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: George William Popovich

Heard: August 27-28, 2013 in Windsor, Ontario
Reasons for Decision (Motion): October 15, 2013

REASONS FOR DECISION (MOTION)

Hearing Panel of the Central Regional Council:

Mark J. Sandler	Chair
Guenther Kleberg	Industry Representative
Glenda Towle	Industry Representative

Appearances:

Shelly Feld	)	Counsel for the Mutual Fund Dealers Association of Canada ("MFDA")
Bob Baksi	)	Counsel for the Respondent

Introduction

1. Mr. Popovich moves for a permanent stay of the MFDA disciplinary proceeding against him. The proceeding was commenced by Notice of Hearing issued on November 30, 2012. On May 5, 2009, the MFDA opened its case file in this matter after it received a number of METS[1] reports submitted by Mr. Popovich's former employer, Desjardins. The METS reports included notification that Desjardins had terminated Mr. Popovich for cause.

2. The motion for a stay is largely related to the delay between May 5, 2009 and November 30, 2012, a period of three and a half years. It is Mr. Popovich's position that this constitutes unacceptable delay which was caused by the MFDA's conduct or inaction and which has resulted in significant prejudice to him.

3. In support of the motion, Mr. Popovich relies upon his own affidavit, together with certain e-mails from his counsel to the MFDA; the report of Dr. Alan Leschied, a psychologist; and various events during the case assessment, investigation and enforcement stages of this matter. He draws his principal support, in law, from the decision of the Supreme Court of Canada in *Blencoe* v. *British Columbia (Human Rights Commission)* ("*Blencoe*")[2] which of course is binding on us, and a non-binding decision of a hearing panel in *Law Society of Upper Canada* v. *Eugenio Totera* ("*Totera*").[3] Although the *Totera* decision is not binding on us, and is currently under appeal, Mr. Popovich's counsel commends it to us for its persuasive value. In *Totera*, a stay of disciplinary proceedings against a lawyer was ordered in circumstances which he submits are analogous to those here.

4. The MFDA resists the motion. It relies upon the affidavit of its primary investigator, Michael Ford, together with the various attachments to that affidavit. It also relies upon a body of jurisprudence said to severely limit when a stay will be granted. It is the MFDA's position that when this jurisprudence is applied to the facts here, the motion must fail.

The Legal Principles

[1] Members of the MFDA are required to report certain types of information to the MFDA by electronic entries on the Member Event Tracking System ("METS").
[2] [2000] 2 SCR 307
[3] 2013 ONLSHP 9 (CanLII)

5. Some of the legal principles that apply are not controversial:

a) This hearing panel has the jurisdiction to stay this proceeding if the circumstances warrant.

b) Mr. Popovich bears the burden of demonstrating that a stay should be granted.

c) A stay is properly regarded as an exceptional remedy, largely because it has the effect of ending a disciplinary proceeding without any consideration of the merits.

d) The *Canadian Charter of Rights and Freedoms* ("The Charter") does not apply to this hearing panel since its powers do not derive from legislation, but only from the powers given to it by a self-regulated body.

e) However, administrative law principles provide scope for a stay based, amongst other things, on delay caused by the authorities – which in this case, would be the MFDA. The applicable principles were articulated by the majority of the Supreme Court of Canada in *Blencoe*. To paraphrase what was said:

   i. Delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. There must be proof of significant prejudice which results from an unacceptable delay.

   ii. Prejudice which is of sufficient magnitude to compromise the fairness of the hearing will, if proven, support a stay.

   iii. Even where the fairness of the hearing has not been compromised, clearly unacceptable delay which has directly caused a significant prejudice so as to amount to an abuse of process may result in a stay. It must be a delay that would, in the circumstances of the case, bring the MFDA disciplinary process into disrepute. Put another way, the hearing panel must be satisfied that the continuation of the proceeding would be contrary to the interests of justice.

   iv. There may also be an abuse of process where the conduct or delay is unacceptable to the point of being so oppressive as to taint the proceeding.

   v. In determining whether a delay is inordinate, one does not consider the length of the delay alone, but all contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceeding, and whether the respondent contributed to the delay or waived the delay.

f) Whether a stay is sought pursuant to the *Charter* or administrative law principles, the jurisprudence also suggests that certain allegations are best addressed after the evidence is heard on the merits – rather than at the outset of the proceeding. For example, allegations that the authorities have lost potentially exculpatory evidence or, through their delay, prevented a respondent from accessing such evidence are best addressed at the end of the evidence, when the hearing panel is well situated to assess the impact of the authorities' conduct on the respondent's ability to make full answer and defence. To state the obvious, allegations that are dependent on the underlying merits of the case can rarely be addressed prior to the complete evidence being heard.

6. Apart from the Respondent's primary allegations, which we address below, he alleges amongst other things, that he has not engaged in any misconduct, that Desjardins acted improperly in bringing forward purported complaints from clients which were not truly complaints, that his business partners conspired to falsely implicate and destroy him financially, and that the MFDA failed to conduct an adequate investigation into the origins of the purported complaints against him or ensure that relevant client files were preserved.

