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

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

Re: Blaise Leslie Szekely

Heard: September 25, 2019 in Edmonton, Alberta
Decision and Reasons: October 24, 2019

DECISION AND REASONS

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller, QC	Chair
Kathleen Jost	Industry Representative
James Samanta	Industry Representative

Appearances:

Justin Dunphy	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Victoria L. Merritt	)	Respondent's Counsel, in person
Blaise Leslie Szekely	)	Respondent, in person

I. INTRODUCTION

1. By Notice of Hearing dated December 19, 2018, the Mutual Fund Dealers Association of Canada (the "MFDA") made four allegations against Blaise Leslie Szekely, (the "Respondent") which read as follows:

> **Allegation #1:** Commencing in November 2009, the Respondent solicited approximately $287,542 from two clients and two individuals for investment outside the Member, and has failed to fully repay or account for these monies, contrary to MFDA Rule 2.1.1;
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> **Allegation #2**: Commencing in November 2009, the Respondent solicited approximately $287,542 from two clients and two individuals for investment outside the Member, thereby engaging in:
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> a) securities related business which was not carried on for the account of the Member or through its facilities, contrary to the Member's policies and procedures, and MFDA Rules 1.1.1 and 2.1.1; or
> b) alternatively, a dual occupation which was not disclosed to or approved by the Member, contrary to the Member's policies and procedures, and MFDA Rules 1.2.1(d) (now MFDA Rule 1.3) and 2.1.1;
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> **Allegation #3:** Between July 2010 and October 2016, the Respondent engaged in personal financial dealings with two clients by:
>
> a) soliciting approximately $80,000 for investment outside the Member, and entering into an agreement to invest the monies on behalf of the clients and pay the investment principal and interest to the clients; and
> b) soliciting approximately $10,000 for a joint investment with the Respondent in a private investment club operated by the Respondent outside the Member;
>
> which gave rise to a conflict or potential conflict of interest that the Respondent failed to disclose to the Member or in writing to the clients and failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to the Member's policies and procedures, and MFDA Rules 2.1.4 and 2.1.1; and

Allegation #4: Commencing on August 30, 2017, the Respondent failed to cooperate with an investigation by MFDA Staff into his conduct, contrary to Section 22.1 of MFDA By-law No. 1.

2. This matter was scheduled for a hearing on the merits commencing September 25, 2019. However, this Hearing Panel was informed late on September 24, 2019, the Respondent would substantially admit the Allegations of MFDA Staff ("Staff") and the matter would be converted to a Penalty hearing. At that time the Hearing Panel was provided with an Affidavit by the Respondent and written submissions by his counsel as to penalty.

3. At the hearing, the parties confirmed the Respondent admitted the facts in Allegations 1, 2a, 3 and 4, and MFDA withdrew the Allegation 2b with consent of the Respondent.

II. FACTS ADMITTED BY THE RESPONDENT

4. This Hearing Panel was advised that the Respondent would not cross examine on the affidavit of the MFDA investigator and intended witness, Allison Howse, ("Howse") as to the facts relevant to the Allegations. In turn, Enforcement Counsel would not cross examine on contents of the Respondent's affidavit.

5. Accordingly, this Hearing Panel accepted the following as facts from the MDFA:

a) The Respondent has been registered in the mutual fund industry since September 1997.

b) From July 6, 2009 to September 1, 2011, the Respondent was registered in Alberta as a mutual fund salesperson (now dealing representative) with Professional Investment Services (Canada) Inc. ("PIS"), a former Member of the MFDA.

c) From September 1, 2011 to December 1, 2015, the Respondent was registered in Alberta as a dealing representative with Global Maxfin Investments Inc. ("Global Maxfin").

d) From January 13, 2016 to January 5, 2017, the Respondent was registered in Alberta as a dealing representative with Sterling Mutuals Inc. ("Sterling"), a Member of the MFDA.

e) On January 5, 2017, Sterling terminated the Respondent's mutual fund registration.

f) With respect to clients NM and SM:

i. Clients NM and SM were clients of PIS and subsequently Global Maxfin, whose accounts were serviced by the Respondent at various times. Clients NM and SM were not clients of Sterling.

ii. Clients NM and SM entered into two agreements with the Respondent whereby they provided $80,000 and $10,000 to the Respondent on July 1, 2010 and August 1, 2010, respectively.

iii. The $10,000 was to be used a part of a private investment club with the Respondent to invest in futures contracts involving commodities.

