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Discipline

Discipline Penalties Imposed on David Michael Michaels; Violations of By-law 29.1 and By-law 19.6

Person Disciplined A Hearing Panel appointed pursuant to IDA By-law 20 has imposed discipline penalties on David Michael Michaels (“Michaels”), at all material times a Registered Representative with the Victoria, BC office of Dundee Securities Corporation (“Dundee”), a Member of the IDA.

By-laws,
Regulations,
Policies Violated

Following a hearing held on January 15 and 16, 2007 in Victoria, BC, a Hearing Panel determined that:

1. Between April 2000 and October 2000, Michaels had facilitated and solicited participation in the sales of shares of a public company, Landstar Inc. (“Landstar”), which transactions were conducted off the books and records of Dundee, contrary to By-law 29.1;
2. Between April 2000 and October 2000, Michaels advised and assisted clients with respect to the purchase of shares of Landstar when his registration was restricted to the sale of mutual funds, contrary to the *British Columbia Securities Act* and By-law 29.1;
3. Michaels entered into personal financial dealings with clients, contrary to Standard C of the *Conduct and Practices Handbook* and By-law 29.1;
4. Michaels attempted to conceal information during the course of an Association investigation and misled Association staff with respect to facts reasonably required for purposes of its

investigation; he also attempted to frustrate the Association's investigation, contrary to By-laws 19.6 and 29.1; and

5. Between August 1999 and February 2004 inclusive, Michaels maintained an account at another Member firm without the knowledge or consent of Dundee, contrary to By-law 29.1.

Michaels was also charged with misappropriation of monies and/or securities from his clients and/or obtaining a secret commission from his clients, contrary to By-law 29.1. However, the Hearing Panel determined that there was no evidence of a lack of consent on the part of the clients involved and accordingly, the allegation was dismissed.

Penalty Assessed The penalty assessed against Michaels was a fine of \$45,000, a prohibition against Michaels making application as an Approved Person for two months, a pre-condition of re-approval in any capacity that Michaels successfully complete the Conduct and Practices Handbook Course administered by the Canadian Securities Institute, and as a further pre-condition of re-approval in any capacity, Michaels must pay the fine and costs herein in full. Further, in the event that Michaels is again registered as an Approved Person, his registration will be subject to six months of close supervision. Michaels was also ordered to pay \$15,000 towards the Association's costs of this matter.

Summary of Facts Michaels was employed by Dundee from August 27, 1999 to February 20, 2004 when his employment was terminated by that firm.

Landstar was headquartered in Victoria, BC. Its shares were quoted on the NASD Over the Counter Bulletin Board, but as a result of a failure to file a Registration Statement with the Securities and Exchange Commission, it was relegated to the "Pink Sheets". The Pink Sheets are daily printed listings containing quotations for thousands of over-the-counter stocks that are not listed on any of the major stock exchanges. Michaels arranged to sell Landstar shares to 13 of his clients, who purchased approximately 140,000 shares in total, almost all at US \$ 0.47 per share. None of these sales were recorded on the books and records of Dundee and Dundee was unaware of Michaels' activities in this regard.

With respect to these activities, the Panel stated that off-book transactions, or "selling-away" have the potential to put at risk the client, the firm and the registrant. The firm is an important industry gatekeeper and it is unable to properly perform this important function if it is not made aware of these transactions. In addition, the clients are put at risk because of the conduct of the salesperson was unsupervised by the firm and potential conflicts of interest could not

be properly managed for the protection of the client.

At the time of the Landstar sales, Michaels' registration was restricted to the sale of mutual funds. He was not registered to advise or sell non-mutual fund securities. Michaels had previously been reminded by the British Columbia Securities Commission on an unrelated matter that his registration was so restricted.

In this regard, the Panel stated that the securities legislation in each of the provinces is the foundation upon which the rules of the Association are based. It is incumbent on all participants in the securities regulatory system to understand the rules and legislation, including the provisions of the *British Columbia Securities Act*. The Panel found that the fact that Michaels had not, at the time, taken the *Conduct and Practices Handbook Course* was no excuse for not being aware of the regulatory requirements. It was also important to note that Michaels had been involved in the securities industry since 1988.