7. Much of the conduct which the Respondent raises is not attributable to the MFDA. Indeed, some of it preceded MFDA's involvement in the matter. This is, of course, relevant to whether the conduct can successfully support an abuse of process motion. But leaving that point aside, these particular allegations are, in our view, more properly ruled on, if an abuse of process motion is pursued, at the end of the evidence on the merits. At that time, the competing positions of the parties can be evaluated, and the impact of any conduct on the fairness of the hearing which is attributable to the MFDA can be assessed.

8. The real issue at this stage of the proceedings, as we see it, is whether there has been unacceptable delay in bringing this matter forward from the opening of the file to the issuance of the Notice of Hearing, and whether such unacceptable delay has caused such significant prejudice to Mr. Popovich's psychological and emotional well-being, and to his related ability to emotionally, cognitively and financially defend himself that it would be contrary to the interests of justice to continue this proceeding.

9. We have deliberately placed the most emphasis on the delay from the opening of the file to the issuance of the Notice of Hearing, rather than from the opening of the file to the hearing itself. We are mindful of the entire time period. However, it cannot reasonably be contended (nor has it been) that the period from the issuance of the Notice of Hearing to the hearing itself has been excessive or should figure prominently in the disposition of this motion.

Whether There has Been an "Unacceptable Delay"

The Existing Guidelines and the Complexity of the Investigation

10. There is no doubt that the delay here invites careful scrutiny given its length. It must also be said that the delay from the opening of the file to the issuance of the Notice of Hearing is certainly not ideal. The issues, however, are (a) whether the delay is unacceptable or excessive, and (b) whether such delay has resulted in sufficient prejudice to compel a stay. The two issues are, of course, related since the greater the prejudice, the less delay that will be tolerated.

11. Mr. Ford gave affidavit evidence. His evidence was based on his personal involvement on the file since October 21, 2011, his experience as an investigator with the MFDA since 2005 and his familiarity with the entire file, based in part on documents available to him. A number of those documents were marked as exhibits to his affidavit.

12. At paragraphs 9 to 18 of his affidavit, he set out the MFDA enforcement process. The following passages are of particular significance:

> 11. When matters are brought to the attention of Enforcement Staff, a case assessment analyst determines whether the matter warrants scrutiny by Staff in the sense that the nature of the concerns raised appear to potentially constitute contraventions of MFDA Rules or other regulatory requirements. If so, a file is opened and a case assessment officer is assigned to the matter to commence the fact gathering process by requesting relevant documents and written responses to the issues of concern from the subject(s) whose conduct are being examined. At the conclusion of the case assessment fact gathering process, an assessment is made as to whether the concerns remain of sufficient gravity to warrant escalation to the investigations group.
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> 12. If the matter is escalated to investigations, it usually reflects concern that the impugned conduct may constitute a serious contravention of regulatory requirements that warrants disciplinary action. A more extensive investigation is conducted by an investigator with support from Enforcement Counsel during which additional

documentation is gathered and interviews are scheduled with individuals who may have relevant information about matters under investigation. At the conclusion of the investigation, the investigator must determine whether there appears to be sufficient evidence of misconduct to support a potential enforcement prosecution. If so, the matter is escalated to the litigation group.

13. If a matter is escalated to litigation, the Enforcement Counsel assigned to the case assesses the sufficiency of the evidence and evaluates the recommendation that disciplinary action should be commenced. In some cases, counsel will recommend further investigation with respect to certain issues. At the conclusion of the evaluation process, if Staff remain satisfied that disciplinary action should be commenced, a Wells process is initiated which affords the Respondent a final opportunity to bring additional information to the attention of Staff on a '*with prejudice*' basis that may affect Staff's decision to commence a disciplinary proceeding or the scope of such a proceeding. At the conclusion of the Wells process, if Staff remains intent on commencing a proceeding, a Notice of Hearing setting out the allegations of misconduct and material facts supporting such allegations is issued and served.

…

16. According to the statistics posted on the MFDA website, 1,094 cases were opened by the MFDA Case Assessment group in 2009-2010 (582 in 2009 and 512 in 2010). A total of 201 cases were escalated to investigations during that 2 year period (112 cases in 2009 and 89 cases in 2010). Between 2010 and 2011, a total of 92 cases were escalated to litigation (43 in 2010 and 49 in 2011).

17. The MFDA has published benchmarks which have been reviewed and approved by each of the Canadian Securities Administrators in accordance with the Recognition Orders in each jurisdiction. The benchmarks contemplate that effective July 1, 2005:

a) 80% of all cases should be reviewed by the case assessment group and closed or escalated within 120 days of case opening;

b) 80% of all cases that are escalated to the investigations group should be closed or escalated within one (1) year of escalation to investigations; and

c) 80% of all cases should be closed, settled, or the subject of an issued Notice of Hearing or Notice of Settlement Hearing within 300 days of escalation to litigation.