iv. The $80,000 was to be invested at a rate of 8% per annum for a period of 2 years, in various financial instruments, with a guaranteed return of principal on July 30, 2012, and monthly interest payments of $533.33.

v. The Respondent admitted, in statements to Sterling, that he received these monies from clients NM and SM.

vi. The Respondent admitted that he paid 8% interest on the $80,000 investment until November 2016.

vii. The Respondent admitted that he invested the $10,000 in a private, informal investment club which was co-mingled with the Respondent's own monies and that of his mother. The August 2010 Agreement would be invested for a period of 3 years.

viii. The $80,000 and $10,000 was subject to a mutual release effective October 27, 2016.

ix. The activities with respect to clients NM and SM were not conducted through the facilities of Global Maxfin or Sterling, and had not been approved as outside business activities by either Member.

g) With respect to RF and NF:

i. Both individuals were not clients of PIS, Global Maxfin, or Sterling.

ii. RF and NF received proceeds from an estate of $148,156.92 and $49,385.64, respectively, for a total of $197,542.56, which was provided to the Respondent to invest on their behalf.

iii. RF provided Staff with an undated and unsigned letter from the Respondent to RF which explained the nature of the investment, including that the principal amount invested would be guaranteed, that he would be the investment manager, that the investment guaranteed a return of 6% per year, and that his fee would be 2% on the principal and 1% -1.5% as a fee for investing the monies.

iv. The investment with the Respondent was for a period of two years, ending January 2012.

v. The Respondent, in an e-mail dated December 31, 2011 to NF, provided an update with respect to the investment that stated that the interest earned was $24,416.26 over 2 years, and the total investment as of February 28, 2012 would be $221,958.82, with a withholding tax of $6,104.06.

vi. RF told Staff that RF and NF only received $95,000 from the Respondent, and provided bank records as evidence of the same.

vii. On September 28, 2018, in a with prejudice response to Staff's Wells Notice to the Respondent, the Respondent confirmed he invested monies on behalf of RF and NF.

viii. The activities with respect to RF and NF were not conducted through the facilities of Global Maxfin or Sterling, and had not been approved as outside business activities by either Member.

ix. The Respondent has not cooperated with Staff's investigation as he failed to attend an interview with Staff. Staff sent multiple letters to the Respondent's address, as well as e-mails to the Respondent's e-mail address attempting to coordinate a time and date for the Respondent's attendance.

6. This Hearing Panel acknowledged that in the Respondent's affidavit, he deposed, *inter alia,* his actions were a regretted error of judgment and, although he did not attend the interview with MFDA as requested, he did make efforts to provide information requested by MFDA and the Members involved in the investigation but the date of events made it difficult to do so.

7. This Hearing Panel concluded that the Allegations admitted by the Respondent had been proven and constituted misconduct in contravention of the By-law and MFDA Rules. It then turned

to the submissions of both counsel as to the penalties to be imposed in light of the above circumstances.

III. SUBMISSIONS AS TO PENALTIES

8. In his initial written submissions, Enforcement Counsel sought the following by way of penalties:

a) A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1;

b) A fine of $200,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; broken down as follows:

   i. A fine of $150,000 in respect of the Respondent's failure to account for client proceeds, including the $126,958.82 that has not been accounted for from RF and NF, as well as the securities related business outside the Members, and personal financial dealings;

   ii. A fine of $50,000 for the Respondent's failure to cooperate; and

c) Costs of $5,000 - $10,000, pursuant to s. 24.2 of MFDA By-law No. 1.

9. Enforcement Counsel did not submit revised written submissions as to penalties at the hearing. He stated the impact of the Respondent's admission of the Allegations on the monetary penalties of the new mitigating factor should be in the discretion of the Hearing Panel. He submitted a draft Bill of Costs showing the costs of this proceeding after conversion to a penalty hearing only would be reduced to $9837.50.

10. Respondent's Counsel in response, submitted the monetary penalties should be:

a) A fine of $20,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; broken down as follows:

   i. A fine of $15,000 "for his failure to account for client proceeds, conducting a securities related business outside the Members and personal financial dealings"

   ii. A fine of $5,000 "in relation to his failure to attend the interview" and

b) Costs of $2,500

11. Respondent's Counsel took no issue with the contents of Enforcement Counsel's draft bill of costs.

Statements of Applicable Law

12. Enforcement Counsel set out a statement of applicable legal principles to the case at hand, with which Respondent's Counsel indicated agreement and which are set out below for ease of reference.

