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 Bruce Rush

Heard: July 11-12, November 12-13, 2013, in Vancouver, British Columbia
Decision and Reasons: February 2, 2014

DECISION AND REASONS

Hearing Panel of the Pacific Regional Council:

Jean P. Whittow, Q.C.	Chair
Elaine Davison	Industry Representative
Cecilia Macharia	Industry Representative

Appearances:

David Halasz	)	Senior Enforcement Counsel, Mutual Fund Dealers Association of Canada
Robert Bruce Rush	)	Respondent, Not in attendance or represented by counsel

I. INTRODUCTION

1. On November 21, 2012, a Notice of Hearing was issued by the Mutual Fund Dealers Association of Canada ("MFDA") to Robert Rush (the "Respondent") pursuant to section 20 and 24 of MFDA By-law No. 1 alleging violations of MFDA By-laws, Rules and Policies as follows:

Allegation #1: Between January 2007 and November 28, 2007 the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by recommending, referring, selling or facilitating the sale of securities to at least clients KC and DC, and possibly two other clients and 11 other individuals, outside the Member, contrary to MFDA Rule 1.1.1(a) and 2.1.1.

Allegation #2: Between January 2007 and November 28, 2007, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by recommending, referring, selling or facilitating the sale of securities to at least clients KC and DC, and possibly to two other clients and 11 other individuals, outside the Member, contrary to MFDA Rule 1.2.1(d).

Allegation #3: Between January 2007 and November 28, 2007, the Respondent failed to comply with the Member's policies and procedures with respect to engaging in outside business activities, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #4: Commencing February 10, 2011, the Respondent has failed to cooperate with an investigation commenced by the MFDA by failing to provide information and documents concerning the matters under investigation and by failing to attend an interview, as requested by MFDA Staff during the course of the investigation, contrary to s. 22.1 of MFDA By-law No. 1.

2. The affidavit of Sofi Vasiliadis sworn December 7, 2012 and filed as Exhibit 2 indicates that the Notice of Hearing was sent to the Respondent by regular mail, registered mail, courier and email. The Respondent acknowledged receipt.

3. The Respondent delivered a Reply dated January 9, 2013. He admitted the facts alleged in Allegation #4 and denied Allegations #1, #2 and #3.

4. The first appearance took place by way of telephone conference call before this hearing panel (the "Panel") on January 16, 2013. After submissions from MFDA staff and the Respondent, the hearing date was set for April 29 to May 1, 2013. Orders were also made regarding pre-hearing disclosure.

5. In mid-April, 2013, the Respondent applied for an adjournment. The application was heard by the Panel in two telephone conferences, on April 18 and 29, 2013. The Panel ordered that the hearing on the merits take place July 11 and 12, 2013.

6. The Respondent did not attend the hearing on July 11, 2013.

7. At the commencement of the hearing on July 11, 2013, when the Respondent did not attend, MFDA counsel drew the Panel's attention to Rules 7.3(1) and 13.5(1) of the MFDA Rules of Procedure. Rule 13.5(1) provides that where a respondent, having been served with a Notice of Hearing, fails to attend, the hearing panel may proceed under Rule 7.3. Rule 7.3 provides:

> ***7.3 Failure to Attend Hearing***
>
> (1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
>
> a) proceed with the hearing without further notice to and in the absence of the Respondent; and
> b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.

8. The Panel was satisfied that the Respondent was served with the Notice of Hearing. The Panel was also satisfied that the Respondent had notice of the date of the hearing as the date had been fixed at a pre-hearing conference in which the Respondent participated. The Panel therefore determined to proceed with the hearing.

9. However, the Panel declined to accept the facts alleged and conclusions drawn and directed that the hearing proceed on the basis of admissible evidence.

10. The MFDA presented its evidence on July 11 and 12, 2013. The matter was then adjourned. The Panel also directed that two days be reserved, in case a second day should be required for continuation or for the conduct of the penalty hearing.

11. The continuation of the hearing was then set for November 12 and 13, 2013.

12. At the outset of the hearing on November 12, 2013 MFDA counsel advised that the Respondent had been notified of the dates for the continuation.

13. The Respondent did not attend any part of the hearing.

14. After the completion of the MFDA's submissions as to the findings on misconduct on November 12, 2013, the Panel reserved briefly and then advised those in attendance that it found that the Allegations were proven, with written reasons to follow.

