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

IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Jack Oosterveld

Heard: August 30, 2016 in Edmonton, Alberta
Reasons for Decision: October 11, 2016

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller, Q.C.	Chair
Nada Israeli	Industry Representative
James Samanta	Industry Representative

Appearances:

David Babin	)	Counsel for the Mutual Fund Dealers Association of Canada
Jack Oosterveld	)	Not in attendance personally or by Counsel

I. INTRODUCTION

1. By Notice of Hearing dated May 28, 2015, the Mutual Fund Dealers Association of Canada (the "MFDA") made two allegations against Jack Oosterveld, (the "Respondent") which read as follows:

a) **Allegation #1:** Between March 2009 and May 2010, the Respondent referred 56 clients and three other individuals to a company selling an exempt market product, and received at least $33,158.67 in referral fees for doing so, thereby participating in a referral arrangement to which the Member was not a party and which did not otherwise comply with sections 13.7 to 13.10 of National Instrument 31-103; and

b) **Allegation #2:** Between March 2009 and May 2010, the Respondent had and continued in another gainful occupation that was not disclosed to the Member by selling, recommending, referring or facilitating the sale of an exempt market product to 56 clients and three other individuals, and received at least $33,158.67 in referral fees for doing so, contrary to MFDA Rules 1.2.1(d) (later MFDA Rule 1.2.1(c) and now MFDA Rule 1.3 as of March 17, 2016) and 2.1.

II. SERVICE

2. Affidavit evidence presented at the hearing showed that:

(a) the Respondent was served with the Notice of Hearing on May 28, 2015 (which stated that the Respondent was registered in Alberta as a mutual fund sales person with Assante Financial Management Ltd., a Member of the MFDA) and served a Reply on June 17, 2015;

(b) the Respondent engaged in some settlement negotiations with MFDA Staff ("Staff") between June 17 and November 26, 2015;

(c) on November 26, 2015 the Respondent's wife advised MFDA that due to his physical, mental and financial circumstances, the Respondent would no longer communicate with MFDA;

(d) Additional efforts were made by MFDA between November 30, 2015 and January 5, 2016 to communicate with the Respondent through his former legal counsel with respect to an offer of settlement, without success;

(e) Additional efforts were made by MFDA between January 6 and January 29, 2016 to communicate directly with the Respondent via email and registered letter with respect to an offer of settlement, without success;

(f) MFDA notified the Respondent by email dated January 26, 2016 of a scheduled telephone attendance on February 4, 2016 to set a date for hearing and provided dial-in information;

(g) The last email sent by MFDA to the Respondent on January 29, 2016 was confirmed with a delivery receipt;

(h) On February 4, 2016, on *ex parte* application of Enforcement Counsel, the Chair of this Panel adjourned the hearing of this proceeding on the merits to April 28 and 29, 2016;

(i) MFDA effected personal service on the Respondent on February 16, 2016 of the February 4, 2016 Order of the Panel, copies of communications from MFDA Enforcement Counsel dated January 14 and 29 and a copy of MFDA Guide to the Disciplinary Hearing Process. In addition, the Respondent was informed by letter that Staff was still prepared to discuss settlement, that he was entitled to receive from Staff disclosure information, a list of witnesses and will-say statements and that, in absence of his appearance, the Panel could proceed with the hearing on the merits;

(j) On February 17, 2016 the Respondent's wife advised Enforcement Counsel and the President and CEO of MFDA via email that she would not reply to any further correspondence sent by the MFDA. She also stated, among other things, that if MFDA continued to make efforts to communicate to them about the subject proceedings, civil and other court proceedings would be commenced for damages

for defamation and a restraining order (Exhibit 5 of Affidavit of Allison Howse dated August 24, 2016).

3. On March 7, 2016, on *ex parte* application of Enforcement Counsel, the Chair of this Panel adjourned the hearing on the merits to July 12 and 13, 2016. A news release of the new hearing date was published on March 7, 2016 and a copy of the same was emailed to the Respondent on March 8, 2016.

4. On July 7, 2016, on *ex parte* application of Enforcement Counsel, the Chair of this Panel adjourned the hearing on the merits to a teleconference on July 12 and 13, 2016. A news release of the new hearing date was published on July 7, 2016 and a copy of the same together with dial-in information was emailed to the Respondent on July 7, 2016.