18. The 80% thresholds reflect the reality that in up to 20% of cases, it will be necessary to exceed one or more of these benchmarks between the opening of a case in the enforcement department and the commencement of a possible disciplinary proceeding due to factors such as the size and complexity of the case and the nature of the issues that arise with respect to the matter. For example, a case will typically take longer to investigate if:

a) the facts alleged by the complainants are disputed by the subject of the investigation;

b) the scope of the investigation is broader, because a greater number of:

i) clients were affected by alleged misconduct of the subject of the investigation and the facts associated with each client's case have to be individually investigated and evaluated;

ii) alleged contraventions are being investigated;

iii) sources of evidence have to be pursued, for example:

A) by conducting interviews with more individuals who have relevant information about matters under investigation; and/or

B) by gathering, reviewing and evaluating the significance of more documents to reach a fair and balanced conclusion about whether the alleged conduct occurred and contravened regulatory requirements, or

c) the nature of the issues that arise in the case are more complex.

Staff is also affected by the availability and willingness of witnesses and other sources of evidence to provide timely information in response to Staff's inquiries. (Footnotes omitted).

13. In our view, the benchmarks referred to by Mr. Ford in these passages are helpful, though not determinative, in our assessment as to whether a delay is unacceptable. As reflected in Mr. Ford's affidavit, the benchmarks have been reviewed and approved by each of the applicable Canadian Securities Administrators in accordance with the Recognition Orders that exist in each jurisdiction.

14. The benchmarks are particularly relevant in determining the extent to which systemic delay due to limited institutional resources will be tolerated. That being said, benchmarks are only guidelines. To paraphrase what has been said by the Supreme Court of Canada in s. 11(b) *Charter* jurisprudence (not always analogous here), guidelines do not create a "limitation period" or a "fixed ceiling" on acceptable systemic delay. A delay may be acceptable even if it exceeds the applicable guidelines. Similarly, a delay which meets the guidelines may be unacceptable due to the existence of other factors.[4]

15. In short, we do not apply a mathematical or administrative formula in determining

[4] *R.* v. *Morin*, [1992] SCR 771

whether a delay is unacceptable. As stated in *Blencoe*, we consider all of the contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceeding, and whether the Respondent contributed to the delay or waived the delay.

16. The benchmarks contemplate that in 80% of all cases, case assessment should be completed within 120 days of case opening. Here, the case assessment phase extended from May 5, 2009 to May 5, 2010, a period of 12 months.

17. The benchmarks contemplate that in 80% of all cases, the investigations phase should be completed in one year. Here, the investigation phase extended from May 5, 2010 to September 2011, a period of 16 months.

18. Finally, the benchmarks contemplate that in 80% of all cases, the litigation phase should be completed (which, in this context, means the issuance of a Notice of Hearing) in 300 days. Here, the litigation phase extended from September 2011 to November 30, 2012, a period of 14 months.

19. The time taken during each of the three phases exceeded the benchmarks for 80% of all cases.

20. As noted in paragraph 18 of Mr. Ford's affidavit, the guidelines also reflect the reality that in up to 20% of the cases, it will be necessary to exceed one or more of the three benchmarks based on the inherent time requirements of the case. The factors that are relevant include the size and complexity of the case, and the nature of the issues that arise. Mr. Ford identified the kinds of circumstances that would typically compel a longer investigation, and which applied here:

a) The facts alleged were disputed by Mr. Popovich;
b) A number of clients were said to be affected by the alleged misconduct, requiring that the facts associated with each client's case had to be individually investigated and evaluated.
c) Allegations that investment recommendations were unsuitable for the clients required more extensive investigation since they were dependent on a full

understanding of each client's situation;

d) Extensive documentation had to be gathered, reviewed and evaluated; and

e) Numerous individuals with relevant information had to be interviewed.

21. Additional investigation was conducted into points that had been raised by Mr. Popovich during his interviews, including his allegations concerning the conduct and ulterior motives of his former branch manager. This resulted in some modest narrowing of the allegations that were ultimately contained in the Notice of Hearing. The additional investigative work was also fair to Mr. Popovich since its rationale, in part, was to determine whether his position had merit. (In saying that, we are expressing no opinion whatsoever on the ultimate merits of this case.)

22. The adequacy of Desjardins' supervision of Mr. Popovich and its complaint handling processes also required investigation though that is not an unusual aspect of any investigation.

23. Mr. Ford also swore that the enforcement process was complicated by the claims and litigation proceedings that were playing out as between the complainants, Mr. Popovich and Desjardins.

24. Forty nine (49) disclosure binders have been provided to Mr. Popovich. Mr. Ford noted at paragraph 56 of his affidavit that "[t]he volume of disclosure that Staff has prepared and delivered to the Respondent reflects the size and complexity of this case and accounts for the time that was required to complete the investigation of this matter."

