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: Ayokunnu Are

Heard: September 9-13, 2013 and May 22-23, 2014, in Toronto, Ontario
Decision and Reasons (Misconduct): October 20, 2014

DECISION AND REASONS
(Misconduct)

Hearing Panel of the Central Regional Council:

The Hon. Edward Saunders, Q.C.	Chair
Brigitte Geisler	Industry Representative
Robert C. White	Industry Representative

Appearances:

Charles Toth	)	Senior Enforcement Counsel, Mutual Fund Dealers Association of Canada ("MFDA")
Ayokunnu Are	)	Respondent
Joseph Bird	)	Advisor to the Respondent

I. Background

1. Between January 2004 to October 2008, the Respondent, Ayokunnu Are (the "Respondent") was registered as a mutual fund sales person with the three following members of the MFDA at the following times:

(a) From January 23 to May 3, 2004 with Manulife Securities Investment Services Inc.;
(b) From May 6, 2004 to November 23, 2006 with Dundee Private Investors Inc. ("Dundee"); and
(c) From December 12, 2006 to January 15, 2008 with FundEX Investments Inc. ("FundEX").

2. From February 15 to October 30, 2008, the Respondent was registered as a sales person with ASG Financial Corp. ("ASG"), a limited market dealer. The Respondent is currently not registered in the securities industry in any capacity.

3. The Respondent was involved in transactions whereby mutual fund clients and other individuals obtained promissory notes (the "JYL Notes") of a U.S. farming business known as the Jenkins Dairy Farm, JYL Agribusiness or JYL Dairy Partners LLC (collectively "JYL"). The JYL Notes bore interest at 13% per annum payable either quarterly or monthly at the option of the holder. The principal was payable at the end of three years and there was no privilege of prepayment. There was a security interest in the dairy cows owned by JYL.

4. The JYL Notes were offered through Summit Trust Company, a U.S. corporation ("Summit Trust"). A proposed holder would deposit monies in an account with Summit Trust who would transfer the monies to JYL and issue a note to the holder.

5. The Respondent was involved in just under 4 million (U.S.) JYL Note transactions. Of these, at least $2.8 million occurred while he was registered as a mutual fund sales person with either Dundee or FundEX. Some of the holders were current clients of FundEX. Some were also

clients of Dundee but those transactions occurred after he was no longer registered as a sales person for Dundee.

6. The involvement of the Respondent in the transactions included:

(a) Providing information and answering questions about the JYL Notes and, in some cases, recommending their acquisition;
(b) Providing proposed holders with Summit Trust application forms and in some cases helping them to complete them;
(c) Receiving the completed forms and the cheques and forwarding them to Summit Trust if instructed to do so.

7. While he was an Approved Person of either Dundee or FundEX, the Respondent was paid a monthly payment of between $5,000 and $11,000 by JYL to put on seminars and for other marketing expenses, such as a direct marketing campaign. The Respondent said that he did not address any JYL or Summit Trust products during the seminars, but provided information about them following the seminars if asked about alternative products.

8. According to accounting records produced by the Respondent, he received at least $528,000 (U.S.) in commission and fees from JYL and its principals between September 27, 2006 and December 31, 2008. The commissions were first paid at the rate of 6%, then at 10% and finally at 13%.

9. Until about August 2009, JYL paid interest to the holders in accordance with the terms of the JYL Notes. It then started to miss payments or to pay less than the full amount due. In June 2010, payments ceased. There has been some litigation and other proceedings intended to collect what is owing to the holders. Some of the proceedings are ongoing. There has been some recovery but none of the holders has received a substantial return of the monies they provided.

10. On October 2, 2012, the MFDA issued a Notice of Hearing against the Respondent containing three allegations of misconduct contrary to the Rules and By-Laws of the MFDA.

II. First Allegation of Misconduct

11. The first allegation against the Respondent is that between August 2005 and January 2008, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of the Member by recommending, selling, facilitating the sale of, or making referrals in respect of the sale of at least $3.2 million of promissory notes to at least 10 clients and 20 other individuals outside the Member, contrary to MFDA Rules 1.1.1, 2.4.2 and 2.1.1.

12. MFDA Rule 1.1.1 states, in part, that no Approved Person shall, directly or indirectly, engage in any securities related business unless it is carried on for the account of the Member through the facilities of the Member and in accordance with the by-laws and rules of the MFDA.

13. The term "securities related business" is defined in MFDA By-Law No. 1 as follows:

> ... 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.