5. On July 7, 2016, on *ex parte* application of Enforcement Counsel, the Chair of this Panel adjourned the hearing on the merits to August 30, 2016. A news release of the new hearing date was published on August 30, 2016 and a copy of the same was emailed to the Respondent on August 30, 2016.

6. Having regard to the foregoing circumstances, this Panel is satisfied that the Respondent was served with good and sufficient notice of the hearing and the consequence that in his absence a hearing on the merits would proceed.

III. MFDA RULES OF PROCEDURE AS TO PROCEEDING WITH A HEARING ON THE MEIRTS IN THE ABSENCE OF A RESPONDENT

7. MFDA Rule of Procedure 7.3 states:

> *Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:*
>
> *(a) proceed with the hearing without further notice to and in the absence of the Respondent; and*

> *(b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.*

8. MFDA Rule of Procedure 13.4 states:

> *Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance with Rule 7.3.*

9. Having regard to the foregoing circumstances, this Panel decided to proceed with the hearing in the absence of the Respondent.

10. This Panel, prior to receiving evidence and submissions of the MFDA at the hearing, expressly determined it would take no account of the comments of the Respondent's wife as recited in paragraph 2(j) above, and which accordingly formed no part of the deliberations of the Panel on the merits as to the allegations or as to penalty.

11. At the commencement of the hearing, on application of Enforcement Counsel, this Panel ordered that Exhibit Number 6 to these proceedings be marked as confidential and be kept separate from the public record, and access to those exhibits, should anyone make inquiries in the future, be granted only by an order of a Panel convened for that purpose.

IV. MFDA JURISDICTION OVER RESPONDENT

12. This Panel accepted submissions of Enforcement Counsel that pursuant to s. 24.1.4 of MFDA By-law No. 1 and based on the Ontario Court of Appeal decision in *Taub v. Investment Dealers Association of Canada* [2009] 98 O.R. (3d) the Respondent remains subject to the jurisdiction of the MFDA despite ceasing to be an Approved Person.

V. HEARSAY EVIDENCE AND EVIDENCE BY SWORN STATEMENT

13. This Panel received submissions of Enforcement Counsel that MFDA Rule of Procedure 1.6 specifically permits hearsay statements to be admitted as evidence as follows:

> *Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.*
>
> *(2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.*
>
> *(3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege*.

14. Likewise, MFDA Rule of Procedure 13.4 permits evidence to be adduced by way of sworn statements, as follows:

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

15. This Panel noted that MFDA Hearing Panels and other regulatory bodies routinely consider and rely on hearsay and affidavit evidence in making findings of fact as referenced in *Tonnies (Re)*, MFDA File No. 200503, Hearing Panel of Prairie Regional Council, Decision and Reasons dated June 27, 2005 ("*Tonnies*") at paras. 10-12.

16. Enforcement Counsel advised that the allegations were pled in the alternative; accordingly on a finding under Allegation #1, it would be unnecessary for this Panel to consider whether the evidence supported a finding under Allegation #2.

17. The facts in support of the case for the MFDA were initially set out in the:

a) Notice of Hearing issued May 18, 2015; and

b) Affidavit of Allison Howse sworn August 24, 2016 with attached exhibits (the "Howse Affidavit").

18. Ms. Howse also gave oral testimony, was lead through certain key aspects of her affidavit and responded to all questions posed to her by the Panel. In summary, the evidence presented indicated that:

a) From March 14, 2003 to May 31, 2010, the Respondent was registered in Alberta as a mutual fund salesperson with Assante Financial Management Ltd. ("Assante");
b) On August 27, 2008, the Respondent and his wife, BO ("BO") registered 1422014 Alberta Ltd. (the "Numbered Company") and at the material times were listed as the sole directors and shareholders of the Numbered Company;
c) In or about March 2009, the Numbered Company entered into a Dealer Referral Agreement (the "Referral Agreement") with the Proforma Group, as defined in the Howse Affidavit. BO, in her capacity Secretary and Treasurer of the Numbered Company, executed the Referral Agreement on behalf of the Numbered Company;
d) Assante was not a party to the Referral Agreement, and the Respondent did not disclose to Assante that he had entered into the Referral Agreement. At all times, Assante has policies and procedures in place that required its Approved Persons to disclose all referral arrangements to Assante, and further required that Assante was required to be a party to any referral agreement entered into by its Approved Persons;
e) The Respondent also did not disclose the Referral Arrangement to Assante as being an Outside Business Activity ("OBA"), despite Assante having policies and procedures in place during the material time that required the disclosure by Assante Approved Persons, of any OBAs;
f) Between March 2009 and May 2010, the Respondent referred 56 mutual fund clients and three non-client individuals to the Proforma Group for the purchase of

