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: Edward S. Brown

Heard: February 10, 2015, in St. John's, Newfoundland
Reasons for Decision: March 23, 2015

REASONS FOR DECISION

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Susan Nixon	Industry Representative
Darrell Bing	Industry Representative

Appearances:

Charles A. Toth	)	For the Mutual Fund Dealers Association of Canada
Gregory A.C. Moores	)	For the Respondent, who appeared by telephone

A. THE ALLEGATIONS

1. By Notice of Hearing, dated the 12th day of May, 2014, the following Allegations were made by the Mutual Fund Dealers Association of Canada (the "MFDA") against Edward S. Brown ("Respondent"):

> **Allegation #1**: Between about November 2003 and April 2007, the Respondent misrepresented, failed to fully and adequately explain, or omitted to explain the risks, benefits, material assumptions, features and costs of a leveraged investment strategy that he recommended and implemented in the accounts of 9 clients, thereby failing to ensure that the leveraged investment strategy was suitable for the clients and in keeping with the clients' investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.
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> **Allegation #2**: Between about November 2003 and April 2007, the Respondent failed to ensure that the leveraged investment strategy he recommended and implemented in the accounts of 9 clients was suitable for the clients and in keeping with their investment objectives, having regard to the clients' relevant Know-Your-Client information and financial circumstances, including but not limited to the clients' ability to withstand investment losses and afford the costs associated with the investment loans and, contrary to MFDA Rules 2.2.1 and 2.1.1.

B. HISTORY OF PROCEEDINGS

2. The First Appearance took place before a Hearing Panel of the Atlantic Regional Council on July 10, 2014.

3. Following submissions, the Hearing Panel scheduled the Hearing on the Merits to take place on February 9 to 13, 2015, at a venue to be announced in Gander, Newfoundland.

4. The Hearing Panel made an Order with respect to, *inter alia*, the delivery of a Reply, Disclosure by Staff and the Respondent, and the provision of Witness Lists and Statements. An interim appearance by teleconference, to address any procedural or scheduling matters, was set for January 9, 2015.

5. The Respondent served and filed his Reply on August 7, 2014.

6. On January 9, 2015, the Hearing Panel heard submissions from the parties with respect to certain scheduling and procedural matters. The Hearing Panel then directed a further appearance, by teleconference, on January 23, 2015.

7. On January 23, 2015, following submissions from the parties, the Hearing Panel directed that the Hearing on the Merits would take place on February 10, 2015, at a location to be determined and announced.

8. On February 6, 2015, the MFDA announced the location of the Hearing on the Merits in St. John's, Newfoundland.

C. THE HEARING ON THE MERITS

9. At the commencement of the Hearing on the Merits, the parties jointly submitted an Agreed Statement of Facts to the Hearing Panel.

10. The parties agreed that this was not a Settlement Hearing, but rather a Disciplinary Hearing, the evidentiary portion of which was resolved by an Agreed Statement of Facts.

11. All of the evidence to be relied upon by the parties was contained in the Agreed Statement of Facts. The Agreed Statement of Facts contained admissions of misconduct by the Respondent as well as a joint submission by the parties as to what they believed was the appropriate penalty in the circumstances.

12. The Agreed Statement of Facts was marked as an Exhibit at the Hearing on the Merits.

D. AGREED STATEMENT OF FACTS

13. The salient portions of the Agreed Statement of Facts are as follows:

I. INTRODUCTION

1. By Notice of Hearing dated May 12, 2014, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced a disciplinary proceeding against Edward S. Brown (the "Respondent") pursuant to ss. 20 and 24 of MFDA By-law No. 1.

2. The Notice of Hearing set out the following allegations:

   Allegation #1: Between about November 2003 and April 2007, the Respondent misrepresented, failed to fully and adequately explain, or omitted to explain the risks, benefits, material assumptions, features and costs of a leveraged investment strategy that he recommended and implemented in the accounts of 9 clients, thereby failing to ensure that the leveraged investment strategy was suitable for the clients and in keeping with the clients' investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1.