13. The primary goal of securities regulation is the protection of the investor.

> *Pezim v British Columbia (Superintendent of Brokers),* [1994] 2 SCR 557 (SCC) ("*Pezim*"), at paras. 59, 68,
>
> *Breckenridge (Re), supra*, at para. 74,

14. In addition to protection of the public, the goals of securities regulation also include fostering public confidence in the capital markets and the securities industry.

> *Pezim, supra*, at paras. 59, 68

15. *Tonnies (Re)*, *supra*, at para. 45, explained the role of a Hearing Panel, when imposing sanctions in furtherance of the above goals as follows:

> *The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in Re Mithras Management Ltd. et al. (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:*
>
> *...[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 prejudicial to the public interest in having capital markets that are both fair and efficient.*

16. Sanctions imposed by a Hearing Panel should therefore be protective, preventative, and intended to be exercised to prevent likely future harm to the markets.

17. To determine whether a penalty is appropriate, the Hearing Panel should consider:

a) The protection of the investing public;
b) The integrity of the securities markets;
c) Specific and general deterrence;
d) The protection of the MFDA's membership; and
e) The protection of the integrity of the MFDA's enforcement processes.

Tonnies (Re), *supra*, at para. 46

18. Hearing Panels also frequently consider the following factors when determining whether a penalty is appropriate:

a) The seriousness of the allegations proved against the Respondent;
b) The Respondent's past conduct, including prior sanctions;
c) The Respondent's experience and level of activity in the capital markets;
d) Whether the Respondent recognizes the seriousness of the improper activity;
e) The harm suffered by investors as a result of the Respondent's activities;
f) The benefits received by the Respondent as a result of the improper activity;
g) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
h) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
i) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
k) Previous decisions made in similar circumstances.

Breckenridge, supra, at para. 77 and the decisions cited therein

MFDA Sanction Guidelines

19. As of November 15, 2018, the MFDA issued updated Sanction Guidelines to assist Staff and Respondents in conducting disciplinary proceedings and negotiating settlement agreements,

as well as Hearing Panels in the fair and efficient imposition of sanctions in settlement or contested disciplinary proceedings. As stated in the heading "Purpose of The Sanction Guidelines":

> *The Sanction Guidelines are not mandatory. The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. The Sanction Guidelines are intended to provide a summary of the key factors upon which discretion may be exercised consistently and fairly in like circumstances, but are not binding on Hearing Panels. The list of key factors in the Sanction Guidelines is not exhaustive, and Hearing Panels may consider other aggravating and mitigating factors as appropriate.*
>
> *Hearing Panels should always exercise judgment and discretion, and consider appropriate aggravating and mitigating factors in determining appropriate sanctions in every case. In addition, Hearing Panels should identify the basis for the sanctions imposed in the Reasons for Decision.*

20. In cases involving the type of misconduct in the present case, the following factors as set out in the Sanction Guidelines are relevant to the Hearing Panel's decision:

a) General and specific deterrence;
b) Public confidence;
c) Benefits received by the Respondent;
d) Harms suffered by investors;
e) Seriousness of the allegations proved against the Respondent; and
f) Failure to recognize the seriousness of the misconduct.

21. It is appropriate for deterrence to be among the factors taken into account when determining penalty.

> *Cartaway Resources Corp. (Re)*, [2004] 1 SCR 672 (SCC) at paras. 52 – 62 ("*Cartaway Resources*"),
>
> *Tonnies (Re)*, *supra,* at para. 47

22. The effect of general deterrence should advance the goal of protecting investors. As a result, the penalty levied should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry. As the Supreme Court of Canada stated in *Cartaway Resources*, *supra*, at para. 61:

> *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…*

23. The applicable legal principles pertaining to the failure to cooperate are set out below for ease of reference.

24. Pursuant to s. 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations of a Member, an Approved Person, and any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that Member's or person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA.

25. In carrying out its s. 21 duty, the MFDA is authorized to request and oblige a Member, Approved Person or any other person under its jurisdiction to:

a) submit a report in writing with regard to any matter involved in any investigation;
b) produce for investigation and provide copies of the books, records and accounts of such person relevant to the matters being investigated;
c) attend and give information respecting such matters; and
d) make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the MFDA.

Section 22.1 of MFDA By-law No. 1

26. Correspondingly, the Member, Approved Person or other person under investigation is obliged to cooperate with the s. 21 requirements.