The next allegation involved Michaels' undisclosed personal financial dealings with clients. Once again, the Panel noted that the harm is that the activity is conducted out of the sight of the firm and clients are at risk because the conduct of the salesperson is unsupervised by the firm and potential conflicts of interest cannot be properly managed for the protection of the client.

There were three issues that formed the basis of the finding of liability with respect to personal financial dealings.

The first issue involved Michaels' attempts to settle the matters relating to the Landstar shares without Dundee's knowledge. The Panel stated that, on the face of it, such conduct could be seen as laudatory. The problem, however, is that the firm was unaware of the conduct and was unable to take steps to protect itself, the client and the registrant. By attempting to settle matters with clients outside the firm's knowledge, Michaels placed himself in a conflict of interest with clients. The clients were entitled to an independent review of the issues and to pursue a number of remedies. By depriving the clients of this opportunity, Michaels preferred his interest to that of his clients.

The second issue involved Michaels' repayment of a \$2,575.87 deferred service charge to a client, which raised similar issues to the attempt to settle the matters regarding the Landstar shares.

The third issue involved Michaels' receipt of more than \$50,000 in loans from clients. These clients were close friends of Michaels. However, once again, Dundee was unaware of these transactions between Michaels and his clients. The firm and the clients were at risk because the conduct of the salesperson was unsupervised by the firm and potential conflicts of interest could not be properly managed

by the firm.

The Panel found that there was no evidence to suggest that that Michaels was being purposefully deceitful in his dealings with clients. He was generally unaware that his conduct was inappropriate and that, in respect of repayments, he was making an honest attempt to make his clients whole.

The next allegation involved the Association's investigation. The Association questioned Michaels regarding the Landstar share sales. His first response, in writing was to admit to the sale of Landstar shares to four clients. He and his then legal counsel later advised the Association that there were five clients. Subsequently, the Association, through its own efforts, identified a further five clients. When confronted regarding the additional clients, Michaels advised the Association that he knew he should have previously disclosed those clients to the Association. Despite being previously asked by the Association to identify all the clients on earlier occasions, it was only in his third interview that Michaels finally revealed all 13 clients who purchased Landstar shares. These changing versions of events were provided by Michaels to the Association over a period of a number of months.

In this regard, the Panel found that Association By-laws require that registered representatives comply in a timely manner with requests from the Association for information and records. In addition, registrants owe a professional duty to respond fully and in a timely manner to inquiries made by the Association. There was no question in the mind of the Panel that Michaels knowingly failed to respond in a timely and truthful manner to inquiries made by the Association regarding the extent of Landstar share sales to clients. He may have panicked, but that is no excuse.

The next allegation was that, prior to and during the currency of his employment with Dundee Michaels controlled an account at another Member firm. Dundee was unaware of this account.

The Panel found that salespersons having a direct or indirect interest in a brokerage account at another Member firm are required to advise their employer of the account and to provide duplicate statements for the account to the employer for monitoring. The rationale for the rule is that the firm requires this information to properly supervise salespersons. There was no evidence to suggest that Michaels was unaware of this requirement. However, there was also no evidence to suggest that anything untoward occurred in the outside account.

Allegation Not Made Out

With respect to the Landstar shares, Michaels purchased each share for US \$0.25. With one exception, the clients paid US \$0.47 per share. Association staff alleged that Michaels retained the difference

for himself without advising the clients and by retaining a percentage of the shares purchased with the client's funds for himself, Michaels misappropriated shares and/or monies for himself from his clients. The Panel, however found that there was no evidence as to the state of the clients' knowledge or consent and accordingly determined that the allegation had not been made out.

Michaels is not currently registered in the industry.

The Association will appeal this decision to the British Columbia Securities Commission with respect to the penalty imposed by the Hearing Panel.

The Decision of the Hearing Panel in this matter will be posted to the Association's website www.ida.ca.

Kenneth A. Nason
Association Secretary