



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: Robert James Thiessen and Wealth Advisory Services Ltd.

Heard: November 24, 2015 in Toronto, Ontario
Decision and Reasons (Penalty): January 27, 2016

**DECISION AND REASONS
(Penalty)**

Hearing Panel of the Central Regional Council:

The Honorable John W. Morden	Chair
Terrence Bourne	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Maria L. Abate)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Robert James Thiessen)	Did not appear in person or by counsel
)	
Wealth Advisory Services Ltd.)	
)	

INTRODUCTION

1. These reasons are concerned with the penalty stage of this Mutual Fund Dealers Association of Canada (the “MFDA”) proceeding against Robert James Thiessen (“Thiessen”) in his capacity as the Director of Wealth Advisory Services (“WAS”) and WAS, the Member.
2. The first stage in the proceeding was concerned with the liability of Thiessen and WAS with respect to allegations of misconduct made by the MFDA and was decided by this panel for reasons dated June 12, 2015.
3. WAS did not respond to the allegations against it in the Amended Notice of Hearing and played no role in this proceeding. In these circumstances under the terms of Rule 8.4(1)(b) of the MFDA Rules of Procedure the panel may “accept the facts and conclusions alleged in the Amended Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.”

THE ALLEGATIONS

4. The following allegations are made by the MFDA against Thiessen and WAS in this proceeding in the Amended Notice of Hearing dated December 20, 2012, amended October 15, 2013:

Allegation #1: Between March 4, 2003 and November 1, 2005, WAS and Thiessen sold shares of a related company of WAS to 48 clients without ensuring a reasonable level of due diligence was conducted on the investment product and without making reasonable inquiries to ensure the product was suitable for sale to clients of WAS, contrary to MFDA Rules 2.2.1(a) and 2.1.1(c).

Allegation #2: Between March 4, 2003 and November 1, 2005, WAS sold shares of a related company to WAS to 48 clients in reliance on the accredited investor and closely held insurer [sic issuer] exemptions:

- a) without ensuring that these investments were suitable for the clients and in keeping with the clients' investment objectives, contrary to MFDA Rule 2.2.1 (a), (b) and (c), and MFDA Rule 2.1.1(c);
- b) without obtaining sufficient documentation to determine if the clients qualified as accredited investors in accordance with s. 2.3 of Ontario Securities Commission Rule 45-501 and subsequently s. 2.3 of National Instrument 45-106, contrary to MFDA Rule 2.1.1(c); and
- c) without complying with the requirements of the closely held issuer exemption as set out in s. 2.1 of Ontario Securities Commission Rule 45-501, in that the clients were not provided with a copy of Form 45-501F3 at least 4 days prior to their purchase of the shares, thereby engaging the jurisdiction of the Hearing Panel to impose a penalty on the Respondents pursuant to s. 24.1.1(h) and 24.1.2(n) of MFDA By-Law No. 1 and contrary to MFDA Rule 2.1.1(c).

Allegation #3: Between March 4, 2003 and November 1, 2005, WAS and Thiessen sold or facilitated the sale of shares of a related company of WAS to 48 clients without disclosing to the clients:

- a) the relationship between WAS and the related company; and
- b) the financial interest of WAS and Thiessen in respect of the sales of the shares of the related company;

thereby giving rise to a conflict or potential conflict of interest between the interests of WAS and Thiessen, on the one hand, and the clients on the other hand, which WAS and Thiessen failed to ensure was addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #4: Between March 4, 2003 and November 1, 2005, Thiessen, in his capacity as a director of WAS, failed to ensure that WAS established, implemented, communicated and maintained a compliance program to:

- a) ensure that a reasonable level of due diligence was conducted on all investment products prior to their approval for sale;
- b) identify and address conflicts of interest with respect to the sale of the securities of non-arm's length issuers;
- c) identify and address through appropriate supervision and compliance procedures material risks of non-compliance with respect to:
 - i. ensuring the suitability of investments in clients' accounts;
 - ii. the sale of exempt products and, in particular, reliance by clients on exemptions from the prospectus requirement; and
 - iii. ensuring the fees and compensation earned by WAS on the sale of exempt products were adequately disclosed to clients;

contrary to MFDA Rules 2.1.1, 2.2.1 and 2.5.1, and MFDA Policy No. 2.