25. Mr. Popovich, through his counsel, Mr. Baksi, had the right to cross-examine Mr. Ford, but chose not to do so. That is not a criticism of Mr. Baksi, who vigorously and effectively represented Mr. Popovich on this motion. It is simply a reflection of what transpired. Mr. Ford's unequivocal evidence that the size and complexity of this case accounted for the time required to complete the investigation was unchallenged in cross-examination. We accept, based on that evidence, and our own evaluation supported by the voluminous disclosure and the chronology of this investigation, that the case properly falls within the 20% of cases in which delays exceeding the guidelines should normally be tolerated.

26. The affidavit evidence of Mr. Popovich did not undermine the conclusion that this was a

large and complex investigation. Indeed, as noted later in these reasons, Mr. Baksi characterized the matter as complex and as involving extensive factual and legal issues when addressing the "Wells" letter issued by Staff in August 2012. His characterization was accurate.

Waiver or Delay Contributed to by Mr. Popovich

27. We next consider whether Mr. Popovich waived or contributed to the delay.

28. We are satisfied that Mr. Popovich never waived the delay. Through his counsel, he articulated his desire for an expeditious investigation. This expressed desire was genuine on his part.

29. That being said, there were two periods of delay which were contributed to by Mr. Popovich. In so concluding, we are not blaming Mr. Popovich. We are simply considering, as we are mandated to do, what explanations exist for the delay.

(a) The Period from August 30, 2012 to November 30, 2012

30. Staff made a determination that there were grounds to commence a disciplinary proceeding. Accordingly, a "Wells" letter dated August 30, 2012 was sent to Mr. Baksi. The letter offered Mr. Popovich an opportunity to respond by raising any new information for Staff's consideration on a "with prejudice" basis

31. Paragraphs 44 to 55 of Mr. Ford's affidavit address the events that followed. No issue is taken with the events as described in those paragraphs:

> 44. On September 5, 2012, Mr. Baksi sent Mr. Feld an e-mail indicating that for the first time since June 9, 2009, Mr. Baksi's firm was no longer retained to represent the Respondent with respect to this matter. In his letter Mr. Baksi stated that:
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> > "any lawyer retained by [the Respondent] to respond to MFDA will have a complex and comprehensive series of events to review. . . Extensive legal research would be required by Mr. Popovich's counsel as well. In these circumstances, allowing less than 10 days for a response is in my opinion manifestly unreasonable for both Mr. Popovich and for legal counsel that he might retain. . . In this writer's opinion, if our firm was to consider accepting a retainer, we would need at least 2 months for a response given the extensive

factual and legal issues needing review by counsel. Any other firm not previously involved, might require a longer period for response."

45. As reflected in a letter from Mr. Feld to the Respondent dated September 11, 2012, on that date Mr. Feld spoke with the Respondent directly and explained the Wells process to him and confirmed to him that he was not obliged to respond to Staff's Wells letter but he was permitted to do so. Mr. Feld also confirmed that Staff would extend the deadline for a response to the Wells letter to September 28, 2012 to permit the Respondent to speak with Mr. Baksi about whether to respond to Staff's Wells letter upon Mr. Baksi's return from vacation.

46. On the same day, Mr. Feld wrote to Mr. Baksi to inform him of Staff's willingness to grant an extension for a response to the Wells letter until September 28, 2012.

47. On September 20, 2012, Mr. Baksi responded to Mr. Feld's letter and informed Mr. Feld that the Respondent intended to retain a lawyer named Myron Shulgan to represent him with respect to a potential MFDA disciplinary proceeding. Mr. Baksi forwarded an e-mail from Mr. Shulgan indicating that Mr. Shulgan was not available to review the file for another 2 weeks. Mr. Baksi asserted that the September 28, 2012 deadline that Staff had proposed for a response to the Wells letter was "arbitrary, prejudicial to [the Respondent] and procedurally unfair." An extension of time until at least October 31, 2012 for a response to the Wells letter was proposed by Mr. Baksi.

48. On October 15, 2012, Mr. Feld exchanged e-mails with Myron Shulgan and Mr. Feld noted that he had not heard from Mr. Shulgan about the outstanding Wells letter. Mr. Shulgan responded on October 16, 2012 by stating to Mr. Feld that he was out of the country until October 31, 2012 but that his associate was reviewing the file in the meantime.

49. No further correspondence or other communication was received from the Respondent or any counsel that he retained. Therefore, on November 30, 2012, Staff issued a Notice of Hearing commencing the proceeding against the Respondent.

50. On December 3, 2012, Mr. Feld contacted Mr. Shulgan to find out if he had been retained to represent the Respondent and whether he was authorized to accept service of the Notice of Hearing. Mr. Shulgan responded by stating that he had not been retained to represent the Respondent and was not authorized to accept service.

51. Later the same morning, Mr. Baksi contacted Mr. Feld to inform Mr. Feld that Mr. Shulgan had not been retained to represent the Respondent and the Respondent's file was being sent back to Mr. Baksi. Mr. Baksi clarified that he was not retained to represent the Respondent.