   Allegation #2: Between about November 2003 and April 2007, the Respondent failed to ensure that the leveraged investment strategy that he recommended and implemented in the accounts of 9 clients was suitable for the clients and in keeping with their investment objectives, having regard to the clients' relevant Know-Your-Client information and financial circumstances, including but not limited to the clients' ability withstand investment losses and afford the costs associated with the investment loans and, contrary to MFDA Rules 2.2.1 and 2.1.1.

II. IN PUBLIC / IN CAMERA

3. The Respondent and Staff of the MFDA ("Staff") agree that this matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

5. Subject to the determination of the Hearing Panel, Staff submits and the Respondent does not oppose, that the appropriate penalty to impose on the Respondent is:

(a) a five (5) year prohibition from conducting securities related business while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
(b) a fine in the amount of $25,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
(c) costs in the amount of $7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

6. On November 18, 2014, the Respondent filed an assignment in bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. The Respondent asserts that he is impecunious and unable to pay any amount towards either a fine or costs.

IV. AGREED FACTS

7. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV and no other facts or documents. In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent. If the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

8. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

9. From December 1999 to July 2, 2008, the Respondent was registered in Newfoundland as a mutual fund salesperson with Berkshire Investment Group Inc. ("Berkshire"). Berkshire became a Member of the MFDA on March 8, 2002.

10. On July 2, 2008, Berkshire amalgamated with Manulife Securities International Limited, a Member of the MFDA. Following the amalgamation, Berkshire and Manulife Securities International Limited continued to operate as Manulife Securities Investment Services Inc. ("Manulife Securities").[1]

11. From July 2, 2008 to March 4, 2011, the Respondent was registered in Newfoundland as a mutual fund salesperson with Manulife Securities.

12. At all material times, the Respondent conducted business in Gander, Newfoundland.

13. The Respondent is not currently registered in the securities industry in any capacity.

[1] In this Notice of Hearing, any reference to Manulife Securities includes Berkshire and Manulife Securities International Limited.

The Respondent Facilitated a Leveraged Investment Strategy

14. At all material times, the Respondent was the mutual fund salesperson responsible for servicing the accounts of the 9 Manulife Securities clients listed below:

    Clients JK and MK
    Clients CB and TB
    Clients LW and BW
    Clients CJ and EJ
    Client GC

15. Between about November 2003 and April 2007, the Respondent facilitated the implementation of a leveraged investment strategy whereby the clients borrowed monies and used the proceeds of the investment loans to purchase return of capital ("ROC") mutual funds for their accounts at Manulife Securities.

16. The leveraged investment strategy was based on the premise that the investments purchased by the clients with their investment loans should generate returns in excess of the clients' borrowing costs, such that the clients should not have to incur any out-of-pocket expenses to sustain the strategy.

17. At all material times, the clients deferred to the Respondent concerning the leveraged investment strategy.

18. Relying on the Respondent, the clients borrowed in excess of the amount they could reasonably afford to finance and invested the borrowed monies in return of capital mutual funds ("ROC mutual funds") offered by IA Clarington Investments and Stone & Co. In total, the clients obtained investment loans in the amount of $700,000, as set out in the chart below:

Clients	Date of Loan	Lender	Loan Amount
Clients JK and MK	December 22, 2004 February 1, 2005 March 3, 2005	BMO Manulife AGF	$80,000 $50,000 $50,000[2] $180,000
Clients CB and TB	August 23, 2005	AGF	$50,000
Clients LW and BW	November 14, 2003 April 16, 2007 April 24, 2007	BMO AGF AGF	$100,000 $60,000 $60,000 $220,000
Clients CJ and EJ	November 30, 2005 April 12, 2006	AGF B2B	$50,000 $50,000 $100,000

[2] The AGF loan was for $100,000. $50,000 was used to repay the Manulife loan. $50,000 was new monies borrowed.

Clients	Date of Loan	Lender	Loan Amount
Client GC	August 31, 2005 September 20, 2005	AGF BMO	$50,000 $100,000 $150,000
Total Loans			**$700,000**

Allegation #1: Failure to Fully Explain Leveraged Investment Strategy

19. At the time the clients implemented the leveraged investment strategy in their accounts, the clients were unsophisticated investors with limited investment knowledge. None of them had previously borrowed monies to invest.

