



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

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

Re: M. Hershberg Capital Limited

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. By Notice of Hearing issued December 20, 2010, the Mutual Fund Dealers Association of Canada (“MFDA”) commenced a disciplinary proceeding against M. Hershberg Capital Limited (“Respondent”) pursuant to ss. 20 and 24 of MFDA By-law No. 1 (“By-law No. 1”).

2. By Notice of Settlement Hearing, the MFDA will announce that it proposes to hold a hearing to consider whether, pursuant to s. 24.4 of By-law No. 1, a hearing panel of the Central Regional Council of the MFDA (“Hearing Panel”) should accept the settlement agreement entered into between Staff of the MFDA (“Staff”) and the Respondent (“Settlement Agreement”).

II. JOINT SETTLEMENT RECOMMENDATION

3. Staff conducted an investigation of the Respondent’s activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be

penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

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

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

III. ACKNOWLEDGEMENT

6. Staff and the Respondent agree with the facts set out in Parts IV and V herein for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondent or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceedings brought by the MFDA (subject to Part XI) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is approved by the MFDA.

IV. AGREED FACTS

Registration History and Current Status

7. The Respondent was registered in Ontario as a mutual fund dealer and had been a Member of the MFDA since March 8, 2002.

8. On April 6, 2011, the Respondent, of its own volition, gave notice to the MFDA of its intention to resign from MFDA membership, and the Respondent has since ceased operations as a mutual fund dealer.

9. Apart from the completion of the settlement herein, there are no outstanding matters to be addressed prior to the resignation being accepted by the MFDA.

10. During the time the Respondent was an MFDA Member, the Respondent's head office and only branch were located and operated out of the same premises in St. Catharines, Ontario.

11. Miles Jerrold Hershberg ("Mr. Hershberg") was the owner, President and controlling mind of the Respondent from January 1992 and for the duration of the Respondent's membership in the MFDA.

12. Mr. Hershberg was registered as the Ultimate Designated Person, Chief Compliance Officer, Branch Manager and as a Dealing Representative (mutual fund salesperson) of the Respondent and had held these or similar designations during the time the Respondent was registered.

13. At all material times, Mr. Hershberg, and the mutual fund salespersons registered with the Respondent, conducted the trading activity described herein.

14. To the best of Staff's knowledge, Mr. Hershberg is not currently working in the securities industry.

MFDA Compliance Examination 2004

15. In August 2004, MFDA Compliance Staff attended at the location of the Respondent's head office and branch and completed a compliance examination covering the period April 1, 2002 to June 30, 2004 ("1st Examination").

16. The results of the 1st Examination were summarized and delivered to the Respondent in a report dated September 20, 2004 ("1st Report").

17. The 1st Report identified a number of deficiencies, including:

- i) incomplete Know-Your-Client ("KYC") information in 18 out of 44 client files reviewed;
- ii) KYC time horizon information that was uniformly recorded for all clients as "one year or less", i.e. to align with the trading practices of the Member; and
- iii) trades that were processed without sufficient evidence of clients' specific instructions.

MFDA Compliance Examination 2008

18. In October 2008, MFDA Compliance Staff attended at the Respondent's head office and branch and completed a compliance examination covering the period July 1, 2004 to August 31, 2008 ("2nd Examination").

19. The results of the 2nd Examination were summarized and delivered to the Respondent in a report dated January 22, 2009 ("2nd Report").

20. The 2nd Report identified a number of deficiencies including:

- i) incomplete KYC information for some of the client files reviewed;
- ii) client portfolios that were constructed to be consistent with one of two model portfolios used by the Respondent to determine the holdings in clients' accounts, which holdings were inconsistent with certain aspects of clients' documented KYC information; and
- iii) trades that were processed without sufficient evidence of clients' specific instructions.

21. Following the 2nd Examination, MFDA Compliance Staff referred the matter to MFDA Enforcement for further investigation and review.

Use of Two Model Portfolios

22. From March 2002 until its resignation, the Respondent serviced the accounts of approximately 130 families, comprising approximately 300 individual clients.

23. Almost all of the Respondent's clients were invested in one of two "model portfolios" of holdings (the "Model Portfolios"). The composition of the holdings in the clients' accounts would track the holdings in the Model Portfolios. The Model Portfolios were substantially the same as each other in composition, save for the fact that one of the Model Portfolios was designated for use with registered accounts and the other for use with non-registered accounts.

24. Commencing in late 2008 and continuing to March 2009, the Respondent updated KYC information for substantially all of its clients which aligned the clients' newly documented KYC

information with the investment parameters of the Model Portfolios which the Respondent managed since 2004 and before.