Section 22.1 of MFDA By-law No. 1

27. This obligation is consistent with the duties owed by all members of self-governing professions. In *Artinian* v *College of Physicians and Surgeons of Ontario*, the Ontario Divisional

Court stated that "fundamentally, every professional has an obligation to cooperate with his self-governing body".

> *Artinian v College of Physicians and Surgeons of Ontario,* [1990] OJ No 1116 (Div. Ct.), at para. 9

28. There is ample authority for the proposition that an Approved Person must provide Staff with information and documentation, and attend an interview with Staff when requested to do so. To hold otherwise would hinder the MFDA's ability to investigate the conduct of registrants in the mutual fund industry and prevent the MFDA from fulfilling its regulatory mandate to protect the public.

> *Philips (Re*), *supra*

Enforcement Counsel Submissions

Permanent prohibition

29. Both counsel agreed that the misconduct in this case warranted the imposition of a permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1, (the "permanent prohibition"), due to the seriousness of the misconduct.

Monetary Penalties

30. On the question of appropriate monetary penalties for misconduct under Allegations 1, 2a and 3, Enforcement Counsel's written and oral submissions were that the following factors were appropriate to take into account:

a) a significant financial penalty must be imposed since the Respondent engaged in securities related business outside of the Members, which prevented the Members from supervising the transactions to ensure that those investments were suitable for clients NM and SM, as well as RF and NF. The Respondent was also in an obvious conflict of interest with clients NM and SM by co-mingling $10,000 with his own monies for an investment club, as well as entering into a separate agreement with those clients with respect to the $80,000.

b) based on the Respondent's long registration history he knew, or should have known, of the requirements set out in MFDA Rules and Staff Notices yet denied the Allegations in the Reply to the Notice of Hearing, displaying a failure to recognize the seriousness of the misconduct.

c) RF and NF have suffered considerable harm as a result of the Respondent investing the estate proceeds of $197,542, and only providing $95,000 in return. The Respondent gained a direct benefit at the expense of these individuals by virtue of the fees or other benefits he received as a result of investing those monies.

d) a significant financial penalty as regards Allegations 1, 2a and 3 is necessary to communicate to other Approved Persons that engaging in securities related business outside the Members, failing to account for monies invested, as well as engaging in personal financial dealings is serious misconduct that has no place in the mutual fund industry.

e) while Allegations 1, 2a and 3 comprised multiple violations, they pertained to a total of 2 transactions. In view of the totality principle, this Hearing Panel should consider imposing a global fine rather than individual fines for each contravention to recognize the 2 transactions involved multiple contraventions of the MFDA Rules.

f) admission of the Allegations prior to the hearing was an additional mitigating factor to take into account in respect of some reduction as regards the fines MFDA originally proposed.

g) the losses remaining unrecovered, depending on the method by which to calculate the market value at the relevant time, could range from $100,000-$120,000.

h) having regard to all the foregoing, the appropriate monetary fine should not fall below that range.

Remorse or Recognition by the Respondent of the Seriousness of the Misconduct

31. Enforcement Counsel noted the following factors in relation to the late admission of his failure to cooperate:

a) by failing to cooperate with Staff during the course of its investigation into his conduct, the Respondent hindered Staff's ability to provide effective oversight of the mutual fund industry,

b) based on the Respondent's long registration history he knew, or should have known, of the requirements set out in MFDA Rules and Staff Notices,

c) the Respondent denied the allegations in the Reply to the Notice of Hearing, and has failed to recognize the seriousness of the misconduct,

d) MFDA does not have direct evidence of the actual benefits received by the Respondent due to his failure to cooperate in the MFDA's investigation into his conduct.

e) the Respondent's after the fact admission of failure to cooperate may have limited the extent of losses found by MFDA.

f) however, the Respondent's admission of his failure to cooperate which saved the MFDA time and expense of proceeding to trial reflected he ultimately recognized the seriousness of his misconduct which is a mitigating factor.

Costs

32. While Enforcement Counsel's draft bill of costs indicating the costs to the date prior to the hearing stood at $9837.50, he conceded the mitigating factor would justify a costs award in the reduced range of $5000-$7500.