Allegation #5: Between October 2010 and August 2011, while WAS was designated in early warning pursuant to MFDA Rule 3.4.2(a)(v), WAS and Thiessen, in his capacity as a director, the Ultimate Designated Person, and controlling shareholder of WAS, permitted payments to be made from WAS to Thiessen without obtaining the prior written consent of MFDA Staff, contrary to MFDA Rules 3.4.2(b)(iv) and 2.1.1.

Allegation #6: In October and November 2010 and from January 2011 onward, WAS and Thiessen, in his capacity as a director, the Ultimate Designated Person, and controlling shareholder of WAS, failed to ensure that WAS complied with its financial requirements while designated in early warning pursuant to MFDA Rule 3.4.2(a)(v), contrary to MFDA Rules 3.4.2 and 2.1.1.

Allegation #7: In October and November 2010 and from January 2011 onward, WAS and Thiessen, in his capacity as a director, the Ultimate Designated Person, and controlling

shareholder of WAS, failed to consistently maintain WAS's required minimum capital and risk adjusted capital, contrary to MFDA Rules 3.1.1 and 2.1.1.

5. The Panel concluded that all of the allegations against Thiessen (allegations #1, #3, #4, #5, #6 and #7) and those against WAS (allegations #1, #2, #3, #5, #6 and #7) were proven.

OVERVIEW OF THE FACTS

6. This proceeding concerns the sale of a non-arm's length product by WAS to clients. The product, shares in S&P 500 Limited ("S&P 500"), was sold to clients purportedly as a means of investing in S&P 500 Futures Index Contracts and other similar instruments on the Chicago Mercantile Exchange. The trading for the S&P 500 product was to be managed by G.H. Lewis & Associates ("G.H. Lewis") of which Gordon Lewis ("Lewis") was the principal. In total, 48 clients of WAS invested a total of \$2,883,993 USD in the S&P 500 product.

7. The S&P 500 product was discovered to be a fraud. Lewis had fabricated the investment returns, was criminally charged with fraud and pleaded guilty. Investors appear to have lost the entirety of their investment in the S&P 500 product with little or no prospect of recovery.

8. The allegations in the Amended Notice of Hearing are made against the Member and Robert James Thiessen ("Thiessen") in his capacity as the Director of WAS. Thiessen was also the co-creator of the S&P 500 product (with Lewis) and the controlling mind of the issuer of the S&P 500 product and its sole director, President and Secretary.

Thiessen – ownership and control of WAS and Promittere

9. At all material times, WAS was wholly owned by Promittere Capital Group Limited Partnership, which at all material times was owned 70% by Thiessen through wholly-owned corporations. The remaining 30% was at all material times owned directly, indirectly or beneficially by members of Thiessen's family. Thiessen was the controlling mind of WAS.

10. Promittere was a related company to WAS by virtue of common ownership by Thiessen, directly or indirectly, at the time the Promittere investment product described herein was launched.

11. WAS was essentially a one-person mutual fund dealer which was operated on a day-to-day basis by Douglas A. Lawson (“Lawson”). At all material times, Lawson was duly registered as the President and Secretary of WAS, its Compliance Officer and its only salesperson. At all material times, Lawson was a salaried employee of WAS who reported directly to and acted under the direction of Thiessen.¹

12. Thiessen is a chartered accountant. Lawson worked alongside or for Thiessen in various capacities at various companies in the securities industry, including companies owned or controlled by Thiessen, from 1985 until the Ontario Securities Commission approved the transfer of Lawson’s registration from WAS to another Member of the MFDA in August 2012 subject to terms and conditions. On the basis of their history together, at all material times Lawson perceived Thiessen to be a skilled professional, specifically with respect to the creation of investment products. Lawson relied on and deferred to Thiessen with respect to the selection and approval of investment products for sale by WAS, including the Promittere investment product described herein.²

¹Lawson had been registered in Ontario as a mutual fund salesperson with WAS and its predecessor, Promittere Securities Ltd. from January 1, 1995 until August 2012, at which time the Ontario Securities Commission approved the transfer of Lawson’s registration to another member of the MFDA subject to terms and conditions, following the conclusion of a disciplinary proceeding commenced against Lawson by the MFDA in relation to his involvement in the subject matter of this Notice of Hearing. On June 19, 2012, a Hearing Panel of the MFDA approved a settlement of the Lawson proceeding. Under the terms of the settlement, Lawson paid a fine of \$20,000 and costs of \$5,000, was permanently prohibited from being an officer, director, Ultimate Designated Person, Compliance Officer or Branch Manager of an MFDA Member, was permanently prohibited from selling exempt securities, required to successfully complete the Canadian Securities Course and agreed to appear and give truthful testimony as a witness in this proceeding. See *In the Matter of Douglas A. Lawson*, MFDA Case No. 200907 at www.mfda.ca.

