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

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

Re: Clayton Kurt Swerdelian

Heard: February 26, 2015, in Calgary, Alberta
Joint Submissions of Staff and the Respondent April 1, 2015
Advice of Decision April 10, 2015
Reasons for Decision: June 26, 2015

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.	Chair
Nada Israeli	Industry Representative

Appearances:

Lyla Simon David Babin	))	MFDA Senior Enforcement Counsel MFDA Enforcement Counsel
Joshua Sadovnick Gunnar Benediktsson	))	Counsel for the Respondent
Clayton Kurt Swerdelian	)	Respondent appeared in person

1. INTRODUCTION

1. The Hearing Panel ("the Panel") was convened pursuant to a joint application by the Mutual Fund dealers Association of Canada (the "MFDA") and Clayton Kurt Swerdelian (herein "the Respondent") to accept a Settlement Agreement between the parties dated February 24, 2015.

2. This case has a protracted and complex history to which reference is required for an understanding of the Panel's decision.

3. A Notice of Hearing was issued by the MFDA dated March 21, 2014 which contained three allegations of violations of the By-laws, Rules for Policies of the MFDA. Allegation #2 (which is the subject of the Settlement Agreement) is:

> **Allegation #2**: Between November 2007 and March 2009, the Respondent referred 15 clients and 12 other individuals to a company to obtain loans totaling $954,000, for which the Respondent was paid referral fees in the amount of $9,540, thereby:
>
> (a) having and continuing in another gainful occupation that was not disclosed to or approved by the Member, contrary to MFDA Rules 1.2.1(d) and 2.1.1; and
> (b) entering into a referral arrangement, contrary to MFDA Rules 2.4.2, 2.1.4 and Rule 2.1.1.

4. The Respondent filed a Notice of Motion, dated September 22, 2014, and extensive supporting Affidavit seeking:

1. Dismissal of the above-referenced proceeding on the basis of a lack of jurisdiction;
2. In the alternative, a stay of the above-referenced proceeding on the basis of prejudice due to the MFDA's undue and improper delay; and
3. The costs of this motion on a full indemnity basis.

5. Voluminous documents were filed and exchanged in connection with the Motion comprising Affidavits, Brief of Law, Books of Authorities and Written Submissions. The materials were provided to the Panel and were read to some extent by the Panel Members in preparation for a Hearing on the Motion. The documents provided considerable information regarding the allegations.

6. The Motion was scheduled to be heard by the Panel on October 15, 2014 but that date had to be cancelled because of a fire and subsequent power outage in downtown Calgary. The Motion was rescheduled to December 18, 2014. Prior to that date the parties jointly requested an adjournment to allow further negotiation and a possible settlement. The Hearing was rescheduled to February 26, 2015. Shortly prior to that date the Panel was advised that the parties had agreed to terms of a Settlement Agreement and would be requesting acceptance of the Settlement Agreement by the Panel.

7. At the Hearing on February 26, 2015 MFDA Counsel advised that the proposed Settlement was of Allegation #2 and that the MFDA was withdrawing Allegations #1 and #3. The Settlement Agreement was presented to the Panel together with written Submissions of Staff of the MFDA (see Section 3 below). Oral submissions were made by Counsel for both parties (see Section 3below).

8. At the conclusion of the Submissions, the Panel, after a brief adjournment, advised that we had concerns about the withdrawal of Allegation #3 which we considered a very serious charge but we believed we were restricted under the Rules from asking questions outside the Settlement Agreement itself. The response of Counsel was to reiterate "that those other two charges have been withdrawn by Staff for the purposes of this settlement". The Panel directed that the Hearing be adjourned for us to consider our position and we would report as soon as possible to the parties as to our proposed course of action.

9. We subsequently became aware of Rule 15.3 of the Rules of Procedure which states:

15.3 Additional Facts Only to be Disclosed on Consent

(1) The Hearing Panel may advise the parties of any additional facts which it considers necessary to assess the settlement but unless the parties consent, any facts which are not contained in the Settlement Agreement shall not be disclosed to the Hearing Panel.