15. The Panel then adjourned the hearing until November 13, 2013. The Panel directed that the MFDA attempt to notify the Respondent of the decision on the Allegations in advance of the resumption of the hearing.

16. On November 13, 2013, MFDA counsel advised of the steps taken by the MFDA to notify the Respondent. The Respondent did not attend on November 13, 2013.

17. At the conclusion of the hearing on November 13, 2013, the Panel reserved its decision.

II. ALLEGATIONS #1, #2 AND #3

A. EVIDENCE

18. The MFDA presented its evidence pertaining to Allegations #1, #2 and #3 through the testimony of KC and an MFDA investigator, Ms. Indira Nadarajan.

19. By way of background, the Respondent was registered in BC as a mutual fund salesperson with a Member of the MFDA, from March 2005 until November 28, 2007. The Member was initially named Clarica Investco Inc. and changed its name to Sun Life in June, 2007. For ease of reference, the Member is referred to in this decision as "Sun Life". The Respondent resigned from Sun Life on November 28, 2007 and has since not been registered in any capacity.

20. Through written agreement with Sun Life (the "Advisor's Agreement"), dated March 24, 2005, the Respondent agreed that he was prohibited from selling, representing or promoting any investments or business opportunities unless they had been approved in writing by Sun Life. In November 2004, the Respondent signed a Compliance Questionnaire indicating he knew all business was to be placed exclusively with companies approved by Sun Life. As set out below, the "investments" which are the subject of this hearing were not approved by Sun Life and not conducted through its facilities.

21. KC testified as to his dealings with the Respondent. KC lives with his wife DC in Salmon Arm. KC has been employed as a customer service manager for 36 years for a large grocery store chain. DC works from home operating a spa and bed and breakfast. Neither have investment or financial training. KC and DC met the Respondent through a referral in approximately May 2006. After discussing their investment objectives, they transferred mutual funds held with another institution to Sun Life.

22. KC testified that the Respondent specifically advised at the outset of their relationship that the only investments they could purchase from the Respondent were under the portfolio of Sun Life.

23. In November 2006, the Respondent contacted KC and told them they might be interested

in purchasing a foreign exchange investment and that, for a $5,000.00 US investment, they could earn 87.5% in one year. The investment was referred to as "Gold-Quest". The Respondent told KC he and his family had invested in Gold-Quest. KC also testified that the Respondent told him that he would "earn a commission" from KC's purchase.

24. KC assumed that Gold-Quest was a Sun Life product, based on his earlier communications with the Respondent.

25. In fact, Gold-Quest was **not** an approved Sun Life product. Indeed, Sun Life was unaware of the Respondent's activities in respect of Gold-Quest.

26. In early May 2007, the Respondent provided KC and DC with documents pertaining to Gold-Quest, being a "Private Member Application Form", a "FOREX Market and Currency Trading Overview", a "Limited Power of Attorney" and a "Funding E-Bullion Account and Gold-Quest International Agreement". These documents purport to describe Gold-Quest. The Respondent provided KC and DC with further information concerning the benefits of the investment. He also assisted them in completing the documents and in transmitting their funds in order to purchase an interest in Gold-Quest.

27. KC and DC used a line of credit to fund their investment.

28. The funds for the purchase of Gold-Quest were wired by KC and DC to a bank account in California and did not go through Sun Life.

29. An email from the Respondent to KC and DC attaches a letter from the Respondent to Gold-Quest dated May 4, 2007 in which the Respondent writes that their investment 'is eighth under [his] administrative management'. This indicates that there were others to whom the Respondent marketed Gold-Quest, beyond KC and DC.

30. After KC and DC made their purchase, they received further communications from or on behalf of Gold-Quest, telling them that the Respondent was their "main contact person" and

periodically reporting how much the investment had earned (without making payment).

31. This continued until May 2008, when Gold-Quest sent an email advising that due to orders by the Securities Exchange Commissions in the US and Canada, it could no longer conduct business.

32. The Respondent continued to reassure KC and DC about their investment.

33. KC testified that they have never received any payment of principal or interest and he believes their investment is lost.

34. The MFDA introduced copies of a press release by the U.S. Securities and Exchange Commission ("SEC") dated May 7, 2008 and a "Complaint" issued by the SEC against Gold-Quest International and persons associated with it, alleging, in short, that Gold-Quest operated a Ponzi scheme involving $27 million and more than 2,100 investors.

