidence in the regulatory process itself.

Jacobson (Re), [2007], Hearing Panel of the Prairie Regional Council, MFDA File No. 200712, Reasons for Decision, dated July 13, 2007, at para. 70.

30. Previous Hearing Panels have also identified a number of additional factors which should be considered when determining whether the penalty sought to be imposed is appropriate. These include:

- a) The seriousness of the allegations proved against the Respondent;
- b) The Respondent's past conduct, including prior sanctions;

- c) The Respondent's experience in the capital markets;
- d) The level of the Respondent's activity in the capital markets;
- e) Whether the Respondent recognizes the seriousness of the improper activity;
- f) The harm suffered by investors as a result of the Respondent's activities;
- g) The benefits received by the Respondent as a result of the improper activity;
- h) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- i) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- j) 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;
- k) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
- l) Previous decisions made in similar circumstances.

Headley [Re], 2006, Hearing Panel of the Central Regional Council, MFDA File No. 200509, Reasons for Decision dated February 21, 2006 at para.85.

31. When determining whether a penalty agreed upon by the parties is appropriate, the Hearing Panel may also consider the MFDA's Sanction Guidelines ("Guidelines") which came in to effect on November 15, 2018. The Guidelines are not mandatory or binding on the Hearing Panel, but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of MFDA Hearing Panels, are also reflected and described in the Guidelines.

V. CONSIDERATIONS IN THE PRESENT CASE

32. Staff made very detailed written and oral submissions as to how these principles and factors applied to the case before us. These included the following:

(a) Nature of the Misconduct

33. We agree with the submission of Staff that the Respondent engaged in serious misconduct.

34. When an Approved Person facilitates stealth advising by an unregistered individual, the client is deprived of fundamental investor protection. The client receives investment advice from an individual who is not registered as a mutual fund dealing representative, who is not supervised

by the Member and who has not agreed to abide by the Member's policies and procedures. The Member, if unaware of the stealth advising arrangement, is misled into thinking that the client has been dealing with a properly qualified Approved Person who is complying with all applicable MFDA requirements, as well as the Member's Policies and Procedures. The client, unaware of the nuance of the relationship between the Member, the Approved Person and the unregistered individual, is left believing that he or she has been receiving investment advice from a properly trained and supervised individual whose interests align with those of the Member.

(b) The Respondent's Past Conduct including Prior Sanctions

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

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

36. By entering into this Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring the time and expense of conducting a lengthy disciplinary hearing. At the Settlement Hearing, the Respondent spoke emotionally and at length about the effect these proceedings have had on him and his family. It is clear to the Hearing Panel that the Respondent is now fully aware of the dangers of stealth advising.

(d) Harm Suffered by the Clients and Investors

37. There is no evidence of financial harm to clients as a result of the Respondent's misconduct.

(e) Deterrence

38. Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors.

39. We agree with the submission of Staff that the proposed penalty will ensure deterrence to both the Respondent and to the mutual fund industry.

40. In our view, the proposed penalty will specifically deter the Respondent from engaging in similar activity by imposing a meaningful sanction upon him which reflects the seriousness of the misconduct at issue.

41. The proposed penalty will also act as a general deterrent by reinforcing the message that stealth advising will not be tolerated within the mutual fund industry and will result in both a fine and a prohibition against Approved Persons who engage in misconduct.

(f) The Respondent's Ability to Pay

42. Section 11 of the MFDA's Guidelines provides that the Respondent's ability to pay may be a consideration in determining the appropriate monetary sanction to be imposed. The burden is on the Respondent to both raise the issue and provide evidence, which is satisfactory to MFDA Staff of his inability to pay. In this case, the Respondent provided evidence to Staff which confirmed that he is currently unemployed, has high levels of personal debt, has effectively no borrowing room available on his line of credit, has a Locked-In Retirement Account that contains a modest balance and has negligible other personal savings. All of these factors were taken into account by the Hearing Panel when considering the appropriateness of the proposed monetary sanctions.

(g) Previous Decisions Made in Similar Circumstances

43. Staff provided the Hearing Panel with a detailed chart seeking to show that the proposed resolution is within the reasonable range of appropriateness with regards to other decisions made by MFDA Hearing Panels in similar circumstances.

44. The following cases were discussed:

- a) *Guglielmi (Re)*, [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201517, Panel Decision dated January 14, 2016.
- b) *Badasha (Re)*, *supra*.

VI. DECISION

45. After a thorough review of the factors by which we should be guided, and the facts of this case, as reflected in the Settlement Agreement, we were, unanimously, of the view that this Settlement Agreement was reasonable and in the public interest and should be accepted by the Hearing Panel. We so informed the parties at the conclusion of the Settlement Hearing.

VII. ORDER

46. After accepting the Settlement Agreement, we made the following Order:

- a) The Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a

period of 2 years from the date that this Settlement Agreement is accepted by the Hearing Panel, pursuant to section 24.1.1(e) of MFDA By-law No.1;

- b) The Respondent shall pay a fine in the amount of \$5,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1, which shall be payable by post-dated cheques as follows:
- i. \$833.34 on June 9, 2022;
 - ii. \$833.34 on July 9, 2022;
 - iii. \$833.33 on August 9, 2022;
 - iv. \$833.33 on September 9, 2022;
 - v. \$833.33 on October 9, 2022; and
 - vi. \$833.33 on November 9, 2022;
- c) The Respondent shall pay costs in the amount of \$5,000, pursuant to section 24.2 of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by the Hearing Panel; and
- d) If at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the *MFDA Rules of Procedure*.

DATED this 1st day of March, 2022.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.
Chair

“Darrell Bing”

Darrell Bing
Industry Representative

“Jason P. Downey”

Jason P. Downey
Industry Representative