10. The Panel sent an email to the MFDA on March 16 referring to Rule 15.3. The email included:

> As you, and both Counsel know, we were provided with extensive documentation in connection with the Respondent's Motion to Dismiss/Stay, including the Affidavit of Patricia West. Having earlier read parts of those documents we are aware of some of the facts connected with charge 3 and remain concerned, without explanation, as to the reasons for the withdrawal of the charge. To satisfy ourselves, before approving the Settlement Agreement, we consider it necessary to seek additional facts to assess the basis of the withdrawal of charge 3. We were, of course, also aware of the three charges set out in the Notice of Hearing.
> It may well be that the parties are not prepared to consent to the provision of additional facts on the basis that we would not, in the ordinary course, have been aware of some of the particulars relating to charge 3. On the other hand, we expect that there are very valid reasons for the withdrawal of the charge and that Counsel may deem it appropriate to advise us of those reasons.
> Accordingly we submit this request and ask you to forward a copy of this email to both Counsel for their consideration and response, preferably by March 20.

11. The Panel received an extensive "Joint Submissions of Staff and the Respondent" dated April 1, 2015 which, after stating that "the parties wish to be helpful to the Hearing Panel" proceeded as follows:

> **ADDITIONAL SUBMISSIONS**
>
> 4. The following are details that the parties are able to provide as further explanation for the hearing Panel's consideration:
>
> i. Staff has limited resources and thus has to exercise its prosecutorial discretion judiciously in deciding whether to make and prosecute allegations, and likewise whether to withdraw some or all allegations at any time during the course of proceeding. In the present case, it was decided that the settlement reached (including the withdrawal of Allegation #3) was a sensible and

reasonable use of Staff's limited resources, having regard to the totality of the circumstances.

ii. Settlements are an effective means of addressing and resolving the litigation risk inherent for any parties in any contested proceeding. In this case, Allegation #3 contains a heightened degree of litigation risk for both sides:

a. The Respondent's risk arises from the fact that he would in all likelihood face a much more serious penalty, and resulting degree of reputational harm and public denunciation, in the event Allegation #3 was sustained following a contested hearing. If Allegation #3 was made out, Staff would typically seek a permanent prohibition, and a much larger fine than has been negotiated.

b. Staff's risk arises from the challenges presented by fulfilling its burden of proof inside the hearing room. A considerable period of time has passed since the events alleged in Allegation #3 occurred (*September to November 2007*). An added degree of difficulty lies in the fact that one of Staff's witnesses in support of Allegation #3 is very senior (late 80s) and now legally blind, while the other is now deceased. While the death of a witness or the limitations on the ability of a witness to testify are not (and should not be) fatal to Staff's case in light of nature of the allegations and the existence of documentary evidence, they are cause for concern. Allegations of unsuitable leveraging and the associated allegations of misrepresentation are incrementally difficult to prove in the absence of client testimony. Further complicating the case from Staff's perspective is that in this case, as in all cases, Staff lacks the ability to compel non-Approved Persons to testify.

iii. On a related note, the Respondent and Staff both faced risks associated with the Respondent's motion (*for dismissal of the proceeding*), which was an additional factor in withdrawing Allegation #3. Considerable resources had already been invested in preparing written motion materials and framing oral arguments. Settling the matter in its entirety avoids the necessity of arguing the motion, and precludes the risk of an unfavorable outcome for either Staff or the Respondent, and potentially appeals or reviews therefrom.

iv. It bears reiterating that the parties wish to settle this matter, and that considerable time and resources have been invested in carefully negotiating the terms of settlement, including finalizing the facts and the misconduct admitted to by the Respondent, as well as the agreed upon penalties to be imposed.

v. The parties each have experienced legal counsel acting on their behalf, and both Staff and the Respondent have made significant concessions in order to come to a reasonable and fair agreement, which likewise respects the goals of enhancing investor protection and strengthening public confidence in the Canadian mutual fund industry.

5. In arriving at the proposed settlement, both sides have had due regard to the totality of the circumstances. Settlements bring certainty and finality to litigation, allowing a Respondent to put the matter behind him, manage ongoing reputational challenges, and bring an end to the expenditure of the considerable legal costs associated with mounting a full defense to a proceeding. From Staff's perspective, settlements also bring certainty and finality, allowing Staff to conclude its proceeding and devote its resources to other pressing and immediate regulatory concerns. The Respondent, for his part, has already been out of the industry for approximately six years. A settlement will bring closure to a process that might otherwise continue for another two years. For its part, Staff will not be required to incur the outlay of considerably more financial resources, as well as time and effort, in prosecuting a contested case.