²Lawson’s failure to discharge his duties and obligations as the President and Compliance Officer of WAS with respect to product due diligence and approval was one of the findings of misconduct, amongst others, that Lawson admitted to in the settlement of his MFDA proceeding.

13. Thiessen and Lawson worked out of the same office (which was shared by WAS and Promittere). Promittere did not have any employees other than the two administrative support personnel that Promittere and WAS shared.

14. Thiessen presented and recommended the Promittere product to Lawson for sale to WAS clients. WAS approved the product for sale and, on August 1, 2002, Lawson began selling shares of Promittere to WAS clients.

15. As described in greater detail below, between August 2002 and November 2005, Lawson sold shares of Promittere to clients of WAS as a means of investing in S&P 500 Futures Index Contracts and other similar instruments on the Chicago Mercantile Exchange. The trading in respect of Promittere was to be managed by G.H. Lewis & Associates (“G.H. Lewis”).

16. In September of 2006, the Respondents were informed that the fraud had occurred and that Promittere could not account for WAS-client funds. The value of the Promittere investment as reported monthly by Lewis, the principal of G.H. Lewis, to Thiessen, and in turn communicated to investors, had been fabricated and, as a result, was grossly overstated. Lewis was subsequently charged with fraud and theft by the Metropolitan Toronto Police Force. On September 14, 2009, he pleaded guilty to a fraud charge and was sentenced to 12 months under house arrest. Investors in Promittere lost almost the entirety of their investment.

17. WAS had directed clients to make their cheques payable to Promittere in US funds. Thiessen forwarded these funds from Promittere’s US dollar bank account to a US dollar bank account over which Lewis had sole signing authority. Lewis then allegedly transferred the funds to a trading account held by Lewis or G.H. Lewis at ED & F Man International Inc., a broker for exchange-listed futures and options.

18. Upon receipt of funds from Promittere, Promittere was issued units of a trust established as part of the Promittere product that Lewis and Thiessen had created. Corresponding shares of Promittere were then issued to clients of WAS who had invested in the product.

19. Once WAS-client investment funds were relinquished to Lewis or G.H. Lewis, the alleged performance of the trust units was reported to Thiessen by Lewis daily by email. The email contained a single figure which Lewis described as the closing value for the trust units for the day.

20. Thiessen provided investors in Promittere with a monthly update on the value of their shares. Each investor also received an annual statement from Promittere. Lawson and/or Thiessen periodically provided some investors with a copy of a monthly newsletter which Lewis provided to Promittere to describe his alleged trading activities.

21. At the time of investment, clients were asked to complete a Promittere share subscription agreement and a New Account Application Form. Clients were also provided with a current version of a 2-page share offering summary for Promittere, (the “Promittere Summaries”). The Promittere summaries contained the following representations, with returns reported up to the most recent year-end:

- a) Promittere was created to permit shareholders to participate in the managed trading of S&P 500 Futures Index Contracts;
- b) Lewis’s net return to investors to date has been: 77% in 1999 (six months), 163% in 2000, 169% in 2001, 230% in 2002, 102.6% in 2003, and 70.5% in 2004. The Promittere Summary noted that these returns were calculated net of management fees, trading costs and currency conversions;
- c) G.H. Lewis would receive an incentive-based fee equal to 50% of the amount by which the percentage increase in the value of the investment exceeded an annual return of 20% (the “Management Fee”). The percentage increase in the value of the investment was to be calculated net of commissions. To the extent that the 20% threshold was not reached, the amount of such shortfall would be carried forward and deducted from the increase in the value of the investment in future years;
- d) Promittere’s investment objectives and risk management strategies included the active use of limit price and stop loss orders, the closure of all contracts at the end

of the day resulting in 100% cash position, and a 15-20% limit of asset exposure on any one trade hence the risk of large losses as a percentage of assets was negligible; and

- e) Redemptions would only be processed once per year, on the last business day of December.