35. In 2010, the Alberta Securities Commission held that Gold-Quest was a "sham investment", had no currency trading program and did not place investors' funds in any external traders. It held that Gold-Quest "depended on the influx of new investors' money to make its payments to existing investors". It held that only a few early investors received any payments and "millions of dollars" of investors' money were transferred to a few principals of Gold-Quest. In short, Gold-Quest was held to be a form of Ponzi scheme and a fraud. (*Re: Gold-Quest International Corp*, 2010 ABASC 19 (CanLII), see paras 35-38).

36. The findings by the Alberta Securities Commission come long after the investment was purchased by KC and DC. The proposed investment, as described in the original documents referred to above, ought to have alerted any investment professional to the likelihood that Gold-Quest was a fraud.

37. In November 2007, the Respondent proposed a second investment to KC and DC. This was after they had made their investment in Gold-Quest, and during the period they were

receiving statements which showed they were earning great returns on the Gold-Quest investment.

38. On November 24, 2007, the Respondent emailed KC and DC and other "undisclosed recipients" about a second investment opportunity. The proposed investment was in "The Hear Now" ("THN"), a Calgary company that manufactured dog collars with two-way radio technology. In the email, the Respondent described the THN investment and attached a letter dated November 9, 2007 addressed "To Prospective Shareholders" explaining that the investment involved purchasing 1,000 shares in another named company at $7.00 each, and which would generate dividends.

39. The Respondent resigned from Sun Life on November 28, 2007. The Respondent did not advise KC and DC that he had done so at that time. The Panel accepts KC's testimony that the Respondent first advised KC that he was no longer with Sun Life in February 2008.

40. Like Gold-Quest, THN was not approved by Sun Life and Sun Life was unaware of the Respondent's activities in respect of it.

41. KC testified that in December 2007, KC and DC met with the Respondent and ultimately purchased an investment in THN of 2000 shares for a price of $14,000.00. As with the Gold-Quest investment, the Respondent facilitated KC and DC in its acquisition. This was in December 2007 and January 2008.

42. The funds for the purchase of THN did not go through Sun Life.

43. By July 2008, KC and DC had not received the share certificates for their investment in THN. They decided to withdraw and get their money back, which the documentation indicated could be done.

44. KC contacted the Respondent about withdrawing and seeking return of their investment in THN. Initially, the Respondent explained they would have to wait during THN`s corporate

restructuring. He later advised that they could sue.

45. KC and DC have received no payments in relation to the THN investment.

46. In an agreement dated February 26, 2010, THN admitted it violated the Alberta *Securities Act*, R.S.A. 2000, c. S-4, by, *inter alia*, distributing securities while not registered and without a prospectus or applicable exemption (*Re: The Hear Now Inc.*, 2010 ABASC 85).

47. KC and DC sued the Respondent and Sun Life regarding Gold-Quest and THN. The claim against Sun Life was withdrawn. KC testified that the Respondent agreed to settle the suit but failed to make the required payment of settlement funds.

48. In the Reply to the Notice of Hearing, the Respondent denied that KC and DC relied on his recommendation to purchase the Gold-Quest investment. He "denied selling Gold-Quest and THN to clients KC and DC or to anyone else" (Reply, Division 3, para 13). The MFDA took extensive lengths to permit the Respondent the opportunity to testify to explain the basis for this assertion, or to cross examine KC. The Respondent did not attend the hearing. The Panel accepts the uncontroverted evidence of KC that the Respondent promoted and sold Gold-Quest and THN to KC and DC.

B. FINDINGS

Allegation # 1

49. Allegation #1 charges that the Respondent was engaged in the business of selling securities not for the account of the MFDA Member. MFDA counsel referred to this as the prohibition against selling securities "off-book".

50. MFDA Rule 1.1.1(a) states:

1.1.1 **Members** No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

(a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than:

(i) such business as relates solely to trading in deposit instruments conducted by any Approved Person not on account of the Member; and

(ii) such business conducted by an Approved Person as an employee of a bank and in accordance with the *Bank Act (Canada)* and the regulations thereunder and applicable securities legislation.