25. As a result of this KYC updating process, the information recorded on the clients' KYC forms uniformly reflected the following characteristics in all or substantially all instances:

- i) an identical risk tolerance breakdown of:
 - a. 10% high,
 - b. 30% medium to high, and
 - c. 60% medium;
- ii) an identical investment objective of "growth"; and
- iii) an identical time horizon of "4-5 years".

Trading inconsistent with documented KYC information

26. From July 2004 to October 2008, prior to undertaking the process of updating the clients' KYC information as described above, the Respondent failed to ensure that trading activity in client accounts was consistent with the clients' documented KYC information, contrary to MFDA Rules 2.2.1 and 2.5.1. For example, in 16 of 33 accounts reviewed by MFDA Compliance and Enforcement Staff, clients who had a documented KYC risk tolerance of "medium" purchased investments comprising at least 28% of the total value of their holdings that had risk ratings of "medium/high" and "high". As such, either the trades were not suitable based on the documented KYC information maintained in the Respondent's records, or the Respondent failed to obtain and document up-to-date KYC information in respect of the clients.

Discretionary Trading

27. From 2002 to present, the Respondent's practice was to conduct all client trading using a limited trade authorization ("LTA") completed by the client at the time of account opening.

28. From July 2004 to May 2009, once the LTAs were executed by the clients, Mr. Hershberg did not meet with the clients to receive trade instructions; rather, he recorded a weekly outgoing telephone message setting out a recommended trade based on forthcoming changes to the Model Portfolios that clients were instructed to telephone in and listen to. The

telephone messages did not include the specific date on which the trade would take place in the client's account.

29. Once clients had listened to Mr. Hershberg's recorded telephone message setting out the recommended forthcoming trade(s) in the Model Portfolios, Mr. Hershberg and the Respondent's other mutual fund salespersons would place outgoing calls and receive incoming calls from the clients, and record details of the clients' instructions in handwritten call logs (the "Call Logs").

30. The Call Logs were grouped by headings that, at times, identified a given trade recommendation for the Model Portfolios (for example "Sell 661, Buy 290" – referring to fund codes), and contained the Respondent's staff's notes identifying the date (and sometimes the time) of the calls, thus failing to maintain evidence of the following elements of the trade:

- i) the fund codes (in those instances where the fund codes were not noted on the Call Logs, which occurred more often than not), units, or names of the mutual funds to be bought and sold;
- ii) the relevant client accounts in which the trades were to be conducted; and/or
- iii) the dollar or percentage amounts of each mutual fund to be transacted.

31. In addition, the Call Logs identified only family surnames or one family member's name, such that in some instances trade instructions were received from only one client but the same trades would be transacted in the accounts of other family member clients.

32. Since 2004 and before, in order to maintain the uniformity of client accounts under the Model Portfolios approach, the Respondent had to ensure that the holdings in each client account reflected the same composition as the Model Portfolio it was tracking. As a consequence, the Respondent attempted to process all client trades on the same day. However, due to the number of clients that had to be contacted, the Respondent often executed the trades in an individual client's account several days, and sometimes up to a week, after the Respondent had received instructions from the client to process the trade.

V. RESPONDENT'S CURRENT STATUS

33. There are no outstanding client complaints made to the Respondent or to the MFDA

regarding the Respondent or its Approved Persons.

34. There are no other open or outstanding MFDA enforcement files regarding the Respondent.

VI. CONTRAVENTIONS

35. The Respondent admits that:

- i) From July 2004 to October 2008, the Respondent failed to ensure that trades in the accounts of clients were consistent with the clients' documented KYC information in that purchase transactions of "medium/high" and "high" risk investments were made in accounts of clients who had a risk tolerance of "medium" recorded on their KYC forms, contrary to MFDA Rules 2.2.1 and 2.5.1;
- ii) From July 2004 to May 2009, the Respondent engaged in discretionary trading in that trades were executed in client accounts:
 - a. pursuant to limited trading authorizations but absent evidence of specific client instructions; and
 - b. several days after receiving client instructions for trades, contrary to MFDA Rules 2.3.2, 5.1(b), and 2.1.1; and
- iii) From July 2004 to May 2009, the Respondent conducted trades for multiple family members' accounts when the Respondent had received trade instructions from only one person in the family who did not have trading authority over the other accounts, contrary to MFDA Rule 2.1.1.

VII. TERMS OF SETTLEMENT

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

- i) The Respondent shall pay a fine in the amount of \$10,000, pursuant to s. 24.1.2(b) of MFDA By-law No. 1;
- ii) The Respondent shall pay costs in the amount of \$2,500, pursuant to section 24.2 of MFDA By-law No. 1; and

iii) Mr. Hershberg shall attend in person at the Settlement Hearing.