Regulatory Investigations, Proceedings and Fraud Charges

a) Compliance Review – Conflict of Interest

22. As described above, in return for managing the trading activities of Promittere, G.H. Lewis received the Management Fee. G.H. Lewis then paid one of Thiessen's Promittere companies a fee equal to 20% of the Management Fee collected, on an annual basis, in either cash or trust units (the "Promittere Fee"). Thiessen then paid Lawson, through WAS, a percentage of the Promittere Fee as a fee for his role in selling shares of Promittere to WAS-clients.

23. In September 2005, MFDA Compliance Staff conducted a compliance examination (the "Compliance Examination") of WAS during which Staff advised Lawson that Staff was concerned with, among other things, the accuracy of WAS' disclosure to clients regarding its relationship with Promittere and Thiessen. At that time, clients had only been advised that Promittere was created by Thiessen to allow shareholders to participate in Lewis' trading activities. Written disclosure of the compensation payable to WAS, Thiessen and Lawson as a result of the sale of shares of Promittere, as well as the fact that Thiessen was a director and controlling mind of both WAS and Promittere, had not been provided to clients of WAS.

24. Following the Compliance Examination, WAS provided clients with written disclosure that Thiessen was a director of both WAS and Promittere. The compensation payable to WAS, Thiessen and Lawson for the sale of shares of Promittere was not disclosed to clients.

25. In September 2006, Thiessen and Lawson advised MFDA Staff that they had just learned that the investment returns provided by Lewis appeared to have been fabricated such that the

value of the investment was greatly overstated. They further advised Staff that they had been advised that the actual amount remaining in the bank and trading accounts was approximately \$40,000 USD. This represented a shortfall of approximately \$5,760,000 USD based on Lewis's reported value of Promittere in the amount of \$5,800,000 USD at that time.

b) MFDA Investigation

26. In September of 2006, at the request of MFDA Staff and as a result of the investigation of this matter, WAS agreed to accept terms and conditions on its membership in the MFDA which included a requirement to cease trading in all exempt securities and related issuers, as well as increased financial reporting requirements to the MFDA. While these terms and conditions expired on March 31, 2007, WAS agreed to continue to abide by them on a voluntary basis. The second and third round compliance examinations conducted by MFDA Compliance Staff confirmed that WAS had continued to comply with the terms and conditions.

27. Further, in September 2006, as a result of its potential liability to clients of WAS for the losses of monies invested by them in shares of Promittere, WAS was designated by the MFDA as being in discretionary early warning pursuant to MFDA Rule 3.4.2(a)(v). WAS was specifically reminded of the requirement under MFDA Rule 3.4.2(b)(iv) to obtain the prior written approval of MFDA Staff for any payments or other distributions of assets to any director, officer, partner, shareholder, related company, affiliate or associate of WAS when this designation was imposed.

28. As we stated above, on September 14, 2009, Lewis pled guilty to the fraud charge and has served a sentence of 12 months under house arrest.

THE EVIDENTIAL BASES OF THE ALLEGATIONS

Allegation #1: Failure to Conduct Adequate Due Diligence

29. As a product being offered to investors in reliance upon exemptions from the prospectus requirement under Ontario securities law, the Promittere product should have been subjected to a

heightened level of due diligence by WAS to ensure that the features, nature and risks of the investment were fully examined and understood before it was offered for sale to clients for the following reasons, among others:

- a) Promittere had never previously been sold by WAS (or by anyone else);
- b) As a newly created investment, Promittere had no prior track record to be used to assess the performance of Promittere in varying market conditions;
- c) Promittere employed a sophisticated strategy of trading in S&P Futures Contracts and other similar interests listed on the Chicago Mercantile Exchange Index with which Lawson had only a basic familiarity. The specifics of the strategy were not fully disclosed in the Promittere Summary or otherwise made available in writing to investors. There were also no controls on Lewis' ability to vary or change altogether the strategy employed by Promittere;
- d) Promittere was not required by regulators to disclose the specific securities it held, the extent of its leveraging, or the extent of its short selling. Promittere had no obligation to make periodic or annual regulatory filings in respect of its performance and operations;
- e) It was difficult to identify comparable investments, classes of investments or published benchmarks for investments of Promittere's nature against which to evaluate its actual performance going forward; and
- f) A conflict or potential conflict of interest existed by virtue of Thiessen's common ownership and control of WAS and Promittere and the compensation scheme relating to sales of Promittere.

30. Thiessen, in his capacity as a director of WAS, failed to ensure that WAS had established, implemented, communicated and maintained a compliance program to ensure that a reasonable level of due diligence was conducted on all investment products, including Promittere, prior to their approval for sale.