52. On December 5, 2012, Mr. Baksi requested that Mr. Feld grant an extension of time for him to work out a retainer to accept service of the Notice of Hearing.

53. On December 10, 2012, Mr. Baksi wrote to Mr. Feld and informed him that he [Mr. Baksi] was not retained to represent the Respondent. He also would not disclose an address for service of the Notice of Hearing.

> 54. Following receipt of Mr. Baksi's e-mail, Mr. Feld sent the Notice of Hearing to the Respondent by e-mail and requested that he contact Mr. Feld.
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> 55. On December 17, 2012, Mr. Baksi contacted Mr. Feld by e-mail to indicate that he was prepared to accept service of the Notice of Hearing on behalf of the Respondent. (References to the fact that the relevant exhibits were attached to the affidavit have been omitted.)

32. In submissions, Mr. Baksi correctly pointed out that there was no obligation on Mr. Popovich to provide a response to the "Wells" letter. We agree. However, Mr. Baksi said in his exchange with Staff that the short time line proposed by Staff for a response was "manifestly unreasonable" given the uncertainties of legal representation, the "complex and comprehensive series of events to review" or as he also put it, "the extensive factual and legal issues needing review." The Staff agreed to extend the time line. Staff continued to inquire whether a response was forthcoming, and was advised by Mr. Shulgan, another lawyer, on October 16, 2012 that his associate was reviewing the file. Nothing further was heard from Mr. Popovich or counsel on his behalf. As a result, the Notice of Hearing was issued on November 30, 2012.

33. In our view, the delay from August 30, 2012 to November 30, 2012 is largely attributable to Mr. Popovich.

(b) The Period from November 10, 2010 to May 11, 2011

34. On November 10, 2010, Stephen Glanville, the lead investigator at the time, wrote to Mr. Baksi requesting Mr. Popovich's attendance at an interview with Staff.

35. On November 19, 2010, Mr. Baksi responded by e-mail. He said that Mr. Popovich welcomed the opportunity to provide a statement to Staff. He explained why Mr. Popovich's role as prime caregiver for his wife only enabled him to attend an interview for a reasonable period of time per day and only if conducted in Windsor. He also advised that Mrs. Popovich had just undergone surgery, with certain post-surgical complications. Under doctor's advice, she was to avoid the cold winter weather. He noted that the couple had intended to leave for Florida on or about December 5, and to remain there for a number of months. He observed that the unfortunate post-surgical complications might force a delay in the Popovich travel plans. This would only be known the following week. The concluding paragraph read as follows:

> Mr. Popovich would like me to be present at any interview. Afternoons are better for Mr. Popovich as he can take care of his wife's needs in the morning, and more easily attempt to secure care for his wife during his temporary absence in the afternoon. Subject to family medical emergencies, we propose possible interview dates here in Windsor on either Wednesday afternoon November 24th, Thursday afternoon November 25th, Monday afternoon November 29th, or Wednesday afternoon December 1st. Please advise if any of these are convenient for MFDA, or call to discuss alternate arrangements. A block of 4 hours is being suggested for any sitting. If more time is needed, we can arrange additional days.

36. By return e-mail also dated November 19, 2010, Mr. Glanville advised as follows:

> We are unable to meet with you and Mr. Popovich on the dates you provided. I am unfortunately out of the office until November 29, 2010. We are also unable to meet December 1, 2010. I will contact you the week of November 29, 2010 to discuss an alternate date for the interview.

37. By letter dated December 9, 2010, Mr. Glanville confirmed to Mr. Baksi that pursuant to their telephone communication on November 30, 2010, the interview had been arranged to occur in Windsor at 1 p.m. on April 6, 2011 and 1 p.m. on April 7, 2011. Mr. Popovich would be back from Florida by then.

38. The questioning could not be completed in those two half-day sessions. As a result, an additional full-day interview had to be scheduled for May 11, 2011. Again, Staff accommodated Mr. Popovich by coming to Windsor. The interview transcripts are approximately 400 pages in length. Seventy two (72) documents were marked as exhibits.

39. Mr. Baksi submitted that Mr. Glanville should have attempted to obtain early dates for the interview, rather than waiting until November 30 to respond. He said that Mr. Popovich might have been able to delay his required trip to Florida to enable the interviews to take place before he departed.

40. To accommodate the legitimate health-care needs of Mrs. Popovich, Staff was required to find time to conduct the interviews in Windsor, to initially do so in half-day sessions and to avoid the winter months. It is speculative to conclude that the interviews could have been scheduled and completed before the required departure of Mr. Popovich to Florida. There is no blame to be assigned to either party. But it would also be unreasonable not to recognize that the need to accommodate Mr. Popovich contributed to the delay during this period.

41. This point might be factored into the analysis in another way. The need to accommodate Mr. Popovich, given the health-care requirements of his wife, represented one of the inherent time requirements of the case that justified a longer delay than would otherwise be tolerated.