14. Referral arrangements which are connected to securities related business must also be done through the Member in accordance with MFDA Rule 2.4.2 which requires, among other things, that: the referral arrangement must be between the Member and an appropriate entity; there is a written agreement governing the referral of the arrangement prior to implementation; and all fees and other forms of compensation paid as part of the referral arrangement must be recorded on the books and records of the Member.

15. A key issue with respect to Allegation #1 is whether the JYL Notes are "securities" within the meaning of the MFDA Rules. It is a position of the Respondent that the Notes are not securities.

16. The Respondent contends that the securities issue must be determined according to the laws of Delaware, one of the United States of America and that under Delaware law the JYL Notes are not a security. The JYL Notes contain a provision which states "This Note will be governed by the laws of the State of Delaware".

17. The issue of the applicability of Delaware law was raised by the Respondent for the first time in submissions filed after the evidence had been completed. If foreign law is to be relied on, it must be pleaded and proved as a fact. In the absence of such a pleading or proof, there is a presumption that the law of Delaware is the same as the law of Ontario. In this case, if Delaware law were to be applied, it would have to be proven as a question of fact and not on the basis of research conducted by counsel or by the tribunal. (See *Yordanes v. Bank of Nova Scotia*, 78 O.R. (3d) 590 (paras. 49, 50 and 139). It would have to be proven that the JYL Notes were not securities under Delaware law.

18. It is our opinion that the issue of whether the JYL Notes are securities must be determined under the law of Ontario. This is a disciplinary hearing dealing with alleged breaches by the Respondent of the rules and by-laws of the MFDA which the Respondent was bound to observe. He is alleged to have breached those obligations while he was a registered sales person for two Members of the MFDA in Ontario. The complaints against the Respondent were made by residents of Ontario who were clients of those Members of the MFDA. The MFDA instituted the hearing in Ontario and the parties to that hearing are the MFDA and the Respondent. The provision in the JYL Notes that Delaware was the governing law is not binding on the MFDA who was not a party to the Notes. The fact that the JYL Notes were created in the United States and that JYL is a United States entity, are outweighed by the other factors pointing to Ontario. Furthermore, the presumption that the law of Delaware is the same as the law of Ontario on the issue has not been rebutted by proof of Delaware law.

19. In arguing for the applicability of Delaware law, Mr. Bird relied on a number of decisions which, after the hearing, he made available. After review of those decisions, we are of the opinion that none of them assist the Respondent. The cases are as follows:

(a) *Vita Foods Products Incorporated v. Unus Shipping Ltd.*, [1939] A.C. 277, a decision of the Judicial Committee of the Privy Council. This was a claim by the United States owner of goods against a ship owner, a Nova Scotia corporation, for damages to the goods. The contract between the parties contained a clause that the contract should be governed by English law. The clause was held to be binding on the parties and the dispute was decided on the basis of English law.

(b) *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 (Can LII), a decision of the Ontario Court of Appeal. This was a dispute in a class action between franchisees across Canada and a franchisor over the enforceability of a clause in the franchise agreement that required a franchisee to release the franchisor of all claims as a condition to renewal of the agreement. The agreement had a controlling law provision that the agreement including all matters relating to the validity, construction, performance and enforcement thereof was to be governed by the laws of Ontario. It was held, in effect, that the franchisees outside Ontario had agreed that Ontario law was to govern and that an Ontario statute relevant to the dispute applied to them.

(c) Yordanes is a decision of the Ontario Superior Court of Justice. The case is essentially about pleading requirements where foreign law is to be relied on. The Respondent did not specify which portion of the decision he relied on and, after review of the entire decision, we are unable to find anything in it that assists the Respondent in his submission.

(d) *Quebec v. Ontario Securities Commission*, 10 O.R. (3d) 577, a decision of the Ontario Court of Appeal. The issue in this case was whether the Ontario Securities Commission had jurisdiction over a Quebec company whose stock was traded on an Ontario exchange. It was held that as the pith and substance of the legislation was within the competence of Ontario (property and civil rights), incidental or consequential effects on extra-provincial rights did not render the Ontario legislation invalid. This was a constitutional case and there was no issue on the choice of law.

(e) *World Fuel Services Corporation v. Nordems et al.*, 2010 FC 332 (Can LII), a decision of the Trial Division of the Federal Court of Canada. This was a claim for payment for bunker fuel supplied to a ship and involved the supplier, the charterer,

the owners and the ship. There was a clause in the contract between the supplier and the charterer that the terms and conditions of the contract were to be governed by the laws of the United States and the State of Florida. It was held that the owners were not parties to the contract and were not bound by the terms of the governing law clause.