VIII. STAFF COMMITMENT

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

38. Nothing in this Settlement Agreement prevents the Respondent from reapplying for MFDA membership in the future.

IX. PROCEDURE FOR APPROVAL OF SETTLEMENT

39. Acceptance of this Settlement Agreement shall be sought at a hearing of the Central Regional Council of the MFDA on a date agreed to by counsel for Staff and the Respondent.

40. Staff and the Respondent may refer to any part, or all, of the Settlement Agreement at the settlement hearing. Staff and the Respondent also agree that if this Settlement Agreement is accepted by the Hearing Panel, it will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter, and the Respondent agrees to waive its rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction.

41. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, then the Respondent shall be deemed to have been penalized by the Hearing Panel pursuant to s. 24.1.2 of By-law No. 1 for the purpose of giving notice to the public thereof

in accordance with s. 24.5 of By-law No. 1.

42. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against it.

X. FAILURE TO HONOUR SETTLEMENT AGREEMENT

43. If this Settlement Agreement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff reserves the right to bring proceedings under s. 24.3 of By-law No. 1 against the Respondent and any of its officers or directors based on, but not limited to, the facts set out in Part IV of the Settlement Agreement, as well as the breach of the Settlement Agreement. If such additional enforcement action is taken, the Respondent agrees that the proceedings may be heard and determined by a hearing panel comprised of all or some of the same members of the hearing panel that accepted the Settlement Agreement, if available.

XI. NON-ACCEPTANCE OF SETTLEMENT AGREEMENT

44. If, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel or an Order in the form attached as Schedule “A” is not made by the Hearing Panel, each of Staff and the Respondent will be entitled to any available proceedings, remedies and challenges, including proceeding to a disciplinary hearing pursuant to s. 20 and 24 of By-law No. 1, unaffected by this Settlement Agreement or the settlement negotiations.

45. Whether or not this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees that it will not, in any proceeding, refer to or rely upon this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any allegation against the MFDA of lack of jurisdiction, bias, appearance of bias, unfairness, or any other remedy or challenge that may otherwise be available.

XII. DISCLOSURE OF AGREEMENT

46. The terms of this Settlement Agreement will be treated as confidential by the parties hereto until accepted by the Hearing Panel, and forever if, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel, except with the written consent of both the Respondent and Staff or as may be required by law.

47. Any obligations of confidentiality shall terminate upon acceptance of this Settlement Agreement by the Hearing Panel.

XIII. EXECUTION OF SETTLEMENT AGREEMENT

48. This Settlement Agreement may be signed in one or more counterparts, which together, shall constitute a binding agreement.

49. A facsimile copy of any signature shall be effective as an original signature.

Dated: September 18th, 2011.

“Howard Winkler”

Witness – Signature

Howard Winkler

Witness - Print name

“Miles Hershberg”

M. Hershberg Capital Limited
Per: Miles Jerrod Hershberg

“Mark Gordon”

Staff of the MFDA
Per: Mark Gordon
Executive Vice-President



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PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
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Re: M. Hershberg Capital Limited

ORDER

WHEREAS on [date], the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Settlement Hearing pursuant to section 24.4 of By-law No. 1 in respect of M. Hershberg Capital Limited (the "Respondent");

AND WHEREAS the Respondent entered into a settlement agreement with Staff of the MFDA, dated [date] (the "Settlement Agreement"), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

AND WHEREAS the Hearing Panel is of the opinion that:

- i. From July 2004 to October 2008, the Respondent failed to ensure that trades in the accounts of clients were consistent with the clients' documented KYC information in that purchase transactions of "medium/high" and "high" risk investments were made in accounts of clients who had a risk tolerance of "medium" recorded on their KYC forms, contrary to MFDA Rules 2.2.1 and 2.5.1;

ii. From July 2004 to May 2009, the Respondent engaged in discretionary trading in that trades were executed in client accounts:

- a. pursuant to limited trading authorizations but absent evidence of specific client instructions; and
- b. several days after receiving client instructions for trades,

iii. From July 2004 to May 2009, the Respondent conducted trades for multiple family members' accounts when the Respondent had received trade instructions from only one person in the family who did not have trading authority over the other accounts, contrary to MFDA Rule 2.1.1.

IT IS HEREBY ORDERED THAT the Settlement Agreement is accepted, as a consequence of which:

1. The Respondent shall pay a fine in the amount of \$10,000, pursuant to s. 24.1.2(b) of MFDA By-law No. 1;
2. The Respondent shall pay costs in the amount of \$2,500, pursuant to s. 24.2 of MFDA By-law No. 1; and
3. If at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this [day] day of [month], 20[].

Per: _____
[Name of Public Representative], Chair

Per: _____
[Name of Industry Representative]

Per: _____
[Name of Industry Representative]

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