20. The Respondent did not fully explain the leveraged investment strategy to the clients. During his discussions with clients, the Respondent focused primarily on the positive aspects of the leveraged investment strategy. He did not fully discuss all of the attendant risks and potentially negative outcomes of the leveraged investment strategy. He did not fully explain the potential consequences for the clients if the risks or potentially negative outcomes materialized.

21. The Respondent failed or omitted to present the leveraged investment strategy to the clients using performance projections based on conservative rates of return or declining market conditions, including a negative rate of return (i.e. investment losses), which would have more fully demonstrated to the clients the potential range of outcomes that might arise if they chose to implement the leveraged investment strategy and in particular, the consequences if the leveraged investment strategy did not generate distributions sufficient to cover the clients' costs of servicing their investment loans.

22. In the course of explaining the leveraged investment strategy to the clients, the Respondent made one or more of the following representations to them:

    (a) the leveraged investment strategy should not require the clients to incur any out-of-pocket expenses to cover the costs of the investment loans;
    (b) the ROC mutual funds should generate proceeds each month to pay the costs associated with the investment loans and provide additional monies in a "side account" (as the Respondent referred to it);
    (c) the value of the investments purchased with the borrowed monies should not likely decline. Rather, the value of the investments would likely grow at a rate of between 6 to 8% per year; and
    (d) after 7 to 12 years, the clients could sell the underlying mutual funds purchased with the investment loans, repay the investment loans with the proceeds from the sale, and keep the monies accumulated in the "side account".

23. The Respondent failed to fully and adequately explain that:

    (a) the leveraged investment strategy had material risks associated with it;

(b) the ROC mutual funds could reduce, suspend or cancel altogether the payment of proceeds to investors, in which event the clients may not be able to rely upon the ROC mutual funds to pay the costs associated with the investment loans;
(c) if the ROC mutual funds reduced, suspended or canceled the payment of proceeds to investors, then clients may be forced to incur out-of-pocket expenses or rely on other sources of income, savings or credit to sustain the leveraged investment strategy, or terminate the leveraged investment strategy and possibly incur financial losses;
(d) if the clients terminated the leveraged investment strategy at a time when the value of the ROC mutual funds was less than the amount of the outstanding investment loans, the clients would be required to rely on other sources of income, savings or credit to cover their investment loss and pay the shortfall;
(e) if the ROC mutual funds purchased with the borrowed monies declined in value, then the clients would incur greater investment losses than if the clients had purchased the same investments using their own monies; and
(f) an increase in the cost of servicing the clients' investment loans due to a rise in interest rates may affect the projections concerning the sufficiency of the proceeds paid to investors by the ROC mutual funds to cover the costs associated with the investment loans and provide the clients with additional monies each month.

24. The ROC mutual funds were structured to pay monthly proceeds to investors which could include a return of the capital originally invested by the investors. In the event that the value of the underlying investments declined due to deteriorating market conditions, poor investment performance or other factors such that the amount of the monthly proceeds paid to investors exceeded the increase in the value of underlying investments, there was a real and substantial risk that the ROC mutual funds would be required to reduce, suspend or cancel altogether the monthly proceeds paid to investors.

25. Initially, the ROC mutual funds generated proceeds which were sufficient to pay the costs associated the investment loans and provide additional monies to the clients each month. Commencing in 2008, the proceeds paid to the clients by the ROC mutual funds declined. The reduced proceeds paid by the ROC mutual funds were insufficient to pay the clients' costs of servicing their investment loans and provide additional monies for deposit into a "side account".

26. As stated above, the proceeds paid by the ROC mutual funds to investors could include a return of the capital originally invested by the investor. If the returns generated by the underlying investments held by the ROC mutual fund were not sufficient to cover the proceeds paid to investors, then the shortfall would, over time, reduce the value of the ROC mutual funds purchased by the clients.

27. At about the same time as the ROC mutual funds reduced the payment of proceeds to investors in 2008, the ROC mutual funds also began to decline in value.

28. At the time the Respondent implemented the leveraged investment strategy for the clients, the Respondent ought to have known that the clients could not afford to pay the

costs of servicing the investment loans or to withstand investment losses in the event the leveraged investment strategy did not perform as the Respondent had explained it should.