Proforma Capital Profit Notes ("PCPN"), an insured term note sold under an Offering Memorandum;

g) The 56 mutual fund clients and three non-client individuals purchased a total of $8,831,200.00 worth of PCPNs between March 2009 and May 2010;

h) Of the 56 mutual fund clients, 41 redeemed $5,478,377.98 worth of mutual funds to purchase PCPNs between March 2009 and May 2010;

i) Between October 7, 2009 and June 2010, the Respondent received $33,158.67 worth of referral fees from the Proforma Group, by way of the Numbered Company;

j) In February 2012, PCPN investors were informed by the Proforma Group that interest payments were being suspended, as payment had not been received from the company that the Proforma Group had in turn lent the PCPN funds to, New Solutions;

k) On April 11, 2012, New Solutions filed for creditor protection in Ontario;

l) On April 10, 2013, New Solutions was permanently barred from trading in securities and derivatives, acquiring securities, using exemptions, and becoming a registrant. On April 2, 2014 the Ontario Securities Commission ("OSC") barred the directing mind of New Solutions, Ronald Ovenden, from trading in securities, acquiring securities or using exemptions in Ontario for a period of 15 years, and permanently banned him from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

m) As of November 5, 2015, the Ontario Superior Court of Justice had authorized a single distribution of $5.7 million in respect of $220 million of proven claims against New Solutions. PCPN investors accounted for 55% of the claims against New Solutions; and

n) The 56 mutual fund clients and three non-client individuals have realized a near total loss of their investments in PCPNs.

VI. ISSUES FOR DETERMINATION UNDER ALLEGATION #1

19. Enforcement Counsel submitted that this Panel must consider the following issues to determine whether the Respondent entered into a referral arrangement with the Proforma Group, in breach of ss. 13.7 and 13.8 of National Instrument 31-103 "Registration Requirements and Exemptions" ("NI 31-103"):

a) whether the Referral Agreement constitutes a referral arrangement as defined by s. 13.7 of NI 31-103; and
b) whether the Respondent met the three requirements of a referral arrangement as listed in s. 13.8 of NI 31-103.

20. Sections 13.7 and 13.8 of National Instrument 31-103 "Registration Requirements and Exemptions" ("NI 31-103") state:

> ***13.7 Definitions – referral arrangements***
>
> *In this Division*
>
> *"client" includes a prospective client;*
>
> *"referral arrangement" means any arrangement in which a registrant agrees to pay or receive a referral fee;*
>
> *"referral fee" means any form of compensation, direct or indirect, paid for the referral of a client to or from a registrant.*
>
> ***13.8 Permitted referral arrangements***
>
> *A registered firm, or a registered individual whose registration is sponsored by the registered firm, must not participate in a referral arrangement with another person or company unless,*
>
> *(a) before a client is referred by or to the registrant, the terms of the referral arrangement are set out in a written agreement between the registered firm and the person or company;*
>
> *(b) the registered firm records all referral fees, and*

(c) the registrant ensures that the information prescribed by subsection 13.10(1) [disclosing referral arrangements to clients] is provided to the client in writing before the party receiving the referral either opens an account for the client or provides services to the client.

21. Enforcement Counsel submitted that:

a) Sections 13.7 and 13.8 of the NI 31-103 are fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry;

b) These provisions create a regime whereby an Approved Person is permitted to refer clients to purchase investment products only through referral arrangements that are subject to appropriate review and supervision by the Member, and require referral fees to be processed though the books and records of the Member;

c) These provisions are structured to drive regulated activity through the Member so that the Member is able to exercise supervision and control over the activity in question. In so doing, the Member is able to consider the appropriateness of any given referral arrangement from both a commercial perspective and a regulatory perspective;

d) By prohibiting Approved Persons from entering into their own referral arrangements, the Member has the opportunity to exercise a degree of control over the types of referral arrangements that its Approved Persons may offer to clients in a manner that protects clients' interests and reduces the likelihood of regulatory and commercial liability for the Member;