31. As a result, or in any event, WAS and Thiessen failed to ensure that a reasonable level of due diligence was conducted on Promittere, Lewis and G.H. Lewis before approving sales of

shares of Promittere to clients. Among other matters, WAS and Thiessen failed to ensure that a reasonable level of due diligence was conducted with respect to the following essential or fundamental matters:

- a) ***Conduct a review of G.H. Lewis' corporate status*** – G.H. Lewis' corporate status was cancelled in 1992.
- b) ***Confirm the registration status of Lewis and G.H. Lewis*** – Neither Lewis nor G.H. Lewis was registered to advise or trade in securities in Canada or the US.
- c) ***Conduct an assessment of G.H. Lewis' and Lewis' management qualifications and track record*** – A copy of Lewis' curriculum vitae was not reviewed and references were not contacted.
- d) ***Review the financial position and trading history of G.H. Lewis*** - The historic returns reported by Lewis, which were exceptionally high and ought to have raised a red flag on their face, were not verified.

32. Had WAS and Thiessen ensured that a reasonable level of due diligence was conducted with respect to Promittere, they would have discovered extensive and fatal deficiencies with the investment product that made it unsuitable for any investor.

33. By engaging in the conduct described above, WAS and Thiessen sold shares of Promittere, a related company of WAS, to 48 clients without ensuring a reasonable level of due diligence was conducted on the product and without making reasonable inquiries to ensure that the product was suitable for sale to clients of WAS, contrary to MFDA Rules 2.2.1(a) and (b) and MFDA Rule 2.1.1(c).

Allegation #2: Suitability of Investments and Reliance on Exemptions

34. Promittere was presented to clients of WAS as a medium to high-risk product. It was in fact a high risk product having regard to, among other things, the lack of verified historic trading results for Promittere, the limited liquidity of the product and the lack of internal controls to monitor G.H. Lewis' trading activities and the handling of client monies. Further, clients were

provided with the Promittere Summaries, which understated the risk of the Promittere product by describing the risk of large losses as a percentage of assets as negligible.

35. For 34 clients of WAS who invested in shares of Promittere, a risk tolerance of moderate or lower had been recorded on their existing Know Your Client (“KYC”) information. Promittere was therefore an unsuitable investment for those clients. Sufficient KYC information for 8 other WAS-clients who invested in shares of Promittere had not been and was not collected in order to enable WAS to determine whether the investment in Promittere was suitable for them.

36. WAS relied, or purported to rely, on the closely held issuer or the accredited investor exemptions then available under Ontario securities law in respect of the sale of shares of Promittere to clients.

37. Clients were not provided with a copy of Form 45-501F3 at least 4 days before their purchase of shares in Promittere, as then required pursuant to Ontario securities law in order to rely on the closely held issuer exemption. Accordingly, WAS was unable to rely on this exemption in respect of these sales.

38. Form 45-501F3 describes investments in small businesses as “inherently risky” and makes the following statement with respect to them, “NEVER MAKE A SMALL BUSINESS INVESTMENT THAT YOU CANNOT AFFORD TO LOSE IN ITS ENTIRETY.” As set out above, at the time of sale, the Promittere product was presented to clients as a medium to high risk product and clients were provided with the Promittere Summaries which described the risk of large losses as a percentage of assets as “negligible.”

39. In addition, WAS failed to ensure that adequate documentation evidencing the qualification of some of the clients to whom WAS sold shares of Promittere as accredited investors was collected.

40. By engaging in the conduct described above, WAS sold shares of Promittere to 48 clients in reliance on the accredited investor and closely held issuer exemptions without:

- a) ensuring that these investments were suitable for the clients and in keeping with the clients' investment objectives, contrary to MFDA Rule 2.2.1 (a), (b) and (c), and MFDA Rule 2.1.1(c);
- b) obtaining sufficient documentation to determine if the clients qualified as accredited investors in accordance with s. 2.3 of Ontario Securities Commission Rule 45-501 and subsequently s. 2.3 of National Instrument 45-106³, contrary to MFDA Rule 2.1.1(c); and
- c) Without complying with the requirements of the closely held issuer exemption as set out in s. 2.1 of Ontario Securities Commission Rule 45-501, in that the clients were not provided with a copy of Form 45-501F3 at least 4 days prior to their purchase of the shares, contrary to MFDA Rule 2.1.1(c).