51. "Securities related business" is defined in MFDA By-law No. 1 s. 1 in broad terms:

> "**securities related business**" means any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities for the purposes of applicable securities legislation in any jurisdiction in Canada, including for greater certainty, securities sold pursuant to exemptions under applicable securities legislation;

52. The terms "security" and "trade" are defined in the BC *Securities Act* [RSBC 1996] c. 418. In s. 1 of that Act, security is defined to include "an investment contract". Trade is defined as "any sale or disposition of a security" and "any act, advisement, solicitation, conduct, or negotiation directly or indirectly in furtherance of [a trade]."

53. The authorities have universally stated that the purpose of these broad definitions is to protect the public. See *Brown, Re* [2010] Central Regional Council, MFDA File No. 200808, Hearing Panel Decision dated Dec. 8, 2010 (paras. 107-110) ("*Re Brown*").

54. The submissions of MFDA counsel are amply supported on the evidence. As to Gold-Quest, the Respondent engaged in securities related business by:

- introducing Gold-Quest to KC and DC;
- advising KC and DC he would receive a commission;
- providing KC and DC with the forms and documents required for investment;
- assisting KC and DC in completing these documents; and
- acting as the "administrator" and the contact between the investor and Gold-

Quest.

55. As to THN, in November, 2007, the Respondent distributed the promotional materials and invited KC and DC and the other recipients to contact him for further information.

56. The securities related business described above took place when the Respondent was registered as a mutual fund salesperson with Sun Life.

57. The uncontroverted evidence is that Sun Life did not approve Gold-Quest or THN, and did not handle the funds used to purchase these investments. It is plain that the Respondent's activities were not carried on for the account of the Member or through the facilities of the Member.

58. The Notice of Hearing alleges that in addition to KC and DC, the Respondent was engaged in recommending, referring, selling or facilitating the sale of securities "possibly to two other clients and eleven other individuals" (Allegation #1 and #2).

59. The evidence relied upon is more limited, which MFDA counsel submits is due to the Respondent's failure to cooperate with the MFDA's investigation.

60. MFDA counsel relies on a list of names and investment amounts provided to the BC Securities Commission by an anonymous informant and in turn to the MFDA. The Panel is of the view we cannot rely upon this list in the absence of some evidence as to the authenticity of its contents.

61. However, by virtue of the letter from the Respondent to Gold-Quest indicating the sale to KC and DC is his 'eighth' and the email to "undisclosed recipients" attaching the letter to prospective investors, the Panel is satisfied that the Respondent was engaged in "recommending, referring, selling or facilitating the sale" of Gold-Quest and THN to others in addition to KC and DC.

62. MFDA Rule 2.1.1 provides:

> 2.1.1 **Standard of Conduct.** Each Member and each Approved Person of a Member shall:
> (a) deal fairly, honestly and in good faith with its clients;
> (b) observe high standards of ethics and conduct in the transaction of business;
> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
> (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

63. The sale of "off-book" securities represents a serious breach of the expected standards of conduct of an Approved Person. It deprives the investor of the protection intended to be afforded through the offices of a Member.

64. The Panel is therefore satisfied that the Respondent engaged in securities related business that was not carried on for the account of Sun Life contrary to MFDA Rules 1.1.1(a) and 2.1.1. Allegation #1 is proven.

Allegation # 2

65. MFDA counsel advised this allegation is in essence an alternative to Allegation #1. MFDA Rule 1.2.1(d) (now 1.2.1(c)) permits an Approved Person to continue in a specified range of other occupations, provided that "the Member for which the Approved Person carries on business…is aware and approves of the Approved Person engaging in such other gainful occupation".

66. The evidence was that Sun Life was unaware of the Respondent's activities and did not give its consent to the Respondent to engage in a secondary occupation.

67. The Panel is satisfied that Allegation #2 is proven.

Allegation #3

68. This allegation also relates to the Respondent's promotion of Gold-Quest and THN.

69. MFDA Rule 2.5.1 requires Members to establish and maintain policies and procedures to ensure that its business is conducted in accordance with the MFDA By-laws, Rules and Policies and applicable legislation.

70. MFDA Rule 1.1.2 requires an Approved Person to comply with his or her related Member's policies and procedures:

> 1.1.2 **Compliance by Approved Persons.** Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1.(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.

71. The evidence is that the Respondent agreed to adhere to Sun Life's policies and procedures. He did not do so. He did not disclose his activities to Sun Life.