e) In the present case, the Respondent failed to meet the requirements for entering into or participating in a referral arrangement in accordance with the requirements of the National Instrument;

f) The Referral Agreement between the Respondent, by way of the Numbered Company, and the Proforma Group, was not permitted under Sections 13.7 and 13.8 of the National Instrument. In particular, the Respondent, by way of the Numbered Company, entered into a written a referral arrangement with the Proforma Group;

g) the Referral Agreement meets the definition of a referral arrangement under s. 13.7 of NI 31-103;

h) the Respondent, by way of the Numbered Company, agreed to receive fees from Proforma in exchange for referring clients to the Proforma Group;

i) the $33,158.67 that the Respondent received, by way of the Numbered Company, from the Proforma Group meets the definition of a referral fee under s. 13.7 of NI 31-103;

j) the Respondent, by way of the Numbered Company, and the Proforma Group were parties to the Referral Agreement and Assante was not a party to the Referral Agreement, contrary to s.13.8 of 31-103; and

k) the Respondent, by way of the Numbered Company, was paid referral fees by the Proforma Group that were not recorded on the books and records of Assante, contrary to s.13.8 of 31-103.

22. Enforcement Counsel cited the following MFDA Hearing Panel decisions that found an Approved Person had engaged in misconduct contrary to the NI 31-103 by entering into or participating in referral arrangements that did not meet the requirements for permitted arrangements, as articulated by s. 13.8 of NI 31-103.

> *Caicco (Re),* File No. 201503, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 4, 2015,
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> *Duggal (Re),* File No. 201365, Hearing Panel of the Central Regional Council, Decision and Reasons dated May 4, 2015 ("*Duggal*"),
>
> *Emery (Re),* File No. 201363, Hearing Panel of the Central Regional Council, Decision and Reasons dated March 19, 2015 (*"Emery*"),
>
> *Rajpal (Re),* File No. 201362, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 9, 2015 ("*Rajpal*"),
>
> *Bulloch (Re),* File No. 201417, Hearing Panel of the Central Regional Council, Decision and Reasons dated January 15, 2015 ("*Bulloch*"),

Chin (Re), File No. 201361 Hearing Panel of the Central Regional Council, Decision and Reasons dated October 10, 2014, (Chin").

VII. EFFECT OF RESPONDENT ACTING THROUGH A NUMBERED COMPANY

23. Enforcement Counsel submitted that:

a) The Respondent is not insulated from a finding of misconduct under Allegation #1 on the basis that the Referral Agreement existed between the Numbered Company and the Proforma Group;

b) the MFDA By-laws, Rules and Policies must be interpreted and applied in a purposive manner. As such, Approved Persons should not be permitted to avoid regulatory requirements by doing indirectly that which is prohibited from being done directly;

c) Previous MFDA hearing panels have held Approved Persons in breach of their regulatory obligations in circumstances where they acted through corporations for which, like the Respondent vis-à-vis the Numbered Company, they were the directing minds;

> *Taylor (Re)*, File No. 201135, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 6, 2013,
>
> *Vitch (Re)*, File No. 201103, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 22, 2011
>
> *Majdoub (Re)*, File No. 201010, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 12, 2010,

d) Finding that the Respondent had no regulatory responsibility in this matter on the basis that he acted through the Numbered Company would vitiate the purpose of ss. 13.7 and 13.8 of NI 31-103 and would allow Approved Persons to circumvent or avoid altogether the supervision of their dealers which would preclude the ability for mutual fund dealers such as Assante to assess the suitability of exempt

market investment products, or to review the eligibility and suitability of clients purchasing such investments;

e) MFDA Rule 1.1.1(a) prohibits an Approved Person from engaging in securities related business in any form that is not carried on for the account of the Member through the facilities of the Member and in accordance with MFDA By-laws and Rules often referred to as the prohibition against selling securities "off book";

f) This rule is fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry. The rule establishes a regime whereby an Approved Person is permitted to sell investment products only which have been first approved for sale by the Member and sold through the facilities of the Member thereby insuring the trading activity is subject to appropriate product due diligence, review and supervision.