29. All of the clients had limited investment knowledge, limited investing experience, and had never previously borrowed monies to invest. The Respondent ought to have known had he conducted reasonable diligence to learn the essential facts relative to the clients, that the clients were unable to understand and appreciate the risks, benefits, material assumptions, features, and costs of the leveraged investment strategy without adequate explanation by him.

30. As a result of the Respondent's explanations, the clients believed that:

    (a) the leveraged investments they purchased would at least maintain their value, and may increase in value, while also generating a continuous monthly cash flow;
    (b) the leveraged investment strategy was low risk and their investments were secure; and
    (c) they should not have to incur any out-of-pocket expenses in order to implement and maintain the leveraged investment strategy in their accounts.

Allegation #2: Unsuitable Leveraging Strategy

31. At the time the Respondent assisted clients to obtain investment loans in order to implement the leveraged investment strategy, the Respondent ought to have known the clients' Know-Your-Client information as set out below[3]:

Clients	Ages	Occupations	Annual Household Income	Household Net Worth	Loan to Net Worth Ratio	Total Debt Service Ratio
Clients JK and MK	54 54	Guide/Tourism Home care	$45,000	$223,100	81%	36%
Clients CB and TB	41 32	Construction (owner) Bookkeeper	$70,000	$52,561	95%	66%
Clients LW and BW	46 42	Superintendent Office Manager	$98,400	$416,700	53%	35%
Clients CJ and EJ	52 50	Plant Worker Seamstress	$58,700	$115,400	87%	16%
Client GC	59	Retired	$65,000	$280,300	54%	22%

32. Most of the clients' household net worth consisted of fixed assets, such as homes and registered investments, which could not easily be converted to cash to pay the costs associated with the investment loans or cover any investment losses arising from the leveraged investment strategy.

[3] The Know-Your-Client information contained in the chart is captured at the time the Respondent facilitated the investment loan, or final investment loan where the Respondent facilitated multiple investment loans.

33. At all material times, the Respondent ought to have known that the leveraged investment strategy was unsuitable for the clients having regard to the clients' relevant Know-Your-Client information and financial circumstances, in that, among other things:

    (a) the clients could not withstand investment losses arising from the strategy; and/or
    (b) the clients could not afford to service their investment loans using their own personal income and without relying upon the distributions generated by the ROC mutual funds.

Ability to Withstand Investment Losses

34. The Respondent failed to consider, adequately or at all, whether the clients could withstand investment losses without jeopardizing their financial security if the leveraged investment strategy did not perform as explained by the Respondent.

35. The clients who implemented the leveraged investment strategy incurred significant investment losses.

Ability to Afford the Costs Associated with the Investment Loans

36. The Respondent failed to consider, adequately or at all, whether the clients could afford, and were willing to pay out-of-pocket, the costs associated with the leveraged investment strategy in the event the ROC mutual funds did not pay proceeds to investors as explained by the Respondent.

Additional Factors

37. The Respondent has not previously been the subject of disciplinary proceedings.

38. The Respondent fully cooperated with Staff's investigation into his conduct.

39. The Respondent has expressed remorse for his actions and the financial harm suffered by clients.

40. The Respondent is not registered or employed in the securities industry. The Respondent states that he has no desire to return to the securities industry in any capacity.

41. The Respondent states that: (1) he invested in the same leveraged investment strategy as his clients; (2) he incurred significant investment losses as a result of the leveraged investment strategy; and (3) these investment losses lead directly to the Respondent filing an assignment in bankruptcy and his present impecuniosity.

42. The Respondent states that, at the time he explained the leverage investment strategy to clients and implemented the strategy in client accounts: (1) he had received no specific training regarding the use of leverage and did not have personal experience with respect to the use of leverage; and (2) Berkshire's policies and procedures did not contain

leverage suitability guidelines. Nonetheless, the Respondent acknowledges that he proceeded to implement the leverage investment strategy in client accounts.

43. The Respondent states that the transactions that he processed in the client accounts were approved by his Branch Manager.