Case Authorities

33. Enforcement Counsel submitted the following cases for guidance:

a) *Latour (Re),* MFDA File No. 201561, Hearing Panel of the Central Regional Council, Decision and Reasons dated June 7, 2016,

b) *Brown-John (Re),* MFDA File No. 200502, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated June 27, 2005

c) *Westgard (Re),* MFDA File No. 200937, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated July 15, 2010

d) *Philips (Re*), *supra*, MFDA File No. 201631, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 28, 2017.

Respondent Counsel Submissions

Permanent prohibition

34. As noted, Respondent's Counsel and the Respondent conceded the penalty of permanent prohibition should be imposed for his conduct.

Monetary Penalties

35. Respondent's Counsel presented the following factors in support of the Respondent's position on monetary penalties:

a) The Respondent's understanding and acceptance of the permanent prohibition should eliminate or significantly reduce the need for harsher penalties sought by MFDA, thus a fine of $150,000 would be excessive in light of his concession regarding the permanent prohibition and which meant he could not return to work in the mutual fund industry,

b) Enforcement Counsel had conceded that admitting the Allegations prior to hearing was a mitigating factor,

c) The Respondent prior to these transactions had a clean disciplinary record since his registration in 1997,

d) The Respondent admitted in his affidavit dated September 24, 2019 that his actions were a regretted error in judgment,

e) The Respondent's actions were not fraudulent or malicious in intent, instead he believed the investments would benefit these clients and were undertaken on their instructions, and

f) The Respondent repaid nearly half the amount of the invested losses to the clients.

Failure to Cooperate

36. Respondent's Counsel contended that while the Respondent failed to attend the interview in December 2017, he had since fully participated in the investigation and the disciplinary process by making multiple efforts to provide information and cooperated in the hearing process including making admissions where appropriate.

37. Respondent's Counsel contended *Latour (Re), supra,* and *Brown-John (Re), supra,* cited by Enforcement Counsel were distinguishable from the facts in the instant case as regards Allegations 1, 2a and 3, for the following reasons:

a) In *Latour (Re), supra,* the respondent's conduct was more serious because there he had borrowed money from clients which was never returned. As such, it was not a genuine investment, whereas in the instant case no borrowing occurred.

b) In *Brown-John (Re), supra,* the conduct involved an intentional fraud in respect of multiple clients and no money was repaid to the client by the respondent, whereas in the instant case, only two transactions were involved.

38. Respondent's Counsel cited *Latour (Re)*, *supra*, *Brown-John (Re), supra*, *Westgard (Re)*, *supra,* and *Phillips Re, supra*, as support for the proposition that the Respondent should receive some diminution in penalty as an incentive to other respondents to cooperate after declining to attend the interview in order that they are not over penalized for an improvement in behavior and making later attempts at resolution.

39. Respondent's Counsel cited the following cases as more applicable to the case at hand

a) *Larson (Re)*, MFDA File No. 200826, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated August 27, 2009.

b) *Majdoub (Re)*, MFDA File No. 201010, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 12, 2010.

c) *Hoard (Re)*, MFDA File No. 201009, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 23, 2011.

Costs

40. Respondent's Counsel's written submissions contended that the costs award should stand in the sum of $2500 by reason that the proceedings were reduced from a contested hearing to a penalty hearing and because, as with the argument on the failure to cooperate, there should be recognition of steps the Respondent took, albeit, belatedly, to significantly minimize the time and expense of the proceeding.

41. In oral submissions, Respondent's Counsel conceded that an appropriate range for costs would extend from $2500 to $5000.

IV. ANALYSIS

42. This Hearing Panel undertook initial deliberations but then determined it was prudent to reserve its decision on penalties with written reasons to be delivered at a future date.

43. This Hearing Panel took into consideration the agreed facts, statements of applicable law, Sanction Guidelines, written and oral arguments of both counsel in its analysis of the appropriate penalties for the Allegations under consideration.

44. This Hearing Panel further took into consideration the following factors as applicable to the case at hand.

Seriousness of the Misconduct

45. This Hearing Panel considers that the misconduct in the present case, although not fraudulent and not involving borrowing from the client, remains within the category of the most serious type of misconduct which an Approved Person can commit namely, engaging in in securities related business outside of the Member's approval. The conduct prevented the Members from supervising the transactions to ensure that those investments were suitable for clients NM and SM, as well as RF and NF.

46. The Respondent was also in a clear conflict of interest with clients NM and SM by co-mingling $10,000 with his own monies for an investment club, as well as entering into a separate agreement with those clients with respect to the $80,000.