72. The import of these provisions is to ensure that the Member can supervise the activities of approved persons, for the benefit of the investing public.

73. The breach of these requirements undermines the MFDA's regulatory regime.

74. MFDA counsel referred the Panel to *Arnold Tonnies, Re*, [2005] Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 27, 2005 ("*Re Tonnies*"). In that case, the Approved Person acknowledged that he read the Member's policies and procedures manual, but did not comply with it. That panel held that the respondent's conduct amounted to a "failure to observe high standards of ethics and conduct in the transaction of business", as required by MFDA Rule 2.1.1(b). This Panel adopts that analysis.

75. The Panel therefore finds that Allegation #3 is proven.

III. ALLEGATION #4

A. EVIDENCE

76. Allegation #4 concerns the Respondent's alleged failure to cooperate with the MFDA's investigation into his conduct. The evidence on this allegation was provided through the complaint related documentation, adduced through the testimony of Ms. Nadarajan.

77. KC and DC initiated the complaint by providing the MFDA with a copy of their Notice of Civil Claim. The MFDA also received information from the BC Securities Commission.

78. On March 1, 2012, the Respondent was personally served with a letter dated February 28, 2012 requesting that he contact the MFDA within five days to schedule an interview. He did not.

79. On April 12, 2012, the Respondent was personally served with a series of letters that had been previously sent which posed specific questions to the Respondent about Gold-Quest and THN. In June 2012, the Respondent replied. He indicated that he was an investor in both Gold-Quest and THN, that he "didn't inform [Sun Life] of his involvement", and asserted that he did not recommend Gold-Quest to KC and DC. Ms. Nadarajan testified that the MFDA found the response to be inadequate to address its concerns, in that it was incomplete.

80. Ms. Nadarajan testified that an interview date was then set, and the Respondent notified of the date, but he did not attend.

81. Ms. Nadarajan testified that without the Respondent's cooperation, the MFDA was unable to determine the true nature and extent of the Respondent's activities.

B. FINDINGS

82. The Panel notes that the Respondent has admitted Allegation #4.

83. Section 22.1 of MFDA By-law No. 1 provides that the MFDA may require a response from an Approved Person, require the production of documents and require his or her attendance at an interview. The relevant portion of that By-law is as follows:

> 22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:
>
> (a) to submit a report in writing with regard to any matter involved in any such investigation;
>
> (b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
>
> (c) to attend and give information respecting any such matters;
>
> (d) to 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 Corporation;
>
> and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly…

84. It is a fundamental principle that members of a self-regulating profession have a duty to cooperate with the governing body. The failure to do so undermines the regulator's ability to fulfil its essential mandate. The failure to cooperate is unquestionably a serious form of misconduct (*Artinian* v. *College of Physicians and Surgeons of Ontario* [1990] O.J. No. 1115 (Ont. Div. Ct.), cited with approval in *Re Gizzo*, [2011] MFDA Central Regional Council, MFDA File No. 201024, Hearing Panel Decision dated March 16, 2011 (para 21) ("*Re Gizzo*")).

85. In this case the Respondent has failed to provide requested documents and failed to attend for an interview as required by the MFDA pursuant to its mandate and its By-laws. The consequence of his failure to cooperate with the MFDA is that the MFDA is unable to determine the extent of his activities.

86. The Panel therefore finds that Allegation #4 is proven.

IV. PENALTY

87. The MFDA submitted that the appropriate disposition is:

- a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member;
- a fine of $90,000; and
- the imposition of costs in the amount of $10,000.

A. AUTHORITY

88. Section 24.1.1 of MFDA By-law No. 1 empowers discipline hearing panels to impose disciplinary sanctions upon an Approved Person. The penalties sought by the MFDA, that is, the permanent prohibition and the fine, are expressly provided for in By-law No. 1, s. 24.1.1 (b) and (e).

89. Section 24.2 of MFDA By-law No. 1 provides that a hearing panel may require that a respondent "pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section 24.3 and any investigations relating thereto".