(f) *Aldo Group Inc. v. Moneris Solutions*, 2013 ONCA 725 (Can LII), a decision of the Ontario Court of Appeal. In this case Mastercard argued that a forum selection clause in its agreement with a bank was binding on a third party supplier. The court rejected the argument and noted that it was a well accepted principle that a contract is only binding on parties to the bargain. The court also considered the "closely related" doctrine which has been developed in the United States and which operates to bind non-signatories to a forum selection clause when they are so closely related to the dispute that it is foreseeable that they would become bound. That is not our case. It is not foreseeable that the MFDA would ever be bound by the terms of the JYL Notes.

20. In the course of his argument, Mr. Bird referred to the Ninth Edition of Dicey and Morris on "Conflict of Law". He did not provide the parts of the text on which he relied and we are unable to comment on it.

21. The cases provided by the Respondent do not alter our view that Ontario law applies to the issue of whether the JYL Notes are securities. Accordingly, we did not address the question as to whether the Notes were 'securities' under Delaware law.

22. In our opinion, the JYL Notes are securities within the meaning of Rule 1.1.1 of the MFDA. In subsection 1(1) of the Securities Act, R.S.O. 1990 c-S-5, a security is defined to include "a note or other evidence of indebtedness" subject to exemptions which are not relevant in this case. The JYL Notes are clearly notes that are evidence of indebtedness and clearly fall within the definition. (See *Re Bilinski*, 2002 LNBCSC 1 (B.C.S.C.)).

23. The definition of a security in the Securities Act also includes "any investment contract". In *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R., 112, the

Supreme Court of Canada held that the test for determining whether a document is an investment contract is whether it is an investment of money in a common enterprise with profits to come from the efforts of others. The JYL Notes meet that test and thus reinforces our view that the notes were securities under Ontario law.

24. The Respondent provided information about the JYL Notes to his mutual fund client base and to others; met with potential Noteholders; directed them to Summit Trust; recommended to some that they acquire the notes; facilitated the acquisition by providing and receiving applications and cheques and forwarding them all to Summit Trust. The Respondent's activities clearly constituted trading in and advising in securities.

25. While he was a registered sales person for Dundee and then FundEX, the Respondent received fees from JYL to conduct seminars and other marketing activities. He received substantial commissions for his participation in the JYL transactions. Those transactions were not disclosed to either Dundee or FundEX and none of them were processed through the books of either as the Respondent was required to do as a registered sales person for those Members.

26. It is important to note that following the FundEX Compliance Field Review in early June, 2007, when the Respondent stated that he had "access to promissory notes", Julie Brocca, a FundEX compliance officer, immediately made it very clear that he was not allowed to sell such products outside of FundEX. At this point, he failed to disclose that he had already engaged in the JYL Note transactions. Despite this explicit instruction received from FundEX, the Respondent continued to engage in the sale and distribution of the JYL Notes outside of the books of FundEX from June 2007 until his actual resignation in January 2008.

27. The conduct of the Respondent violated MFDA Rule 1.1.1 which requires that a securities related business must be carried on for the account of the Member and through the facilities of the Member. In our opinion, the Respondent's conduct also breached MFDA Rule 2.1.1 which prescribes a standard of conduct for Approved Persons and Members.

III. The Second Allegation of Misconduct

28. The second allegation in the Notice of Hearing states as follows:

> Between about August 2005 and January 2008, the Respondent had and continued in another gainful occupation which was not disclosed to and approved by the Member by recommending, selling, facilitating the sale of, or making referrals in respect of, the sale of at least $3.2 million of promissory notes to at least 10 clients and 20 other individuals outside the Member, contrary to MFDA Rules 1.2.1(d) (now rule 1.2.1(c)) and 2.1.1

29. The MFDA submits that if Allegation #1 has been established, a finding with respect to Allegation #2 is unnecessary. However, as a great deal of time in the hearing was spent on this allegation, we propose to comment on it briefly.

30. The MFDA Rules permit an Approved Person to have and continue in another gainful occupation provided that, among other things, the Member (in this case, Dundee or FundEX) is aware and approves of the Approved Person engaging in such other gainful occupation. Policies and procedures at both Dundee and FundEX require written disclosure of outside business activities and forms were available for that purpose.