6. Having regard to all of the foregoing considerations, it is submitted that the proposed Settlement Agreement (and the penalties agreed upon therein) are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case.

12. The Panel accepted the "Joint Submissions" and issued an "Advice of Decision" dated April 10, 2015 stating that "after due consideration the Panel accepts the Settlement Agreement dated February 24, 2015".

2. SETTLEMENT AGREEMENT

13. The Settlement Agreement includes the following:

II. JOINT SETTLEMENT RECOMMENDATION

2. Staff conducted an investigation of the Respondent's activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent agrees to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule "A".

4. Staff and the Respondent agree that the terms of this Settlement Agreement, including the attached Schedule "A", will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.

…

IV. AGREED FACTS

Registration History

6. From October 30, 2008 to March 23, 2009, the Respondent was registered on the National Registration Database as a mutual fund salesperson with Armstrong & Quaile Associates Inc. (**"Armstrong & Quaile"**) in Calgary, Alberta

7. From April 2008 to October 2008, the Respondent was registered as a mutual fund salesperson with Laurier Capital Planning Inc. (**"Laurier"**), which ceased to be a Member of the MFDA on March 2, 2009.

8. From February 2007 to April 2008, the Respondent was registered as a mutual fund salesperson with Portfolio Strategies Corporation ("**Portfolio Strategies"**), a Member of the MFDA.

9. From November 2004 to February 2007, the Respondent was registered as a mutual fund salesperson with WFG Securities of Canada Inc. (**"WFG"**), a Member of the MFDA.

10. At the material time and to present, the Respondent resided in Calgary, Alberta.

11. From November 2004 to present, the Respondent was licensed to sell insurance in multiple provinces.

12. The Respondent has not been registered in the mutual fund industry since March 2009. (*He was terminated by Armstrong & Quaile on March 23, 2009*.)

OUTSIDE BUSINESS ACTIVITY/DUAL OCCUPATION/REFERRAL ARRANGEMENT

13. The Pacific Financial Group of Companies (**"Pacific Financial"**) was a Vancouver based group of British Columbia incorporated companies which carried on business (under various named entities) selling exempt market bonds and providing loans.

14. Among the products and services that Pacific Financial offered was a lending program that utilized a client's RRSP or LIRA, personal credit, and ability to repay as a means to determine the overall loan value available to a borrower (**"Lending Program"**). The loans were subject to interest at the rate of approximately 8% to 9% per annum and Pacific Financial also charged the borrower additional administrative and account fees. It later became clear (and as is further explained at para. 23 below) that in the opinion of the Canada Revenue Agency (**"CRA"**), the Lending Program purported to offer tax advantages to a borrower based on the fact that the borrower would not have to

pay the taxes that would ordinarily be required to (be paid) if the monies were otherwise withdrawn from the borrower's RRSP or LIRA.

15. On or about December 9, 2007 (*back-dated to November 20, 2007*), the Respondent executed a Loan Referral Agreement [the **"December 2007 Investee Agreement"**] with Investec Solutions Inc. (**"Investec"**), a British Columbia corporation which acted as an agent for Pacific Financial.

16. Under the terms of the December 2007 Investec Agreement, the Respondent agreed to act as an Investec "Referral Representative" on the following terms, among others:

(a) the Respondent would refer prospective borrowers to Investec; and
(b) the Respondent would be paid a referral fee of 1% of the face value of each loan prospect the Respondent referred to Investec.

17. On or about January 1, 2008, the Respondent executed another Investec Loan Referral Agreement [the **"January 2008 Investec Agreement"**], wherein he again agreed to act as an Investec "Referral Representative" on the same terms as the December 2007 Investec Agreement.

18. Between January 2008 and March 2009, while an Approved Person, the Respondent, pursuant to the January 2008 Investec Agreement, referred a total of 13 clients and 12 individuals to Pacific Financial, who obtained loans totalling $942,000.