Mr. Popovich's Desire for an Expeditious Investigation

42. Mr. Baksi forcefully submitted that we should only be prepared to tolerate a much shorter delay here because Staff was placed on notice that Mr. Popovich desired an expeditious investigation, and was alleging that the delay was causing significant prejudice to him.

43. By e-mail dated June 9, 2009, Mr. Baksi indicated that Mr. Popovich would fully cooperate with MFDA in its investigation and would make himself available for an interview. Mr. Baksi asked that the investigation be advanced as quickly as possible. He outlined Mr. Popovich's position as to Desjardins' conduct, and the denial of his access to relevant files. Mr. Baksi described the shareholders who were in a dispute with Mr. Popovich and who might have been the source of promoting and/or reporting potential complaints. He discussed why Desjardins apparently named persons as having "complaints" when those parties stated that they never made or intended to make a complaint.

44. In subsequent e-mails dated November 6, 2009 and December 23, 2009, Mr. Baksi reasserted the alleged continuing prejudice to Mr. Popovich as a result of the outstanding investigation, and articulated his concern about the lack of a response from the MFDA or a scheduled interview with Mr. Baksi. These representations to Staff were summarized in paragraph 11 of Mr. Popovich's affidavit.

45. Mr. Popovich deserved timely responses to his counsel's entreaties to Staff. Mr. Feld apologized on behalf of the MFDA (though he was not personally involved at that time) for the failures to acknowledge Mr. Baksi's correspondence. However, the evidence does not demonstrate that the delays occasioned in this matter could have been substantially shortened so as to prevent or significantly diminish any prejudice to Mr. Popovich. When the above correspondence was received by Staff, the matter was still in case assessment and much was still required in order to move the file forward.

The Cause and Extent of any Prejudice

46. As noted earlier, the cause and the extent of prejudice is relevant to whether the delay will be found to be unacceptable or tolerated. Even where the delay is found to be unacceptable, the prejudice resulting from that delay must also be so significant as to justify a stay of proceeding. Accordingly, it is important to consider the evidence of prejudice here.

47. Mr. Popovich alleged prejudice in his affidavit. The most relevant portions are as follows:

> Para. 2: After describing his wife's condition: "Her condition in my opinion has been exacerbated by the pressure of the lengthy MFDA investigation, and that in turn directly increases the scope of care I must provide and adds pressure and stress to me."
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> Para. 4: I am now 69 years old, and have been unable to work for several years because of the delay in the investigation by MFDA staff and the initiating of disciplinary proceedings. After the investigation began, I made several attempts to secure a replacement dealer for Desjardins who had wrongfully terminated my dealer agreement. I was able to locate a dealer willing to take me on, but the existence of the MFDA investigation prevented the arrangement from being concluded.
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> Para. 5: I am now unable to leave her for any length of time, as her condition has continued to deteriorate during the time of the MFDA investigation and my responsibilities to her have continued to increase.
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> Para. 6: My own condition continues to weaken, and although my cancer currently is in remission, I now suffer from high blood pressure, back pain, and other related conditions that did not exist at the outset of the MFDA investigation, and which I believe to have been brought in part by the stress and pressure of the lengthy investigation. MFDA staff were aware from the outset of the investigation of my health and financial fragility.
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> Para. 14: As a result of the lengthy MFDA staff investigation and the delay in completing the investigations and initiating disciplinary proceedings, I have been significantly prejudiced in the following manner:
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> > a) Having been unable to finalize a replacement dealer agreement, I have had no meaningful ability to earn a living and I no longer have the financial ability to defend myself against the allegations. Specifically, I have been unsuccessful in my attempts to retain counsel to represent me at the contemplated disciplinary hearing;
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> > b) Based on copies of client file documents received from Desjardins, I believe that file memos which would have been of exculpatory value to me and support

my defence against the allegations have been deliberately removed from the client files by my business partners;

c) As a direct result of the stress of the lengthy investigation, my mental and physical health have declined throughout, to the point where I was confused during the MFDA interview of me which didn't take place until April of 2011, and have continued to deteriorate to date. Having recently learned of the extensive documentation disclosure which MFDA has not yet even completed, I now no longer believe myself capable mentally or physically of adequately preparing for the hearing.

The combination of the above prejudicial factors means that I can no longer mount a full and effective defence to the allegations.

Para. 18: The declining health of myself and my wife are evidenced by the fact that Mr. Shelly Feld and Mr. Stephen Glanville of MFDA Staff attended in Windsor to interview me in 2011. Since that interview in April of 2011, our health situation has deteriorated to a greater degree, and in my case as a direct result of the stress and pressure from the failure to complete the investigation and any disciplinary proceedings within an acceptable time.

48. The affidavit also outlined Mr. Popovich's position on the role allegedly played by Desjardins, his former business partners and shareholders of Financial Investment Centre, and the MFDA (apart from the issue of delay). As we have said, these are issues that can only be addressed at the conclusion of the evidence, not now.