31. The Respondent was interested in dealing in products being offered by ASG, including JYL Notes. As ASG products were not approved by Dundee, he decided to leave Dundee and move to FundTrade Financial Corp. ("FundTrade"), a MFDA Member, because he had been told that ASG products were approved by FundTrade. He believed that the arrangement with Summit Trust for the acquisition of JYL Notes was a product on the ASG shelf. When he left Dundee, he had already participated and received commissions with respect to the JYL Notes although none of the transactions involved Dundee clients. FundTrade and FundEX operations had come together on September 1, 2006, as one entity operating under the name of FundEX prior to the Respondent becoming one of its registered sales persons in December 2006. It is not clear whether ASG products were ever on the FundEX approved list. In any event, the Respondent

became aware that they were not and in January 2007 unsuccessfully applied to have them added.

32. In December 2006, the Respondent completed an Outside Business Activities form as part of the due diligence process in becoming an Approved Person with FundEX. On these forms he disclosed: (a) that he operated an insurance agency and described his activities as "insurance and annuities", and (b) that he was a Director of a hotel and catering firm in Nigeria. There was no disclosure whatsoever that he had Outside Business Activities as (i) a Business Planning Consultant with Summit Trust and (ii) that JYL was paying him between $5,000 and $11,000 per month to conduct seminars and provide other marketing services and (iii) that he was facilitating the sales of the JYL Notes and receiving substantial commissions for so doing.

33. As stated above, in June 2007, following an audit of his activities by FundEX compliance officers, he disclosed he had access to "promissory notes" without specifically mentioning the JYL Notes. He was told that he must sell securities related products or limited market products through FundEX. The next day the Respondent announced his intention to resign from FundEX although he did not actually leave until January 2008.

34. While he was at Dundee and throughout his time at FundEX, the Respondent continued to participate in directing clients to the JYL Notes and receiving substantial commissions and fees for his activities. After he was told by the FundEX compliance officers that promissory note transactions must be processed through the books of FundEX, he continued nevertheless to participate in the processing of acquisitions of JYL Notes outside of the books of FundEX to the extent of over $2 million in the aggregate until his departure from FundEX in January 2008. He also continued to receive fees from JYL.

35. Throughout the Respondent contended that he participated in the JYL transactions through his United States insurance licence. This contention gives rise to a number of problems. First, the JYL Notes are by no stretch of the imagination insurance products, or insurance related products. In support of his assertion, the Respondent provided material from Northwestern, an insurance company, indicating that it transacted in stocks and bonds and other securities. On

examination of the material, it is clear that the securities transactions were carried out through a non-insurance affiliate of Northwestern. Many other insurance companies do the same thing.

36. Second, as far as Summit Trust was concerned, it was not necessary for the Respondent to have an insurance licence to be involved in the JYL transactions but Summit Trust may have thought it desirable to indicate professionalism. The existence of the licence did not eliminate the obligation of the Respondent to disclose to Dundee and FundEX that he was participating in the JYL Note transactions as an outside business activity. Furthermore, if they were securities, the Respondent had an obligation to process the transactions through the books of his Member.

37. The Respondent made reference in his evidence to his E&OE insurance application which would be insurance to protect him in the case of liability as a result of his activities. In December 2006, he gave a long list of his activities to a Mr. Van Kesteren, an employee of FundEX who was processing his E&OE insurance application. Mr. Van Kesteren advised that the ASG products were not on the FundEX approved list and also advised that he found the other products "a little out of the norm". It is not clear, but unlikely, that Mr. Van Kesteren was told about Summit Trust and the JYL Notes. In any event, when the Respondent completed the Outside Business Activity form in December 2006, this activity was not disclosed.

38. Nowhere in all the written correspondence and documents or in the evidence of the FundEX compliance officers is there any indication that the JYL Note transactions were disclosed or discussed. When in June 2007, compliance officer, Ms. Brocca, learned about access to promissory notes (in general and without specification), she told the Respondent that he must process those transactions through the books of FundEX. The Respondent says that he told the FundEX compliance officers about the Notes. His actions are confusing. He went to FundEX because he wanted to deal in all the ASG products which were on the ASG product platform, including the JYL Notes. When he found ASG products were not on the FundEX approved list, he unsuccessfully applied to have them added. On the other hand, he never made an attempt to disclose his involvement in the JYL transactions or to have his commissions for the JYL Note transactions remitted through FundEX.

39. Having regard to all the circumstances, we cannot accept the Respondent's evidence that he disclosed the JYL transactions to FundEX compliance officers. We conclude that while at Dundee and FundEX, the Respondent had and continued in a gainful occupation, namely receiving fees from JYL to market the JYL Notes and participating in the acquisition of JYL Notes by mutual fund clients and others, all of which was not disclosed to the respective Members and consequently was not agreed to by them. We find that Allegation #2 has been established.