19. In the course of referring the clients and other individuals to Pacific Financial, the Respondent:

(a) assisted them in completing the required paperwork;
(b) explained Pacific Financial's Lending Program to them; and

(c) assisted them in completing Pacific Financial documents, including witnessing their signatures.

20. The Respondent, while an Approved Person, personally or through his companies, received referral fees from Investec for each loan he facilitated, totalling $9,420.

21. At no time did the Respondent obtain written approval from Portfolio Strategies, Laurier, or Armstrong & Quaile to refer clients or other individuals to, or to engage in outside business activities with, Pacific Financial and Investec.

22. None of Portfolio Strategies, Laurier, or Armstrong & Quaile had entered into referral arrangements with either Pacific Financial or Investec in accordance with the requirements for such arrangements as set out in MFDA Rule 2.4.2.

23. In or about October 2010, the CRA wrote to some or all of the clients and individuals who had participated in the Lending Program advising them, among other things, that the CRA had concerns about the Lending Program, and would be reassessing their taxes owing. As a result of CRA's concerns, many if not all of the participants in the Lending Program faced additional tax liabilities. The CRA review of the Lending Program is currently being disputed and challenged.

V. CONTRAVENTIONS

24. The Respondent admits that from January 2008 to March 2009, he referred 13 clients and 12 individuals to Pacific Financial and Investec to obtain loans in the total amount of $942,000 and received referral fees in the amount of $9,420 for doing so, such that he:

i. had and continued in another gainful occupation for which he did not obtain written approval from the Members with whom he was registered, contrary to MFDA Rules 1.2.1(d) [now renumbered as Rule 1.2.1(c)] and 2.1.1; and

ii. entered into a referral arrangement as it related to the loans, contrary to MFDA Rules 2.4.2, 2.1.4 and Rule 2.1.1.

VI. TERMS OF SETTLEMENT

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

i. the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of six months commencing from the date of the Hearing Panel's final Order herein, pursuant to s. 24.1(e) of MFDA By-law No. 1;
ii. the Respondent shall pay a fine in the amount of $10,000 pursuant to s. 24.1(b) of MFDA By-law No. 1;
iii. the Respondent shall pay costs in the amount of $5,000 pursuant to s. 24.2 of MFDA By-law No. 1;
iv. the Respondent shall attend in person at the Settlement Hearing; and
v. the Respondent shall in future comply with MFDA Rules 1.2.1(c), 2.4.2, 2.1.4 and MFDA Rule 2.1.1.

VII. STAFF COMMITMENT

26. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the facts set out in Part IV and the contraventions described in Part V of this Settlement Agreement, subject to the provisions of Part IX below (*"Failure to Honour Settlement Agreement"*). Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any contraventions that are not set out in Part IV of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the facts and contraventions set out in Part IV, whether known or unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

3. SUBMISSIONS OF STAFF OF THE MFDA

14. Ms. Simon, Senior Staff Enforcement Counsel, submitted written Submissions and a Book of Authorities. In oral submissions, she referred to the facts as set out in the Agreed Facts (above) and to the admissions by the Respondent to the allegations of misconduct as also set out in the Settlement Agreement. For the reasons set out herein, Staff submits that the settlement advances the public interest, as it is reasonable and appropriate having regard to the nature and extent of the Respondent's misconduct and all of the circumstances. The Submissions of Staff include the following:

LAW

Applicable Provisions

2. The relevant MFDA provisions in this matter are:

Provisions	**Details of Provision**
MFDA Rule 1.2.1(c) Former MFDA Rule 1.2.1(d)	Dual Occupations
MFDA Rule 2.1.1	Standard of Conduct
MFDA Rule 2.1.4	Conflicts of Interest
MFDA Rule 2.4.2	Referral Arrangements
MFDA By-law No. 1	° Section - Definitions ° Section 24.1.1 - Power of Hearing Panels to Discipline - Approved Persons ° Section 24.2 - Costs ° Section 24.4 - Settlement Agreement

MFDA Staff Notice MSN-0040	"Outside Business Activities" - issued May 20, 2005
MFDA Staff Notice MSN-0060	"Penalty Guidelines" - issued January 18, 2007

FACTORS CONCERNING ACCEPTANCE OF A SETTLEMENT AGREEMENT

6. When determining whether a proposed settlement should be accepted, the following principle is of assistance:

> "in a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. …[A] Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness."
>
> ***Professional Investments (Kingston) Inc.*** 2009 LNCMFDA 9, MFDA Central Regional Council Reasons for Decision dated March 24, 2009, MFDA File No. 200836 at para. 13

FACTORS CONCERNING THE APPROPRIATENESS OF THE PENALTY

7. As was stated in the Supreme Court of Canada case ***Pezim,*** the primary goal of securities regulation is the protection of the investor.

> ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994], S.C.J. Jacobucci, J. at paras. 59 and 68

8. MFDA Hearing Panels commonly consider the following factors when determining whether a penalty is appropriate:

i. The seriousness of the allegations proved against the respondent;

ii. The respondent's experience in the capital markets;

iii. The level of the respondent's activity in the capital markets;

iv. The harm suffered by investors as a result of the respondent's activities;

v. The benefits received by the respondent as a result of the improper activity;

vi. The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;

vii. The damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;

viii. 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;

ix. The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and

x. Previous decisions made in similar circumstances.

Larson, 2009 LNCMFDA 30, Prairie Regional Council Reasons for Decision dated October 14, 2009 at para. 75, MFDA File No. 200826

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

BREACH	**PENALTY TYPE & RANGE**	**SPECIFIC FACTORS TO CONSIDER**
Dual Occupation/ Outside Business Activity (Guidelines, p.14)	• Fine: Minimum of $10,000. • Write or rewrite an appropriate industry course. • Period of increased supervision. • Suspension. • Permanent prohibition in egregious cases.	• Magnitude (in size and value) of outside business activity. • Number of clients affected. • Magnitude of client losses. • Suitability of outside business activity if involving securities. • Compensation received by the Respondent. • Any personal interest of the Respondent in outside business activity. • Whether the Respondent had honest but mistaken belief that proper approval obtained. • Legality of outside activity.

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
		• Whether outside activity resulted directly or indirectly in injury to clients of the Member and, if so, the nature and extent of the injury. • Whether the marketing and sale of the product or service could have created the impression that the Member had approved the product or service. • Whether the Respondent misled the Member about the existence of the outside activity or otherwise concealed the activity from the Member.
Referral Arrangements (Guidelines, p. 18)	• Fine (AP): Minimum of $5,000. • Write or rewrite an appropriate • Industry course. • Suspension. • Permanent prohibition in egregious Cases.	• Magnitude (in size and value) of referrals. • Number of clients affected. • Magnitude of client losses (if any). • Suitability of referrals if involving securities. • Compensation received by the Respondent. • Any personal interest of the Respondent in referral. • Existence of client complaints. • Legality of referral.
Standard of Conduct (Guidelines, p. 27)	• Fine (AP): Minimum of $10,000. • Write or rewrite an appropriate Industry course. • Suspension. • Permanent prohibition in egregious cases.	• Nature of the circumstances and conduct. • Number of individuals affected. • Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.

FACTORS APPLIED IN THE PRESENT CASE

Respondent's experience and past conduct, including prior sanctions

9. The Respondent is 41 years old and worked as a mutual fund salesperson for approximately 4½ years (November 2004 to March 2009). The Respondent has no prior MFDA disciplinary history, and is not currently registered in the mutual fund industry.

Seriousness/Magnitude of the Misconduct

10. Outside business activity without the approval of the Member is serious misconduct. The Member is denied its ability to supervise the Approved Person and the suitability of the outside activity, as well as sustaining potential risk management issues. Clients may be left with losses and few avenues for recovery.

Harm to Clients & Individuals/Benefit to Respondent

11. The Respondent's misconduct impacted a significant number of clients and individuals.

12. In or about October 2010, the CRA wrote to some or all of the clients and individuals who had participated in the Lending Program advising them, among other things, that the CRA had concerns about the Lending Program, and would be reassessing their taxes owing. As a result of CRA's concerns, many if not all of the participants in the Lending Program faced additional tax liabilities. The CRA review of the Lending Program is currently being disputed and challenged.