VIII. DECISION AS TO ALLEGATION #1

24. On the evidence, this Panel is satisfied that the Referral Agreement constitutes a referral arrangement as defined by s. 13.7 of NI 31-103; and the Respondent failed to meet the three requirements of a referral arrangement as listed in s. 13.8 of NI 31-103.

25. On the question of the Respondent's conducting those activities through the Numbered Company, this Panel noted the well accepted Canadian judicial authority as set out in *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), in which Laskin J.A. stated:

> *Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done": Clarkson Co. v. Zhelka at p. 578. Sharpe J. set out a useful statement of the guiding principle in Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423 at pp. 433-34 (Gen. Div.), affd [1997] O.J. No. 3754 (C.A.): "the courts will disregard the separate legal personality of a corporate entity*

where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."

26. In the case at hand, the Respondent was registered in Alberta as a mutual fund salesperson with Assante; together with his wife he registered the numbered company and listed himself and his wife as the sole directors and shareholders of the Numbered Company; the Numbered Company entered into the Referral Agreement with the Proforma Group; the Respondent's wife executed the Referral Agreement on behalf of the Numbered Company; the Respondent did not disclose to Assante that he had entered into the Referral Agreement or disclose the Referral Arrangement to Assante as being an Outside Business Activity ("OBA").

27. The Respondent then referred 56 mutual fund clients and three non-client individuals to the Proforma Group who purchased a total of $8,831,200 worth of PCPNs and the Respondent received $33,158.67 worth of referral fees from the Proforma Group, by way of the Numbered Company.

28. On the evidence presented, this Panel can draw no other reasonable conclusion than that the purpose of creating the Numbered Company was to shield the Respondent and his wife from the consequences of the Respondent's breach of the fiduciary duties he owed to the mutual fund clients, while permitting reaping the benefits of the referral fees.

29. On the evidence, this Panel finds that the Numbered Company was completely dominated and controlled by the Respondent and his wife, and as such, considers it is entitled on these facts and the above legal authority to disregard the separate legal personality of the Numbered Company.

30. Following due consideration, this Panel accepted the evidence of Ms. Howse and finds her testimony together with the submissions of Enforcement Counsel sufficient to establish Allegation #1 in the Notice of Hearing. This Panel made no finding in respect of Allegation #2.

31. This Panel then invited Enforcement Counsel to make submissions as to penalties.

IX. PROPOSED PENALTIES

32. Enforcement Counsel submitted the following penalties to be imposed:

a) A permanent prohibition of the Respondent's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction;
b) A direction that the Respondent pay a fine of $50,000 for engaging in securities related business as described in Allegation # 1 and hampering the investigation into that conduct;
c) A direction that the Respondent pays to the MFDA $10,000 for costs of the investigation.

X. FACTORS CONCERNING THE APPROPRIATENESS OF PROPOSED PENALTIES

33. In submissions as to penalties, Enforcement Counsel referred this Panel to the following:

a) s. 24.1.1. (h) of MFDA By-law No.1 which permits imposition of any of the penalties set out in s. 24.1.1. (a)-(f);
b) cases where Approved Persons have received referral fees as part of referral agreements, MFDA Hearing Panels have held that the quantum of a fine should be set at least equal to the fees received by the Approved Person, including:

Duggal, *supra*, at paras. 19-21
Emery, *supra*, at para.14
Rajpal, *supra*, at paras. 16 and 21
Bulloch, *supra*, at para. 23;

c) The decisions of *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 (*"Pezim*"), at paras. 59, 68 and *Breckenridge (Re)*, File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 ("*Breckenridge*"), at para. 74 as authorities for the

proposition that the primary goal of securities regulation is the protection of the investor;

d) The decision of *Pezim, supra*, at paras. 59, 68, for the proposition that in addition to protection of the public, the goals of securities regulation also includes fostering public confidence in the capital markets and the securities industry;

e) the decision in *Tonnies, supra,* for the following considerations in determining an appropriate penalty (at para. 46):

    (i) The protection of the investing public;
    (ii) The integrity of the capital markets;
    (iii) Specific and general deterrence;
    (iv) The protection of the MFDA's membership;
    (v) The protection of the integrity of the MFDA's enforcement processes.

f) The decision in *Breckenridge, supra,* referencing the following other factors that hearing panels frequently consider (at para 77):

    (i) The seriousness of the allegations proved against the Respondent;
    (ii) The Respondent's past conduct, including prior sanctions;
    (iii) The level of the Respondent's activity in the capital markets;
    (iv) Whether the Respondent recognizes the seriousness of the improper activity;
    (v) The harm (or potential harm) suffered by investors as a result of improper activity; and
    (vi) previous decisions made in similar circumstances.