Allegation #3: Undisclosed Conflict of Interest

41. Until MFDA Compliance Staff conducted the Compliance Examination in September of 2005, clients of WAS had only been advised that Promittere was created to permit shareholders to participate in Lewis' trading activities.

42. Following the Compliance Examination, WAS provided clients with written disclosure that Thiessen was a director of Promittere and WAS. WAS still did not disclose the compensation payable to WAS, Thiessen and Lawson in respect of sales of Promittere.

43. By failing to provide written disclosure to clients of the relationship between WAS and Promittere and by failing to provide written disclosure to clients of the financial interest of WAS, Thiessen and Lawson in sales of Promittere, the actions of WAS and Thiessen gave rise to a conflict or potential conflict of interest between WAS and Thiessen, on the one hand, and the clients, on the other hand, which WAS and Thiessen failed to ensure was addressed by the

³In September 2005, National Instrument 45-106 came into force. Many of the prospectus and registration exemptions previously available in OSC Rule 45-501 were incorporated into NI 45-106. The "accredited investor" exemption was amended slightly but the amendments are not relevant to the allegations against the Respondents.

exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #4: Failure to ensure adequate compliance program

44. As stated above, at all material times Thiessen was a director and the controlling mind of WAS. In his capacity as a director of WAS, Thiessen had a regulatory obligation to ensure that an adequate compliance program was established, implemented, maintained and communicated by WAS, which program was required to identify and address material risks of non-compliance and to ensure that appropriate supervision and compliance procedures were in place to manage those risks.

45. By engaging in the conduct described above, Thiessen failed to ensure that WAS established, implemented, communicated and maintained a compliance program to, among other things:

- a) ensure that a reasonable level of due diligence was conducted on all investment products prior to their approval for sale;
- b) identify and address conflicts of interest with respect to the sale of the securities of non-arm's length issuers;
- c) identify and address through appropriate supervision and compliance procedures material risks of non-compliance with respect to:
 - i. ensuring the suitability of investments in clients' accounts;
 - ii. the sale of exempt products and, in particular, reliance by clients on exemptions from the prospectus requirement; and
 - iii. ensuring the fees and compensation earned by WAS on the sale of exempt products were adequately disclosed to clients;

contrary to MFDA Rules 2.1.1, 2.2.1 and 2.5.1, and MFDA Policy No. 2.

Allegations #5, 6 and 7 – Failure to Comply with Minimum Capital and Risk Adjusted Requirements

46. In September 2006, WAS was placed in discretionary early warning status by the MFDA as a result of concerns relating to potential client losses relating to investments in shares of Promittere.

47. In October 2010 (while WAS was designated in early warning and while OSC approval for the transfer of Lawson's registration was pending such that client accounts remained at WAS), Thiessen withdrew \$86,000 from WAS's operating account without seeking or obtaining the prior written consent of MFDA Staff and without the prior knowledge of Lawson. The removal of these monies rendered WAS deficient in respect of its of minimum capital and risk adjusted capital obligations as of October 31, 2010.

48. After repeated requests from Lawson, which referenced the requirement that WAS remain compliant with all MFDA By-Laws, Rules and Policies, Thiessen repaid \$86,000 to WAS's operating account in December 2010.

49. Between December 2010 and August 2011, Thiessen, without the approval of Lawson, made the following additional withdrawals from WAS's operating account without seeking or obtaining the prior written consent of Staff of the MFDA:

- a) December 2010 - \$9,300 (withdrawal);
- b) January 2011 - \$30,000 (withdrawal);
- c) February 2011 - \$6,300 (withdrawal);
- d) March 2011 -\$1,000 (withdrawal);
- e) April 2011 - \$8,000 (withdrawal); and
- f) August 2011 - \$10,000 (withdrawal which was subsequently repaid).

50. The above-referenced withdrawal of \$30,000 by Thiessen in January 2011 rendered WAS deficient once again in respect of its minimum capital and risk adjusted capital obligations, which deficiency continues.

51. In February 2011, as a result of the foregoing, MFDA Staff imposed additional restrictions on WAS pursuant to MFDA Rule 3.4.3 including, prohibiting WAS from opening new client accounts and hiring new salespeople, requiring WAS to operate as a Level 2 Dealer (rather than a Level 3 Dealer) and, in conjunction with its transition to a Level 2 dealer, requiring WAS to clear any pending trades from its trust account and to thereafter desist from all use of the trust account.