47. In addition to the foregoing, the Respondent's failure to cooperate with MFDA Staff during the course of its investigation into the Respondent's conduct hindered MFDA's Staff's ability to provide effective oversight of the mutual fund industry.

Respondent's Past Conduct and Experience in the Capital Markets

48. The Respondent was registered in the mutual fund industry since 1997. There is no evidence of any prior disciplinary history by the MFDA.

49. However, based on the Respondent's long registration history he knew, or should have known of the requirements set out in MFDA Rules and Staff Notices.

Remorse or Recognition by the Respondent of the Seriousness of the Misconduct

50. This Hearing Panel acknowledged Enforcement Counsel's submission that admission of responsibility for the Allegations ahead of a hearing is a mitigating factor which saves the MFDA time and expense and indicates recognition of the seriousness of the misconduct.

51. However, the evidence indicated the Respondent continued to formally deny responsibility for his actions from the outset of the investigation until as late as March, 2019, the date of his filed Reply to the Notice of Hearing and informally on the pleadings until September 24, 2019, the day prior to the hearing.

52. The Howse affidavit contained numerous examples of his failure to cooperate in scheduling or attending an interview. While Respondent's Counsel contended many efforts were made subsequently to make up for his refusal to attend the interview, a close reading of the Respondent's affidavit reflects a dearth of proof that he subsequently provided any meaningful information.

Harm Suffered by Investors and Benefits Received by the Respondent

53. At a minimum, RF and NF suffered considerable harm as a result of the Respondent investing the estate proceeds of $197,542, and providing only $95,000 in return.

54. Enforcement Counsel contended the Respondent gained a direct benefit at the expense of these individuals, whereas the Respondent deposed he received no benefit from the investments in question. Despite this conflict of positions, it is clear that the Respondent sought, or was in a position to attain, personal gain at the expense of those clients. This is an aggravating factor.

55. A further aggravating factor was the Respondent's failure to cooperate which prevented the MFDA from satisfying itself as to the true extent of loss and thus fulfilling its regulatory mandate to protect the public.

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

56. The Respondent poses a significant risk to other investors and the market at large if he is allowed to return to the industry. The misconduct he engaged in was serious, and in failing to cooperate with Staff of the MFDA, he has demonstrated disregard for the mutual fund industry and the protections put in place to ensure investor protection.

Deterrence

57. A significant fine, in addition to the permanent prohibition, is necessary to communicate to other Approved Persons that engaging in securities related business outside the Member, failing to account for monies invested, as well as engaging in personal financial dealings is serious misconduct that has no place in the mutual fund industry. A strong penalty for a failure to cooperate is also necessary to deter Members and Approved Persons of refusing or delaying their obligation to participate fully in the investigative process.

Review of Case Authorities

58. Despite the Respondent's contention that *Latour (Re), supra,* was a case of more serious misconduct distinguishable from the instant case because the respondent there had borrowed money from clients which was never returned, so was not a genuine investment, whereas in the instant case no borrowing occurred, this Hearing Panel found circumstances to be otherwise similar in terms of serious misconduct. Moreover, it found the reasons in that case to be apposite to the instant case.

59. In *Latour (Re), supra,* the hearing panel imposed a fine of $900,000, including a fine of $50,000 dollars for failure to cooperate even though the respondent was impoverished. Despite the respondent's linking his failure to cooperate with certain legal advice, the hearing panel concluded he had a clear duty to cooperate with the MFDA investigation to provide information about his activities in contact with clients to his member and MFDA as a result of which the MFDA was not able to determine whether more losses than the amount identified had been suffered.

60. The hearing panel in *Latour (Re), supra,* also referenced the MFDA penalty guidelines in suggesting a minimum fine of $50,000 and permanent prohibition where a respondent has been non-cooperative. It held that having regard to those guidelines, the respondent should not be

permitted to profit from his misconduct and the penalty should be preventive and protective of investors and the capital markets in general.

61. The Respondent's contention was that *Brown-John (Re), supra,* was a case of more serious misconduct distinguishable from the instant case because it involved an intentional fraud, it involved multiple clients and the respondent repaid no money to the clients. Here there was no fraud, there was partial repayment and only two transactions were involved. Moreover, as regards the failure to cooperate, Respondent's Counsel submitted this case in support of the contention that the Respondent should receive some diminution in penalty as an incentive to other respondents to cooperate after declining to attend the interview in order that they are not over penalized for an improvement in behavior and making later attempts at resolution.