34. Enforcement Counsel also emphasized a passage in *Tonnies, supra,* setting out the proper role of a Hearing Panel, when imposing sanctions, which reads as follows (at para 45):

> *...[T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain as best we can future conduct that is likely to be.*

35. Enforcement Counsel also referred to the MFDA Penalty Guidelines as an additional resource that a Hearing Panel may consult for the purpose of providing a basis upon which a Hearing Panel's discretion can be exercised consistently in like circumstances.

36. In cases involving the type of misconduct in the present case, the Penalty Guidelines recommend consideration of the following penalties and factors:

BREACH	**PENALTY TYPE & RANGE**	**SPECIFIC FACTORS TO CONSIDER**
Referral Arrangements (NI 31-103) (Guidelines, p. 18)	• Fine: Minimum of $10,000. • Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course). • Suspension. • Permanent prohibition in egregious cases.	1. Magnitude (in size and value) of referrals. 2. Number of clients affected. 3. Magnitude of client losses (if any). 4. Suitability of referrals if involving securities. 5. Compensation received by the Respondent. 6. Any personal interest of the Respondent in referral. 7. Existence of client complaints. 8. Legality of referral.

37. Enforcement Counsel also referred us to *Chin,* supra, *Andrews (Re)*, File No. 201324, Hearing Panel of the Central Regional Council, Decision and Reasons dated May 6, 2014, *Hesselink (Re)*, File No. 201315, Hearing Panel of the Central Regional Council, Decision and Reasons dated October 13, 2013, *Disenhouse (Re)*, File No. 200927, Hearing Panel of the Central Regional Council, Decision and Reasons dated July 8, 2010, *Cormylo (Re)*, File No. 200927, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated August 12, 2014, and *Cavalli (Re)*, File No. 201259, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated November 6, 2013.

38. Enforcement Counsel submitted that the proposed penalties are necessary, in order to communicate to other Approved Persons that entering into unapproved referral arrangements in violation of NI 31-103 puts clients at risk, and is serious misconduct that has no place in the mutual fund industry.

39. Enforcement Counsel also submitted that the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons and that the proposed sanctions will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.

40. Prior to arriving at its conclusions as to penalties, this Panel took into consideration all of the foregoing submissions.

41. In its deliberations, this Panel noted that factors potentially mitigating the penalties in this case were that the Respondent had no prior discipline history with MFDA and that there were letters submitted on his behalf attesting to sustaining a depressive disorder due to his clients' investment losses which purportedly resulted "despite his being unable to foresee or prevent that situation" (exhibit C of affidavit of Anne Dyer, exhibit 1 of Howse affidavit).

42. This Panel noted the following aggravating factors:

(a) Magnitude of referrals

The magnitude of referrals both as to number of clients and amount invested was substantial.

(b) Number of clients affected

A total of 56 clients and three non-clients impacted by the Respondent's conduct is a significant number.

(c) Magnitude of client losses

The total loss of investments by the clients of $8,831,200 was very substantial

(d) Compensation received by the Respondent

The Respondent received $33,158.67 from the Proforma Group for the referrals made between March 2009 and May 2010.

(e) Legality of referral

The Respondent concealed his involvement from the Member and prevented it from effective oversight that could have prevented the client losses.

(f) Seriousness of the Misconduct

The Respondent admitted to the MFDA investigator that he did not fully understand the nature of the investment. The Respondent did not conduct thorough due diligence into the PCPNs. The Respondent circumvented a key pillar of securities regulation, and consequently exposed his clients to undue risk. Had the Respondent instead sought the approval of Assante prior to entering into any referral arrangement, the harm suffered by clients could have been avoided.