13. The Respondent earned referral fees in the amount of $9,420.

Respondent's Recognition of the Seriousness of his Misconduct

14. The Respondent has cooperated with Staff and has admitted to the facts and the misconduct at issue. By entering into a Settlement Agreement, he has saved Staff resources and time that would have otherwise been required to order to conduct a fully contested hearing.

Whether the Respondent was aware of the prohibited nature of the activities

15. Staff submits that the Respondent knew or ought to have known that his outside business activities were prohibited under MFDA Rules. Approved Persons are required

to be honest and candid with their Members and abide by the Member's policies and procedures and industry Rules. Rules such as the required approval of outside business activities help protect clients, the reputation and the business of the Member, and aid in ensuring the integrity of the capital markets.

Previous decisions made in similar circumstances

16. The following chart sets out some cases comparable to the present case:

Cases re. Outside Business Activity	**Facts**	**Outcome**
Andrews (Re), 2014 LNCMFDA 39, Reasons for Decision of the Central Regional Council dated May 6, 2014	Settlement hearing. The Respondent admitted the following Activities outside the Member: • Selling $880,000 of viatical settlements to 8 clients and 10 individuals (earned $13,200); • Selling $700,000 of a 'sham' investment to 5 clients (earned $5,000).	• 3 year suspension • Complete industry course • $5,000 fine • $5,000 costs
Smilestone (Re), 2013 LNCMFDA 55, Reasons for Decision of the Atlantic Regional Council dated August 8, 2013	Settlement hearing. The Respondent admitted, inter alia, falsifying client signatures, engaging in discretionary trading, and failing to comply with conditions imposed on him re. outside business activity.	• 2 year prohibition • Write ethics exam • Close supervision • $10,000 fine • $2,500 costs
Lambros (Re), 2011 LNCMFDA 48, Reasons for Decision of the Central Regional Council dated March 15, 2011	Settlement hearing. The Respondent admitted engaging in securities related business by selling $1.9 million in securities of a business she owned.	• 3 month suspension • $40,000 fine • • $5,000 costs
Kaley (Re), 2010 LNCMFDA 2, Reasons for Decision of the Atlantic Regional Council dated January 23, 2010	Settlement hearing. The Respondent admitted, inter alia, engaging in securities related business and a dual occupation outside the Member by selling $1.8 million in shares in a business he owned (fishing camp).	• 6 month suspension • $10,000 fine • • $2,500 costs

Conclusions on Penalty

17. While the MFDA does not have a formal 'credit for time served' rule or policy, Staff is cognizant of the amount of time that has elapsed between when the admitted misconduct was investigated and present day. In Staff's submission, the proposed six month prohibition is meant to reflect the circumstances in the present case.

18. The proposed penalties reflect the seriousness of the Respondent's misconduct and are in keeping with the purposes of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by its Members and Approved Persons.

19. The proposed six month prohibition will, in addition to penalizing the Respondent, act as a general deterrent; improve overall compliance by mutual fund industry participants; and foster public confidence in the securities industry.

Costs

21. Staff requests that an order for costs be made against the Respondent. The amount requested will permit the MFDA to recover a portion of the costs attributable to conducting the investigation and hearing.

4. SUBMISSIONS OF THE RESPONDENT

15. Mr. Sadovnick, Counsel for the Respondent, spoke briefly. He emphasized that the proceeding has been a very long one and a resolution has taken a great deal of time and effort by everyone. He said that the Respondent accepts responsibility for the allegations against him and is fully committed to resolving the matter on the terms set out in the Settlement Agreement.

5. REASONS FOR DECISION

16. We recognize that this has been a difficult, protracted disciplinary proceeding for both parties. One of the consequences has been that the Respondent has not been involved in the mutual fund industry for six years and it is to be expected he will have a significant challenge in re-establishing a clientele. That period of inactivity in the industry and the damage to his reputation are, in themselves, a severe penalty for his misconduct; those factors were clearly among the reasons which led to the Settlement Agreement and the withdrawal of charges No. 1 and No. 3.