62. In the view of this Hearing Panel, the serious misconduct in the instant case as regards Allegations 1, 2a and 3, albeit not identical, remained similar to the category of serious misconduct cases imposing permanent prohibitions together with substantial monetary fines.

63. On the other hand, the penalties for failure to cooperate in *Brown-John Re, supra,* appeared distinguishable from the instant case. There, the fine of $10,000 for failure to cooperate reflected the facts that the Respondent attended the examination, and the MFDA office to supply certain requested bank information within one week after the deadline imposed for doing so. The second fine of $25,000 was imposed for failure to perform an undertaking to promise more, which, despite efforts, he did not do. In the instant case, the Respondent avoided responding to requests for an interview, ultimately never did, maintained his denial that he failed to cooperate until just before the hearing despite early warnings as to the consequences that could result in non-cooperation, and presented no concrete evidence of information that would help the MFDA fulfill its mandate of providing effective oversight of the mutual fund industry.

64. *Westgard (Re), supra,* and *Philips (Re), supra,* appeared similar in fact patterns and penalties to those imposed in *Latour Re*, *supra*. In particular, both those cases imposed in addition to permanent prohibitions and significant monetary fines in proportion to the client losses, a $50,000 fine for failure to cooperate.

65. There did not appear to be support in either case for the proposition that the Respondent should receive some diminution in penalty as an incentive to other respondents to cooperate after declining to attend the interview in order that they are not over penalized for an improvement in behavior and making later attempts at resolution.

66. In particular, the hearing panel in *Westgard Re*, *supra,* considered the protection of the investing public, the integrity of the securities markets, specific and general deterrence and protection of the MFDA's membership and protection of the integrity of the MFDA's enforcement processes. It recognized but concluded the respondent's clear disciplinary history did not mitigate against the imposition of severe penalties.

67. *Majdoub (Re), supra, and Hoard (Re), supra,* did not involve consideration of a failure to cooperate. In imposing a permanent prohibition and monetary penalty of $120,000, the hearing panel in the former case noted the monetary fine to be equivalent to the commission paid to the respondent. The hearing panel in the latter case imposed the global fine of $100,000 with respect to allegations of securities related business outside the member, undisclosed and unapproved outside business activities and conflict of interest. In the view of this Hearing Panel, those case authorities supported the position of Enforcement Counsel as regards the need to impose a significant monetary fine, in addition to the permanent prohibition.

68. In the case of *Larson (Re), supra,* the hearing imposed a permanent prohibition and a $200,000 global fine for the first two allegations of securities related business. The hearing panel noted that previous MFDA panel decisions clearly supported the penalties proposed by MFDA as regards the first two allegations.

69. Respondent's Counsel cited *Larson, (Re), supra,* for the disposition apparently in respect to the failure to cooperate. However the hearing panel there considered there were significant extenuating circumstances which warranted a reduction of the proposed fine of $50,000, including:

a) The respondent cooperated with the Member in its investigation which enabled extensive evidence to be provided to the MFDA;
b) The respondent responded to a letter from MFDA providing accurate answers to all the questions raised;

c) The respondent's explanation for failing to respond to a request for, or attending the interview was that he was in hospital suffering from colon cancer and understood his lawyer had written a letter to an FDA regarding his inability to attend;

d) The lawyer had communicated to MFDA his belief that the respondent was not intentionally being evasive.

70. The hearing panel in *Larson (Re), supra,* had assessed the conduct of the MFDA warranted some show of compassion to the respondent. It held that the MFDA should have granted a further opportunity for an interview and an opportunity to explain any reasons he could not then attend. Third, the hearing panel concluded the facts constituted a mere technical breach of section 22.1 that could not be fully condoned.

71. The Hearing Panel considers the circumstances of the instant case to be entirely dissimilar. Here the respondent made no effort to cooperate with the Member's investigation. He did not provide early and fulsome responses to the MFDA's questions. There were no extenuating circumstances pertaining to a hospitalization or other serious medical concerns that would have warranted an exercise of extra compassion on the part of the MFDA. Finally, there was nothing in the conduct of MFDA or the Respondent to justify a characterization that the failure to cooperate here was merely technical.

V. SUMMARY

72. This Hearing Panel considers it appropriate to impose sanctions on the basis of past conduct that will protect the public interest and prevent future conduct detrimental to the integrity of the capital markets by removing from the capital markets, wholly or partially, permanently or temporarily as the circumstances may warrant, those whose past conduct leads to the conclusion that their conduct in the future may be detrimental to the integrity of those capital markets.