44. By entering into this Agreed Statement of Facts, the Respondent has saved the MFDA the time, resources and expenses associated with conducting a full hearing of the allegations set out in the Notice of Hearing.

45. Manulife Securities has entered into settlements with some of the clients who filed complaints with respect to the Respondent's handling of their accounts.

Misconduct Admitted

46. The Respondent admits the following violations of the By-laws, Rules or Policies of the MFDA:

    (a) between about November 2003 and April 2007, the Respondent failed to fully and adequately explain the risks, benefits, material assumptions, features and costs of a leveraged investment strategy that he implemented in the accounts of 9 clients, thereby failing to ensure that the leveraged investment strategy was suitable for the clients and in keeping with the clients' investment objectives, contrary to MFDA Rules 2.2.1 and 2.1.1; and
    (b) between about November 2003 and April 2007, the Respondent failed to ensure that the leveraged investment strategy that he implemented in the accounts of 9 clients was suitable for the clients and in keeping with their investment objectives, having regard to the clients' relevant Know-Your-Client information and financial circumstances, including but not limited to the clients' ability withstand investment losses and afford the costs associated with the investment loans, contrary to MFDA Rules 2.2.1 and 2.1.1.

E. CHANGES FROM THE ORIGINAL ALLEGATIONS

14. The Hearing Panel notes that the misconduct admitted by the Respondent in the Agreed Statement of Facts is significantly different from the misconduct alleged by Staff in the Notice of Hearing.

15. The Notice of Hearing alleged that the Respondent "misrepresented" and/or "omitted to explain" the risks, benefits, material assumption, features and costs of a leveraged investment strategy which was implemented in the accounts of 9 clients. Both of these Allegations were

effectively withdrawn by Staff in the admitted misconduct contained in the Agreed Statement of Facts.

16. The Notice of Hearing also alleged that the Respondent "recommended" the leveraged investment strategy to the clients in question. This Allegation was not contained in either of the Allegations agreed to by the Respondent.

17. At the Hearing on the Merits, this Hearing Panel was asked to consider an appropriate penalty for misconduct of a significantly different nature and quality than that originally alleged.

18. Our findings reflect this altered state of affairs.

F. FINDING OF MISCONDUCT

19. MFDA Rule 2.2.1 provided as follows during the relevant period of time:

> 2.2.1 "Know-Your-Client". Each Member and Approved Person shall use due diligence:
>
> (a) to learn the essential facts relative to each client and to each order or account accepted;
>
> (b) to ensure that the acceptance of any order for any account is within the bounds of good business practice; and
>
> (c) to ensure that each order accepted or recommendation made for any account of a client is suitable for the client and in keeping with the client's investment objectives; and
>
> (d) to ensure that, notwithstanding the provisions of paragraph (c), where a transaction proposed by a client is not suitable for the client and in keeping with the client's investment objectives, the Member has so advised the client before execution thereof.

20. MFDA Rule 2.1.1 provides as follows:

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.

21. Rule 2.2.1 codified the "Know-Your-Client" and "suitability" obligations recognized by securities regulators. In E.A. Manning Ltd. et al (Re), the Ontario Securities Commission held that "these requirements are an essential component of the consumer protection scheme of the Act and a basic obligation of a registrant, and a course of conduct by a registrant involving the failure to comply with them is an extremely serious matter."

Re: *E.A. Manning Ltd. et al (Re*), 1995 LNONOSC 377 (OSC) at p. 34.

22. In Lamoureux (Re), the Alberta Securities Commission stated that "the "know your client" and "suitability" obligations are conceptually distinct but, in practice, they are so closely connected and interwoven that the terms are sometimes used interchangeably. The "know your client" obligation is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance. The "suitability" obligation is the obligation on a registrant to determine whether an investment is appropriate for a particular client. Assessment of suitability requires both that the registrant understands the investment product and knows enough about the client to assess whether the product and client are a match."

Re: *Lamoureux (Re)*, 2001 LNABASC 433 (A.S.C.) ("Lamoureux") at pp. 11-12.

23. Securities authorities have adopted a three-stage analysis of suitability, according to which a registrant is obliged to:

(a) use due diligence to know the product and know the client;

(b) apply sound professional judgment in establishing the suitability of the product for the client; and

(c) disclose the negative as well as the positive aspects of the proposed investment.