B. PRINCIPLES

90. The objects of sanctions and the factors to be considered in their imposition are the subject of extensive authorities. As submitted by MFDA counsel, the primary purpose of securities regulation is to ensure the protection of the investor. Sanctions are a means by which this goal is achieved (*Re Tonnies*). The purpose of the MFDA's process is not to punish the offender, but to protect the public from future acts of misconduct by this Approved Person or others. The additional objects to be considered in the imposition of sanctions, also referred to in *Re Tonnies*, are:

- the protection of the investing public;

- the integrity of the securities markets;
- specific and general deterrence;
- the protection of the MFDA's membership; and
- the protection of the integrity of enforcement processes.

91. MFDA counsel referred the Panel to the list of factors generally held to be appropriately considered in the assessing the appropriate penalty (see *Re Tonnies*, p. 22; *Re Brown*, para. 122). The list of factors is as follows:

- the seriousness of the proven allegations;
- the respondent's past disciplinary record;
- the respondent's experience and level of activity in the market;
- whether the respondent recognizes the seriousness of the misconduct;
- the harm done by the respondent's conduct;
- the benefits received by the respondent as a result of the misconduct;
- the risk to investors and the capital markets if the respondent was to continue to operate;
- the damages caused to the integrity of the capital markets;
- the need to deter the respondent and others from engaging in similar activities;
- the need to alert others to the consequence of inappropriate activities to other persons who are authorized to participate in the capital markets; and
- previous decisions made in similar circumstances.

92. MFDA counsel also referred the Panel to the MFDA Penalty Guidelines. He noted that it is a guide only, and contained recommended minimum penalties for the misconduct found here. The minimum recommended fine for a finding of outside business activity is $10,000, and the recommended penalty ranges up to a suspension or permanent prohibition. The minimum recommended fine for a failure to cooperate is $50,000, and the recommended penalty ranges up to a termination or permanent prohibition.

93. In the present case, an examination of the relevant factors aggravates the appropriate penalty.

<u>Seriousness of the proven allegations</u>

94. The misconduct is very serious. The Respondent recommended and sold investments that were not authorized by the Member. Those investments were later found by the relevant securities commission to be a fraud and an illegal distribution. It ought to have been apparent to any trained and qualified investment professional that the investments were entirely inappropriate and ought not to have been sold to anyone. The Respondent's failure to cooperate with the MFDA's investigation is especially serious as it undermines the MFDA's ability to fulfil its regulatory mandate to protect the public. In this case, the MFDA has been unable to determine the extent of the Respondent's activities.

Respondent's Discipline Record

95. MFDA staff advised that the Respondent has not been the subject of prior disciplinary proceedings. While this is a mitigating factor, it is of little use, given the weight of the aggravating factors.

Respondent's Market Experience

96. The evidence was that the Respondent was an Approved person for 2 years and 8 months. This is a moderate level of experience. However, it would not excuse or justify the serious misconduct here.

Whether the Respondent recognizes the seriousness of the Misconduct

97. The Respondent did not attend or cooperate in the process and there is an absence of any evidence that he recognizes the misconduct in any way. The Respondent's failure to cooperate or explain his conduct in any way indicates that the Respondent is unwilling to submit to the MFDA's powers of regulation.

Harm Done to the Investor

98. KC testified that he and his wife lost their entire investment of $19,000. KC testified that he had borrowed funds to make the investment, so the cost of borrowing was lost too. Since the

Respondent did not cooperate with the investigation or participate in the hearing, there is no evidence as to the extent of the harm suffered by other investors.

Benefits Received by the Respondent

99. Since the Respondent did not participate, there is little evidence in this regard. However, the evidence of KC was that the Respondent indicated he would receive a commission. He received a financial benefit for his "off-book" sales.

Deterrence

100. The Respondent is no longer an Approved Person and specific deterrence may therefore not be required. However, the penalty imposed must serve to deter other registrants from engaging in similar conduct.

101. The Panel is also of the view that the penalty imposed must communicate to the membership and to the public that the misconduct committed by the Respondent will not be tolerated by the MFDA. The Respondent's conduct demonstrates that he is entirely unsuitable as an Approved Person. The penalty imposed must be commensurate with the seriousness of the Respondent's conduct in order to ensure public confidence in the market and the ability of the MFDA to regulate the conduct of its registrants.