52. To date, Thiessen has failed or refused to respond to requests from MFDA Staff and Lawson to return the funds he improperly withdrew from WAS's operating account as set out above.

53. As an MFDA member, WAS remains responsible for client complaints and for losses in the event of insolvency. The regulatory requirements with respect to minimum capital and risk adjusted capital, which Thiessen has either intentionally breached or ignored, are intended to, among other things, address these obligations.

THE PENALTIES PROPOSED BY THE MFDA STAFF

54. Staff proposes that the following penalty be imposed on the Respondent Thiessen:

- a) Pursuant to section 24.1.1(e) of MFDA By-law No. 1, a permanent prohibition on conducting securities related business in any capacity while in the employ of or associated with any Member of the MFDA;
- b) Pursuant to section 24.1.1(b) of MFDA By-law No.1, a fine in the range of \$75,000 to \$100,000; and
- c) Pursuant to section 24.2 of MFDA By-law No. 1, costs attributable to conducting the investigation and prosecution of this matter in the amount of \$10,000.

Sections 24 and 24.2 of MFDA By-law No. 1.

55. Staff proposes that the following penalty be imposed on the Respondent WAS:
- a) Pursuant to section 2.4.1.2(d) of MFDA By-law No. 1, a termination of any and all of the rights and privileges of MFDA Membership for the Respondent WAS;
 - b) Pursuant to section 24.1.2(b) of MFDA By-law No. 1, a global fine in the range of \$4,000,000⁴;
 - c) Pursuant to section 24.2 of MFDA By-law No. 1, costs attributable to conducting the investigation and prosecution of this matter in the amount of \$50,000.

Sections 24 and 24.2 of MFDA By-law No. 1.

PENALTY PRINCIPLES

56. There is no need to elaborate on the recognized principles and considerations related to what is a fair and appropriate penalty. The primary goal of securities legislation is the protection of the investor as well as capital market efficiency and ensuring public confidence in the system: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. 58 at paras 59 and 68.

57. General deterrence is an appropriate consideration in making orders that are both protective and preventative. A penalty must re-affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry. *Re Arnold Tonnies*, [2005] MFDA file no. 200503 citing *Re Cartaway Resources Corp.*, [2004] I S.C.R 672 and paragraph 61.

⁴ This amount is supported by the following reasoning in the MFDA submission: “In total, clients of WAS invested and lost approximately \$2,883,933.00 USD in Promittere. Staff has calculated the fine in Canadian dollars using the exchange rate of \$1 USD to \$1.33 CDN as of the date of November 18, 2015. Therefore, the client losses of \$2,883,933.00 USD is equivalent to \$3,847,477.38 CDN. Staff seeks a global fine of \$4,000,000 for the following misconduct: failure to conduct adequate due diligence, suitability of investments and inappropriate use of exemptions, undisclosed conflict of interest and failure to ensure an adequate compliance program.”

AGGRAVATING AND MITIGATING FACTORS

58. After considering general principles when determining an appropriate penalty to impose on a Respondent, hearing panels should then examine the particulars of the matter before it by assessing any aggravating and mitigating factors and their relationship to the general principles on penalty. MFDA staff relies upon the following aggravating factors in this case:

- (a) the Respondent Thiessen had been registered in senior roles in the financial services industry for nearly ten (10) years and should have been familiar with the rules and requirements of MFDA Membership ("Respondent's experience and level of activity in the capital markets");
- (b) the Respondent Thiessen is a chartered accountant and skilled professional who was the controlling mind of WAS, directing all of its activities and undertakings including product selection and development ("Respondent's experience and level of activity in the capital markets");
- (c) the Respondents failed to conduct bare minimum levels of due diligence on the Promittere product and to conduct an assessment of its risk to and suitability for clients, thereby leading to the sale of Promittere to clients for whom it was unsuitable and could not withstand the losses when they inevitably occurred ("Harm suffered by investors as a result of activities and integrity of the capital markets");
- (d) the Respondents sought legal advice on the sale of Promittere and retained counsel to prepare a draft offering memorandum prior to the sale of Promittere, but the Respondents ultimately rejected the use of the offering memorandum failing to finalize it and using a two page share offering summary which was prepared by Thiessen and Lewis ("Lewis") (the individual retained to manage the investment funds) instead ("seriousness of the activity");
- (e) the Respondents failed to conduct bare minimum levels of due diligence on Lewis and G.H. Lewis Associates including the following:

- (i) failure to review the corporate status of G.H. Lewis Associates which had been cancelled in 1992;
 - (ii) failure to confirm the registration status of Lewis to advise or trade in securities in Canada and the United States despite legal advice to do so by the Respondents outside counsel;
 - (iii) failure to conduct an assessment of Lewis' management qualifications and track record and failure to confirm references; and
 - (iv) failure to review the financial position and trading history of Lewis especially when trading returns were being reported at exceptionally high levels of between 70.5% to 230% for the years 1999 to 2004 ("seriousness of the activity and integrity of the capital markets").
- (f) the Respondents proceeded to present the Promittere product for sale to clients despite being made aware by legal counsel on several occasions that Lewis was not registered in the United States ("seriousness of the activity, level of experience in the capital markets and integrity of the capital markets");
- (g) the Respondents failed in their basic record keeping and regulatory requirements to ensure investors qualified as "accredited investors" under the "closely held issuer" exemption during the material time and to provide clients with the relevant disclosure materials (Form 45-501F3) at least four (4) days before their purchase of shares in Promittere as required by securities regulations at the time ("seriousness of the activities, client harm and experience in the capital markets");
- (h) the Respondents sold Promittere as a medium to high-risk product when it was, in fact, a high risk product and described the potential for large losses as "negligible" ("harm suffered by investors");
- (i) the Respondents failed to address the conflict or potential conflict of interest between their interests and the best interests of their clients and investors either in writing or verbally until required to by MFDA Compliance Staff and even then the Respondents failed to disclose the compensation payable to them in respect of sales of Promittere ("harm to investors, integrity of the capital markets and potential benefits to the Respondents");

- (j) the Respondents failed to establish, implement, communicate and maintain an adequate compliance program and more specifically the Respondents appeared to dismiss the importance of monitoring the investments made by Lewis and ignored potential clues to the fraud when Thiessen was refused signing authority over Lewis' bank account and denied direct access to trading statements by Lewis ("level of experience in the capital markets, harm to investors and seriousness of conduct");
- (k) the Respondents, between August 1, 2002 and November 1, 2005, solicited approximately \$2,883,993 USD from investors for investment into the Promittere product all of which, save for \$40,000 USD, was lost with little to no chance of recovery when Promittere was discovered to be a fraud ("harm to investors and threat to the capital markets");
- (l) the Respondents repeatedly breached their early warning designation by withdrawing funds without seeking or obtaining the prior written consent of MFDA Staff thereby rendering WAS deficient in respect of its minimum capital and risk adjusted capital ("RAC") requirements ("seriousness of misconduct, client harm and protection of the MFDA's Membership");
- (m) to date, approximately \$54,600 of the funds withdrawn from the operating accounts of the Member after the discovery of the fraud and designation into the Early Warning System have not been returned and Thiessen has failed or refused to respond to requests to do so ("seriousness of the misconduct, client harm and protection of the MFDA's Membership"); and
- (n) Lastly, the Respondents have ceased participating in the disciplinary hearing being conducted against them ("seriousness of the misconduct").

59. We accept the relevance and force of these submissions.

60. The only mitigating factor referred to by MFDA Staff, against which the aggravating factors must be weighed, is that the Respondents have no disciplinary history. We agree with Staff's submission that this factor should be given little, if any, weight when weighed against the

gravity of the misconduct, the large amounts of money involved, and the fallout from the actions and failure of the Respondents.

CONCLUSION ON THE PENALTIES

61. Apart from the penalty with respect to the fine proposed relating to Thiessen (a fine in the range of \$75,000 to \$100,000) we accept these submissions. Accepting that it does not follow the approach to the fine imposed on WAS, we think that it is still too low. It appears to play down the seriousness of Thiessen’s breaches of his obligations. In its place, we think that a fine of \$250,000.00 is more appropriate. Accordingly, we impose the penalties set forth in paragraphs 54 and 55 of these reasons subject to amending them to provide that the fine proposed in paragraph 54(b) be replaced with a fine in the amount of \$250,000.

DATED this 27th day of January, 2016.

“John W. Morden”

The Honorable John W. Morden
Chair

“Terrence Bourne”

Terrence Bourne
Industry Representative

“Guenther W. K. Kleberg”

Guenther W. K. Kleberg
Industry Representative

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