Re: *Lamoureux*, supra at pp. 16-18.

Re: *Bilinski (Re)*, 2002 LNBCSC 1 (B.C.S.C), at paras. 330-333.

24. In Lamoureux, the Securities Commission explained the three stage process that an advisor must follow to fulfill their suitability obligations, stating that:

> Knowing the product involves carefully reviewing and understanding the attributes, including associated risks, of the securities that they are considering recommending to their clients.
>
> Only after the "due diligence" of the first stage is completed, can the registrant move to the second stage in which they fulfil their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for the client.
>
> Suitability determinations . . . will always be fact specific. A proper assessment of suitability will generally require consideration of such factors as a client's income, net worth, risk tolerance, liquid assets and investment objectives, as well as an understanding of particular investment products. The registrant must apply sound professional judgement to the information elicited from "know your client" inquiries. If, based on the due diligence and professional assessment the registrant reasonably concludes that an investment in a particular security in a particular amount would be suitable for a particular client, it is then appropriate for the registrant to recommend the investment to that client.
>
> By recommending a securities transaction to a client, a registrant enters the third stage of the process… At this stage, when making the client aware of a potential investment, the registrant is obligated to make the client aware of the negative material factors involved in the transaction, as well as positive factors.
>
> The disclosure of material negative factors in the third stage of the process is intended to assist the client in making an informed investment decision.

Re: *Lamoureux*, supra at pp. 16-17.

25. In the Agreed Statement of Facts, the Respondent conceded that he failed to fully and adequately explain the risks, benefits, material assumptions, features and costs of a leveraged investment strategy that he implemented in the accounts of 9 clients, thereby failing to ensure that the strategy was suitable for the clients and in keeping with the clients' investment objectives.

26. The admissions of the Respondent clearly prove that he acted contrary to MFDA Rules 2.2.1 and 2.1.1 and that Allegation #1 is established.

27. In the Agreed Statement of Facts, the Respondent admits that he also acted contrary to Rules 2.1.1 and 2.1.1 when he failed to ensure that the leveraged investment strategy that he implemented in the accounts of 9 clients was suitable for the clients and in keeping with their investment objectives, having regard to the clients' Know-Your-Client information and financial circumstances, including but not limited to the clients' ability to withstand investment losses and afford the costs associated with the investment losses.

28. Consequently, we unanimously find that Allegation #2 is established.

G. JOINT SUBMISSION AS TO PENALTY

29. The parties jointly recommended that the following penalties and costs be imposed upon the Respondent:

(a) a five (5) year prohibition from conducting securities related business while in the employ of or associated with any MFDA Member, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
(b) a fine in the amount of $25,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
(c) costs in the amount of $7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

30. The law is clear that a Hearing Panel should not interfere with such a joint submission unless it considers the recommendation to be manifestly unfit. In the criminal law context, the standard most often cited by the Courts for rejection of a joint submission as to sentence is that it would be "contrary to the public interest" and would "bring the administration of justice into disrepute".

Re: *R. v. R.W.E.*, [2007] O.J. No. 2515 (Ont. C.A.) at paras. 22-31.

Re: *Hunt (Re)* 2014 LNCMFDA 54 at para. 12.

H. FACTORS CONCERNING THE APPROPRIATENESS OF THE PENALTIES

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

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

Re: *Headley (Re)*, 2006 LNCMFDA 3, at para. 85.

32. The Hearing Panel was provided with excerpts from the MFDA Penalty Guidelines seeking to show that the proposed penalties were consistent with these Guidelines. These Guidelines are not mandatory but are intended to assist Hearing Panels when considering appropriate penalties in MFDA disciplinary proceedings.

I. CONSIDERATIONS IN THE PRESENT CASE

33. At the Hearing on the Merits, Staff provided the Hearing Panel with extensive written submissions. Oral submissions were also made by Counsel for Staff and the Respondent. These submissions contained an analysis of both aggravating and mitigating factors.