Similar Cases

102. MFDA counsel referred the Panel to a number of decisions of past hearing panels: *Re Laverdière*, [2010] MFDA Pacific Regional Council, MFDA File No. 200936, Hearing Panel Decision dated May 10, 2010 ("*Re Laverdière*"); *Re Batac*, [2011] MFDA Central Regional Council, MFDA File No. 201142, Hearing Panel Decision dated March 22, 2011 ("*Re Batac*"); *Re Westgard*, [2010] MFDA Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 27, 2005 ("*Re Westgard*"); *Re Majdoub*, [2010] MFDA Central Regional Council, MFDA File No. 201010, Hearing Panel Decision dated November 12, 2010; *Re Willis*, [2012] MFDA Central Regional Council, MFDA File No. 201201, Hearing Panel Decision dated

June 7, 2012 ("*Re Willis*"); *Re Bytnar*, [2011] MFDA Prairie Regional Council, MFDA File No. 201015, Hearing Panel Decision dated April 6, 2011("*Re Bytnar*"); and *Re Gizzo.*

103. All of these cases concerned similar allegations to the present case, in that, the respondent either admitted or was found to have engaged in business outside the Member and/or failed to cooperate to one degree or another in the MFDA's investigation. In all but one case referred to, in which the penalty decision has not been rendered (*Re Batac*), the disposition imposed involved a permanent prohibition, fines up to $120,000 and costs ranging from $2,500 to $10,000.

C. ANALYSIS AND DECISION

104. The imposition of a permanent prohibition is perhaps the most serious sanction that can be imposed. The Panel is satisfied that a permanent prohibition is appropriate in the present case. The "investments" were not approved by the Member. As set out above, Gold-Quest was later held to be a fraud and THN an illegal distribution and the frailties of these investments ought to have been apparent to the Respondent from the outset. By conducting off-book sales, the Respondent circumvented the regulatory regime designed to protect the public. As a consequence of the Respondent's activities KC and DC and likely others have suffered the loss of their entire investment. The Respondent sent a single and incomplete reply to a letter from the MFDA. He failed to cooperate with the MFDA's investigation, a fundamental obligation of every registrant. That the Respondent has no prior disciplinary history is outweighed by the seriousness of these aggravating factors. The Respondent's conduct is entirely inconsistent with that of a member of a self-regulated profession. The Panel is therefore satisfied a permanent prohibition is necessary to adequately protect the investing public.

105. MFDA counsel has submitted that in addition a fine of $90,000 should be imposed. This is at the higher end of the range set out in the authorities referred. MFDA counsel provided some rationale for the figure based upon the recommended minimum amounts in the Penalty Guidelines. In some cases, the hearing panels attribute the fine to individual allegations, in others, the fine is imposed on a global basis.

106. In *Re Willis*, a permanent prohibition was imposed, plus a fine of $35,000 and costs of $2,500. In that case, the loan had been repaid so that there was no loss. Also, the respondent signed an Agreed Statement of Facts, which demonstrated a degree of cooperation and minimized the costs of the hearing. That is of course the opposite of the present case.

107. In *Re Westgard*, a permanent prohibition and a fine of $100,000 was imposed, $50,000 attributable to the allegations of securities related business outside the Member or the "dual occupation" charge (similar to Allegation #1 and #2 in the present case) and $50,000 attributable to the allegation of failure to cooperate. In that case, the respondent sold unauthorized investments totaling $38,000 and this sum was lost. He failed to cooperate with the MFDA by failing to provide the requested documents and information, provide a statement or attend an interview, much like the Respondent in this case. That Panel also imposed costs of $7,500. *Re Westgard* is most similar to the present case.

108. The Panel is therefore satisfied that the fine sought by the MFDA is appropriate.

109. The MFDA seeks the sum of $10,000 as a portion of the costs attributable to the conduct of the investigation and the hearing. The Panel expects that the actual costs incurred are far higher. The costs sought are at the higher end but within the range of costs order in the MFDA decisions referred to above. We note that the costs at the low end of the range, $2,500, were set in cases where the respondent cooperated in the process. The Panel is satisfied that the costs sought in the present case are appropriate.

110. In the result, the Panel makes the following orders as to penalty and costs:

- The Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- The Respondent shall pay a fine of $90,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- The Respondent shall pay costs in the amount of $10,000 pursuant to s. 24.2 of MFDA By-law No. 1.

DATED this 2nd day of February, 2014.

"Jean P. Whittow"

Jean P. Whittow, Q.C.,
Chair

"Elaine Davison"

Elaine Davison,
Industry Representative

"Cecilia Macharia"

Cecilia Macharia,
Industry Representative

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