(g) Lack of Remorse or Recognition by the Respondent of the Seriousness of the Misconduct

The Respondent has not demonstrated that he recognizes the seriousness of his misconduct, and has not expressed remorse for his actions. He claimed his conduct was an extension of his commitment to helping clients. However, he referred them to a risky exempt market product about which he had concerns then neglected to share those concerns with his clients. While the Respondent's clients ultimately lost their investments, the Respondent earned and retained referral fees. Moreover, the Respondent has refused to participate in the disciplinary process or acknowledge his obligations as a registrant with the MFDA

(h) Risk to Investors and Markets if the Respondent Continues Operating in Industry

Despite his absence from the hearing, the Howse Affidavit indicated that the Respondent claimed his conduct was well intended and in the interest of his clients. However his alleged good intentions and actions in the interests of his clients did not extend to disclosing his activity to the Member, or conducting himself within the MFDA Rules and applicable securities legislation. It is arguable with greater force that had he truly wished to act in the best interests of his clients, he would not have acted contrary to the rules and legislation which governed his professional conduct and exposed his clients to the risk of loss of the entirety of their investments.

(i) Deterrence

The goal of deterrence is an appropriate and important factor to be considered in determining penalty in cases such as the case at hand. As stated by the Supreme Court of Canada in *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 at paras. 52 – 62

> *A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction . . . The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged…*

XI. DECISION AS TO PENALTIES

43. With all the foregoing factors in mind, the Panel deliberated on its decision as to penalties and arrived at the conclusions set out in paragraphs 44 to 51 below.

44. Having regard to the various responses given by the Respondent to investigator Howse, this Panel concludes that the Respondent must have been well aware that his failing to disclose to the Member his conduct at any time between May 2009 and May 2010 was wrong, and was intentionally committed without regard to the harm to his own clients, the Member, the investing public, and the integrity of the capital markets. Otherwise, the Respondent would have no reason to suppress the fact of his activities to the Member, at all, or over the period of time that he did so.

45. This Panel considers as a particularly aggravating factor the primary fact that the Respondent seems not to have recognized from May 2009 until February 16, 2016 when he ceased all communications with the MFDA the seriousness of his improper activity or his significant role in the losses resulting to his clients by deliberately withholding from the Member the nature and extent of his wrongful conduct. This wrongful conduct deprived the investor clients, the Member and the Respondent himself from the protection and benefit of the guidance of the Member that could have avoided or reduced the loss to all concerned.

46. This Panel considers the Respondent's refusal to face up to his professional responsibility for the significant amount of financial loss to a large number of clients who reposed trust in him demonstrates not only a disturbing lack of remorse but also an insufficient understanding of the nature and extent of his misconduct.

47. For these reasons, this Panel is satisfied that a permanent prohibition is necessary for the specific deterrence of this Respondent and for general deterrence of any mutual fund Approved Persons who might be inclined to risk engagement in similar conduct.

48. As to a monetary penalty, this Panel closely questioned Enforcement Counsel as to whether his submission as to monetary fine was sufficient, having regard to the great number of investors harmed, the totality of the investment funds. Enforcement Counsel noted that the amount of $50,000 would represent a minimum level of the monetary fine to be imposed and for the benefit of the Panel, he carefully reviewed all of the relevant factors to be considered in imposing an appropriate monetary penalty.

49. Although during its deliberations as to penalty, this Panel gave serious consideration to whether a monetary fine in the circumstances of this particular case warranted an amount even higher, ultimately it was persuaded that a fine of $50,000 in this case is appropriate in that it properly balances the aggravating factors and the mitigating factors in this particular cases and in addition, the suggested amount properly reflects:

a) the benefits received by the Respondent;

b) a signal to the Respondent and to others that his conduct was a serious violation of the MFDA Rules and caused significant harm to a number of investors leaving financial consequences that will impact their lives substantially;

c) that the monetary fine is not meant to represent punishment to the Respondent.

50. Finally, this Panel is satisfied that the costs award of $10,000 is consistent with the awards in similar cases.

51. In summary, after consideration of all the submissions of Enforcement Counsel, this Panel concluded that the following penalties were appropriate in this case:

a) A permanent prohibition of the Respondent's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction;

b) A direction that the Respondent pay a fine of $50,000 for engaging in securities related business as described in Allegation # 1 and hampering the investigation into that conduct;

c) A direction that the Respondent pays to the MFDA $10,000 for costs of the investigation.

DATED this 11th day of October, 2016.

"Shelley L. Miller"

Shelley L. Miller, Q.C.
Chair

"Nada Israeli"

Nada Israeli
Industry Representative

"James Samanta"

James Samanta
Industry Representative

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