34. We considered the following aggravating factors:

(a) The failure by the Respondent to comply with the Know-Your-Client and suitability obligations set out in the Rules is an extremely serious matter.
(b) The Respondent's conduct occurred over a lengthy period of time, and involved a large number of clients and quantum of investments. Between November 2003 and April 2007, 9 clients obtained investment loans totaling $700,000 in order to implement the leveraged investment strategy.
(c) The clients who implemented the leveraged investment strategy incurred significant investment losses.
(d) The Respondent benefitted from his misconduct. By borrowing to invest, the clients increased the amount of monies invested in mutual funds, which had the effect of generating additional sales commissions or other payments for the benefit of the Respondent.

35. Against the aggravating factors, we weighed the following mitigating factors:

(a) The Respondent has no disciplinary history with the MFDA.

(b) By entering into an Agreed Statement of Facts, which includes a joint recommendation as to penalties and costs, the Respondent has accepted responsibility for his misconduct, saved the MFDA from having to expend additional resources to conduct a full disciplinary proceeding and demonstrated that he recognizes the seriousness of his misconduct.

(c) The Respondent advised that he invested in the same leveraged investment strategy as his clients and suffered similar investment losses, which resulted in him filing an assignment in bankruptcy. It was the submission of Staff that the Respondent's own experience with the leveraged investment strategy has likely led him to recognize the seriousness of his misconduct.

J. PREVIOUS DECISIONS

36. In its written submissions, Staff provided the Hearing Panel with a number of MFDA and Investment Industry Regulatory Organization of Canada ("IIROC") Decisions made in similar circumstances which, it submitted, demonstrated that the joint recommendation as to penalties and costs in the case before us falls within an acceptable range of outcome. These Decisions included:

(a) Mytting (Re), 2012 LNIIROC 45.

(b) Sarker (Re), [2014] MFDA Central Regional Council, MFDA File No. 201327, Hearing Panel Decision, dated February 28, 2014.

(c) Grasgasin (Re), [2014] MFDA Prairie Regional Council, MFDA File No. 201249, Hearing Panel Decision, dated July 9, 2014.

(d) Sobrevilla (Re), [2014] MFDA Prairie Regional Council, MFDA File No. 201351, Hearing Panel Decision, dated July 9, 2014.

(e) Sulkers (Re), [2014] MFDA Prairie Regional Council, MFDA File No. 201318, Hearing Panel Decision, dated July 9, 2014.

(f) Snyder (Re), [2014] MFDA Atlantic Regional Council, MFDA File No. 201330, Hearing Panel Order, dated December 9, 2014.

37. The Hearing Panel is also aware of a number of leveraged investment strategy cases which were not resolved by way of either an Agreed Statement of Facts or a Settlement Agreement. In those cases, the penalties imposed by the Hearing Panel were more onerous than the ones proposed in this case. These cases included:

(a) Arseneau (Re), 2012 LNCMFDA 93.
(b) DeVuono (Re), 2013 LNCMFDA 34.
(c) Pretty (Re), 2014 LNCMFDA 56.

K. DECISION ON PENALTY

38. As indicated, the Notice of Hearing alleged that the Respondent "misrepresented" or "omitted to explain" certain things in connection with the leveraged investment strategy. It also alleged that he "recommended" this strategy to the clients in question. These Allegations were removed from the Agreed Statement of Facts.

39. Were it not for the removal of these Allegations and the mitigating factors listed above, we would have been inclined to impose harsher penalties.

40. After a detailed consideration of the Agreed Statement of Facts, the applicable law and the submissions of the parties, we unanimously concluded that we should accept the joint recommendation as to penalties and costs of Staff and the Respondent.

L. PENALTIES IMPOSED

41. At the conclusion of the Hearing on the Merits, we issued an Order imposing the following penalties on the Respondent:

(a) a five (5) year prohibition from conducting securities related business while in the employ of or associated with any MFDA Member;

(b) a fine in the amount of $25,000; and

(c) costs in the amount of $7,500.

DATED this 23rd day of March, 2015.

"Thomas J. Lockwood"

Thomas J. Lockwood, Q.C.
Chair

"Susan Nixon"

Susan Nixon
Industry Representative

"Darrell Bing"

Darrell Bing
Industry Representative

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