49. Dr. Leschied is a senior psychologist and professor. He saw Mr. Popovich on a single occasion. He also received information from Mr. Baksi, including his e-mail exchanges with the MFDA. Dr. Leschied did not meet with Mr. Popovich's treating physician. His opinions were derived almost exclusively from what Mr. Popovich told him.

50. Mr. Feld sought to cross-examine Dr. Leschied if his report was to be relied upon. He was entitled to do so. No arrangement had been made for Dr. Leschied's attendance. Mr. Baksi had not understood, in advance of the motion hearing dates, that Mr. Feld was requiring Dr. Leschied to be made available. Mr. Baksi said that it would be exceedingly difficult, if not impossible, for Dr. Leschied, who resides and works in London, Ontario, to attend in Windsor during the two days set aside. In the circumstances, we asked Mr. Baksi to advise us whether he was seeking either to produce Dr. Leschied at a later date or to produce him within the next two days by telephone for cross-examination. We indicated that if he chose not to produce Dr. Leschied, he could expect the MFDA to argue that his evidence should be given little or no

weight. With that understanding, Mr. Baksi, on behalf of Mr. Popovich, opted not to make inquiries about Dr. Leschied's availability to testify by telephone or alternatively, in person at a later date. With the consent of the MFDA, Dr. Leschied's report was received into evidence, subject to the expected argument as to its diminished weight.

51. Mr. Feld was well situated to ask us to disregard Dr. Leschied's report based on his inability to cross-examine him. He had no opportunity to challenge Dr. Leschied's expertise (which in his resume is largely directed to child-related issues) or the scope or reliability of his opinion.

52. That having been said, it appears to us that Dr. Leschied's opinion is cautiously expressed, extremely limited, and ultimately does not materially assist Mr. Popovich.

53. Dr. Leschied provided some common sense propositions about the undoubted effect of stress on one's ability to function. He documented the medical history of Mr. Popovich and Mrs. Popovich. He noted that, in the midst of the formidable health concerns relating to Mrs. Popovich's progressing MS, Mr. Popovich's investment business came under question by one of his then partners. He stated that "there was additional and considerable stress generated due to these allegations, which Mr. Popovich felt then and continues to believe now, were malicious in nature and did not accurately reflect concerns of his clients. These allegations were translated into complaints to the MFDA and thus began the almost four-year proceedings culminating in the Notice of Hearing."

54. Dr. Leschied stated that "as [a] result of the response of his business partners, Mr. Popovich lost his source of income. As a result, he and Mrs. Popovich were forced to sell most [or] all of their belongings. Their current lifestyle is supported through the financial generosity of friends and other sources of income."

55. The report also reflected that the requirement that the family's adult children be relocated away from Windsor placed further demands on Mr. Popovich to assume greater care for his wife.

56. Dr. Leschied concluded that Mr. Popovich has been under considerable stress for a lengthy period of time. Certain symptoms associated with high levels of stress affect, amongst

other things, cognition. Mr. Popovich has described symptoms typically associated with high levels of stress. The doctor opined that Mr. Popovich's reported inability to review various reports and/or report on memories related to the allegations would be consistent with high levels of stress.

57. The final paragraph stated that "delays in these proceedings have had a material and substantial contribution to the wellbeing of Mr. Popovich." Nonetheless, he noted that "the negative effects of stress are cumulative. Hence it is not possible to address the extent or isolate the nature of harm that Mr. Popovich has experienced due specifically to the delay in the MDFA disciplinary hearings. This is in part reflective of the challenges Mr. Popovich has faced due to the numerous other complicating aspects of his life including his own and as well his wife's serious medical concerns, the loss of his livelihood and the financial misfortunes that resulted."

58. The only conclusion that one can reasonably draw from Dr. Leschied's report is that a number of very serious events in Mr. Popovich's life explain the reported erosion in his health, such as:

a) the actions of his business partners which Mr. Popovich stated, in his meeting with Dr. Leschied, led to his loss of income, livelihood and financial misfortunes;
b) the seriously disabling and progressive illness of his wife with its corresponding toll on Mr. Popovich; and
c) the relocation of family, heightening Mr. Popovich's role as prime caregiver

As well, one cannot ignore the fact that Desjardins terminated Mr. Popovich's employment prior to any involvement by the MFDA in his affairs

59. We recognize that the delay in the investigation likely contributed to the stresses, and therefore the health issues that faced Mr. Popovich. We also recognize that the presence of multiple contributing events does not inevitably disqualify an applicant from success on a stay motion. However, the evidence here failed to demonstrate that any prejudice to Mr. Popovich, including the health issues described above, directly caused by delay was so significant that the continuation of these proceedings would be contrary to the interests of justice. In the particular circumstances of this case, the very serious events in Mr. Popovich's life other than delay make

it impossible, to paraphrase Dr. Leschied, to determine the extent of harm attributable to delay.