17. We accept and adopt the Submissions of Staff, above.

18. We have reviewed the decisions provided by MFDA Enforcement Counsel (above). We consider the admitted misconduct of the Respondent serious but less serious than the misconduct in the ***Andrews*** and ***Smilestone*** cases in which the respondents were prohibited from acting as mutual fund salespersons for periods of three years and two years respectively. In ***Andrews*** the investors lost the totality of their investments, at least $700,000, in the "sham" investment. In ***Smilestone***, although the misconduct regarding outside business activities related only to failure to follow conditions imposed by the Member, there were several other serious instances of misconduct including forging clients' signatures, falsifying contents of documents, denying some of the misconduct, conducting discretionary trading and providing false reports to the member's compliance staff.

19. Although the ***Lambros*** case did not involve a similar fact situation to the present case, and was primarily a conflict of interest case, it provides some limited guidance in assessing penalty. The panel in ***Lambros*** remarked that the three month suspension agreed upon in the settlement agreement seemed low but they were persuaded that the settlement agreement should be accepted because no investor lost money and the fine of $40,000 was significant. The penalties proposed in the present case, with a lesser fine ($10,000) and a longer period of prohibition (six months) seem to be in line with the penalties in that case.

20. The penalties imposed in the ***Kaley*** case are essentially the same as those proposed in the present case. That case was primarily another conflict of interest case but also involved the "dual occupation" charge. There was no evidence of client harm.

21. The present case is distinguishable from the latter two cases in that the clients in the present case may suffer a loss as a result of the CRA reassessment. Whether the reassessment will be successfully challenged or whether the reassessed taxes are different than the taxes the clients will eventually pay when they make redemptions from their RRSPs is unknown, but if there is a reassessment the clients will be paying money to the CRA in the foreseeable future and will not be able to defer payment of tax until each redemption of a portion of their RRSPs. The reassessment may also include penalties. The Respondent has put the clients at a significant risk of losing money.

22. Having had the benefit of the Joint Submissions of the MFDA and the Respondent (above) we are of the view that: (1) the withdrawal of charges No. 1 and No. 3 was warranted and (2) the penalties sought for the remaining charge No. 2 are reasonable. A serious disciplinary response is required in this case having regard to the protection of the investing public, the integrity of the security markets, specific and general deterrence, the protection of the MFDA's membership and the protection of the integrity of the MFDA's enforcement processes. Several mitigating factors are to be considered, including:

- the Respondent's career as a mutual fund dealing representative has been very significantly affected by his being out of the industry for six years;
- he has no prior disciplinary history;
- he has cooperated with the MFDA in reaching the Settlement Agreement.

23. We will comment on the possible perception that the Respondent was responsible for some of the delay, and the resulting considerable cost, because of his Motion for Dismissal/Stay. Arguably there was a legal basis for the Motion and the amount of time and effort expended by the parties regarding the Motion would indicate that it was not a frivolous application. It was an application he was entitled to bring. As was pointed out in the Joint Submissions of Staff and the

Respondent (above) the litigation involved in proceeding with the application, the risk of an unfavourable outcome for either party, and potential appeals or reviews, were factors influencing the Settlement Agreement.

24. In that regard we take the point made in the Joint Submissions that the Counsel are experienced Counsel and have carefully weighted all the pros and cons in arriving at the negotiated Settlement Agreement. The Panel recognizes that we are not to reject a Settlement Agreement "unless the proposed penalty clearly falls outside the reasonable range of appropriateness" [***Professional Investments (Kingston) Inc.*** (above at p. 12)]. We do not consider the Settlement Agreement penalties as falling outside that range.

25. We confirm our decision as follows:

i. the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of six months commencing from the date of the Hearing Panel's final Order herein (*April 10, 2015*), pursuant to s. 24.1(e) of MFDA By-law No. 1;
ii. the Respondent shall pay a fine in the amount of $10,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
iii. the Respondent shall pay costs in the amount of $5,000 pursuant to s. 24.2 of MFDA By-law No. 1;
iv. the Respondent shall attend in person at the Settlement Hearing; and
v. the Respondent shall in future comply with MFDA Rules 1.2.1(c), 2.4.2, 2.1.4 and MFDA Rule 2.1.1.

26. We signed an Order dated April 10, 2015, confirming the foregoing.

DATED this 26th day of June, 2015.

"Alan V. M. Beattie"

Alan V. M. Beattie, Q.C.
Chair

"Nada Israeli"

Nada Israeli
Industry Representative

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