73. This Hearing Panel accepts the general principal that wrong-doers should not benefit from their wrong-doing, and to the extent possible, the sanction should reflect the extent to which the Respondent obtained or attempted to achieve a financial or other benefit from the misconduct.

74. This Panel is also mindful of the need to impose sanctions that provide sufficient specific deterrence to this Respondent and general deterrence to others who might be like-minded in considering conduct of this nature.

75. The factors favouring the Respondent were that he had no prior disciplinary history with the MFDA, he effected some partial payment of the client losses and on the day prior to the hearing, he conceded the facts in Allegations 1, 2a, 3 and 4, which saved the MFDA some small amount of hearing time and expense.

76. Against the mitigating factors, were aggravating factors including:

a) The Respondent's decisions to engage in high risk commodity trading after he well knew the Member had advised it was not permitted;
b) Co-mingling client funds with his own personal funds, which could only have been undertaken to enhance his own personal gain, and constituted a clear conflict of interest, demonstrating the Respondent appeared to have acquired very little insight into the gravity of his conduct.

77. The above referenced aggravating and mitigating factors, as well as the Respondent's representations lead this Hearing Panel to conclude that the Respondent would continue to present a risk to potential investors, Members and the capital markets, were he permitted to continue to operate in such markets. 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 Approved Persons who might be inclined to risk engagement in similar conduct.

78. This Hearing Panel rejects the proposition that the imposition of a permanent prohibition should impact consideration of the appropriate monetary penalties for the respondent's conduct. The fact that he will be precluded from returning to the mutual funds industry might operate as specific deterrence to him, but does nothing to address the unrecovered losses sustained by clients adversely affected by his conduct.

79. This Hearing Panel is also satisfied that for Allegations 1, 2a and 3, a global fine of $100,000 would demonstrate 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 impacted their lives. It will appropriately signify the need to protect the public interest and prevent future conduct detrimental to the integrity of the capital markets and dissuade other Approved Members from similar conduct in the future. Moreover, a fine in this amount appropriately considers the aggravating and mitigating factors in this case.

80. Despite the representations of the Respondent and Respondent's Counsel, this Hearing Panel is not satisfied that the Respondent made any meaningful efforts to cooperate or provided significant relevant documentation after his refusal to attend the interview to assist the MFDA to fully investigate the extent of harm caused by his misconduct. Thus it rejected the contention that his late admission of failure to cooperate should be considered a meaningful mitigating factor as regards Allegation 4.

81. As was found in *Latour Re, supra,* the respondent had a clear duty to cooperate with the MFDA investigation to provide information about his activities in contact with clients to his member and MFDA as a result of which the MFDA was not able to determine whether more losses than the amount identified had been suffered. Similarly, this Hearing Panel concludes that there is no merit in the contention that the Respondent's misconduct was minimized by reason that he had not earlier sought legal advice to bring home to him his obligations as an Approved Person.

82. Had the Respondent's recognition of his responsibility been recorded at various earlier points between December 2017 and March 2019 and had there been demonstrable evidence that his production of information had allowed the MFDA to satisfy itself that it had completed a full investigation, such a foundation could have possibly been laid. Instead, having regard to all the aggravating and mitigating factors of this case, this Hearing Panel is satisfied that a fine of $50,000 is appropriate as a penalty for the failure to cooperate.

83. Finally, as to costs, this Hearing Panel would have been satisfied to impose an award of $7500, given that the majority of preparation time for hearing had already been expended before the Respondent's admissions the day prior to hearing. However, in recognition of the mitigating factor of acknowledging the Allegations, this Hearing Panel concluded that a costs award of $5000 was appropriate.

84. In summary, having concluded these penalties are in the circumstances, reasonable and proportionate, and will foster public confidence in the integrity of the Canadian capital markets and the industry, this Panel orders the following:

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 $100.000 for engaging in securities related business as described in Allegations 1 and 2a and 3;
c) A direction that the Respondent pay a fine of $50,000 for failure to cooperate as described in Allegation 4, and
d) A direction that the Respondent pay to the MFDA $5,000 for costs of the investigation, including hearing preparation.

DATED this 24th day of October, 2019.

"Shelley L. Miller"
Shelley L. Miller, Q.C.
Chair

"Kathleen Jost"
Kathleen Jost
Industry Representative

"James Samanta"
James Samanta
Industry Representative

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