60. In so concluding, we acknowledge that Mr. Popovich was not cross-examined on his affidavit, which contains some sweeping generalizations about cause and effect. As was the case with Mr. Ford, we considered the fact that Staff chose not to cross-examine him. However, while several paragraphs in Mr. Popovich's affidavit lead us to conclude that he may well believe that delay explains much of his prejudice, Dr. Leschied's opinion, also drawn from what Mr. Popovich told him, represents a more accurate account of the extent to which actual prejudice resulting from delay has been demonstrated.

61. To provide but one example, Mr. Popovich stated that significant prejudice has resulted from the delay because his business partners destroyed exculpatory evidence.

62. This is not the time to determine what, if any, documents have been destroyed and the effect of any destruction on Mr. Popovich's ability to make full answer and defence. But there is no evidence whatsoever that any destruction of documents by Mr. Popovich's former business partners occurred because of, or was facilitated or enabled by, the delays in investigation by the MFDA.

63. The evidence concerning Mr. Popovich's financial situation is equally problematic. He described, in the most general terms, his financial situation. As already indicated, in his session with Dr. Leschied, he attributed his loss of income, livelihood and financial misfortunes to the conduct of his business partners. Again, he may believe that the delay accounts for much of his financial hardship. But the evidence failed to demonstrate the extent to which his financial situation was truly caused by the delay, as opposed to the other events already described. As well, his affidavit failed to explain why he surrendered his insurance licence in 2011, and why he was unable to work in the insurance field. Equally important, it is unclear the extent to which he could have continued to work, even if he was employable, through the period of delay, given the deterioration of his wife's health.

64. Mr. Popovich described some difference in his cognitive abilities over the past few years. Again, it is unclear to what extent Mr. Popovich's cognitive abilities have eroded over the past few years, and whether that erosion is explained by the delay in this proceeding, rather than the

other events in his life. As well, Mr. Popovich was aware of the allegations against him years ago. He could have taken steps to record his recollections while relatively fresh. Finally, it is particularly unclear at this stage of the proceeding whether any cognitive impairment prevents Mr. Popovich from adequately defending himself here, with or without counsel. The latter issue is best addressed, if at all, after a hearing on the merits.

65. We are also mindful of the fact that Mr. Popovich is the plaintiff in an ongoing wrongful dismissal lawsuit against Desjardins, and also a party to litigation involving his ex-partners. Both lawsuits inevitably overlap with the issues here. Undoubtedly, one of the issues to be litigated will be his ex-partners' role, if any, in instigating the allegations he currently must answer to. Although Mr. Baksi pointed out that we have no evidence as to precisely what role Mr. Popovich must take or has taken in those proceedings, nobody has suggested that he is unable to instruct counsel or conduct litigation in those cases by reason of cognitive impairment. In evaluating whether the preconditions to a stay exist here, one cannot ignore the logical implications of Mr. Popovich's position: namely, that he would remain free to pursue his civil litigation while he would be immunized from having to defend himself in a disciplinary proceeding where its issues and the civil litigation issues will significantly overlap.

66. We are very sympathetic to Mr. Popovich's situation – most particularly the seriousness of his wife's health-care needs and the pressures associated with being her prime caregiver. It is obvious to us that the delay here has occasioned some prejudice. However, it would also appear that much of the prejudice is attributable to third parties, and was also inevitable, given (a) the existence of the allegations against him, regardless of the length of the delay, and (b) the relentlessness of his wife's illness. We are not satisfied that the prejudice directly attributable to delay is so significant as to support the motion for a stay.

67. We wish to make it clear that we are not deciding whether the MFDA should, in the exercise of its discretion, choose not to continue the prosecution against him. Mr. Popovich indicated, through his counsel that he is prepared to undertake not to practice in the mutual fund industry or to seek to become an Approved Person. That is a relevant consideration for the MFDA in deciding whether a prosecution should proceed. However, it is not our role to interfere with the exercise of prosecutorial discretion. The fact that Mr. Popovich is prepared to make the undertaking would have been relevant to us in determining whether a stay was contrary to the

public interest, if we had concluded that the preconditions for a stay had otherwise been established.

68. We regard the *Totera* decision as distinguishable for many of the reasons advanced by Mr. Feld. In particular, the hearing panel in *Totera* found that systemic lack of institutional resources explained significant delay in that case; the overall delay was considerably longer; there were lengthy periods of time of investigative inaction (one period of 21 months and one period of 30 months); the licensee did not waive the delay or contribute to it; and there was highly particularized evidence of prejudice.

69. In summary, while the delay here was certainly not ideal, we are not satisfied that Mr. Popovich has demonstrated, having regard to all of the applicable factors, that the delay occasioned by Staff was unacceptable or excessive. We are also not satisfied, in any event, that the delay occasioned by Staff was the cause of significant prejudice to Mr. Popovich to a point that justifies a stay. The continuation of these proceedings would not be contrary to the interests of justice.

DATED this 15th day of October, 2013.

"Mark J. Sandler"
Mark J. Sandler,
Chair

"Guenther Kleberg"
Guenther Kleberg,
Industry Representative

"Glenda Towle"
Glenda Towle,
Industry Representative

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