IV. The Third Allegation of Misconduct

40. The third allegation in the Notice of Hearing states as follows: Commencing in May 2011, the Respondent failed to cooperate with an investigation conducted by MFDA Staff when he refused to provide documents and other information requested by MFDA Staff, contrary to section 22.1 of MFDA By-Law No. 1.

41. As a Member of a self-governing profession, the Respondent had an obligation to cooperate with the MFDA. Under section 22.1 of By-Law No. 1 of the MFDA, the Respondent was required, if requested by the MFDA, to produce for inspection and provide copies of his books, records and accounts relevant to the matters being investigated. The MFDA asked him to produce books, records and accounts from the time he made his arrangement with Summit Trust (August 22, 2005) until he ceased to be a registered sales person with FundEX (January 15, 2008).

42. It is not disputed that the Respondent:

(a) Provided redacted and incomplete account statements of his J.P. Morgan account. There were no statements for part of the period requested and the statements that were produced were extensively redacted;
(b) Did not provide any information with respect to an account he had with the Royal Bank of Canada. He admits that the account was opened during part of the period requested and that he used the account to conduct mutual fund business. We accept

the evidence submitted on behalf of the MFDA that it was unaware of the account until September 2013; and

(c) Did not provide the names and transaction details of United States residents that he assisted to purchase the JYL Notes for more than 15 months after the information was requested.

43. The Respondent's explanation for the nature of his response was that he was not advised by the MFDA of the relevance of the requests; that he was harassed during the investigation, either directly by the MFDA or by third parties to whom the MFDA had allegedly leaked information; and that the MFDA had no jurisdiction to obtain information about United States residents who might have been assisted by him in acquiring the JYL Notes.

44. A request by the MFDA for books, records and accounts is limited to those that are "relevant to the matter being investigated" (section 22.1 of the MFDA By-Law No. 1). The MFDA has a duty to investigate the conduct, business or affairs of an Approved Person as it considers necessary or desirable in any matter related to the compliance with MFDA by-laws, rules or policies, applicable securities regulations or the by-laws, rules, and regulations and policies of a self-regulatory organization (section 21 of MFDA By-Law No. 1). Having regard to these provisions, the concept of relevance has to be broadly applied.

45. Specifically in this case, when the complaints with respect to the JYL Notes were received, the MFDA had to attempt to determine the full nature and extent of the Respondent's activities with respect to those Notes. In our view, the requirement for books, records and accounts was relevant to that determination as it would assist in assessing the extent and nature of the Respondent's involvement.

46. The Respondent on a number of occasions asked the MFDA to advise him on the relevance of the requests. He did not receive an answer. As a result, he took it upon himself to determine relevancy by submitting only part of his accounts in which he redacted a number of entries. While his frustration may have been understandable, he did not have the unilateral right to determine relevance. There may very well have been some items in the accounts which were

not relevant to the investigation and which the Respondent was reluctant to disclose. It would have been better if the Respondent and the MFDA had discussed the situation and, if necessary, attempted to work out a process to resolve the problem.

47. The Respondent said he was reluctant to provide information because he did not trust the MFDA. He felt he was being harassed either by the MFDA or by persons to whom the MFDA had allegedly leaked information. The alleged harassment was in the form of emails, telephone calls and certain events. The MFDA investigated and found no security leak in its system. As a precaution, it started to communicate with the Respondent by ordinary mail rather than email. In reviewing the emails and the evidence of telephone calls and other events, we were unable to find even a remote connection to the MFDA in any of that material.

48. The Respondent submitted that the MFDA had no jurisdiction with respect to United States residents who were not clients of either Dundee or FundEX. We agree with the MFDA that its jurisdiction is over the Respondent as an Approved Person and the geographic location of the persons he dealt with is irrelevant to the issue of jurisdiction.

49. We conclude in this allegation that the Respondent failed to fully cooperate with the investigation by providing incomplete and redacted accounts and unreasonably delaying providing names of U.S. residents with whom he had been involved in the acquisition of the JYL Notes contrary to section 22.1 of By-Law No. 1 of the MFDA. We would add that in general the Respondent cooperated with the investigation and his failure to fully cooperate may have been due to a misconception of his obligations as an Approved Person. He did not otherwise impede or stall the investigation.

V. Miscellaneous Matters

50. In the course of the hearing on the merits, two matters came up that should be noted in these reasons.

51. First, the Respondent alleged that the transcript of the interview of the Respondent by the MFDA investigator was incorrect as, in effect, it should have contained an admission by the investigator that it was not the view of the MFDA that the JYL Notes were securities. The Panel decided that although the suggested error was unlikely, it was in any event up to the Panel to decide whether the JYL Notes were in fact securities. The Panel did not propose to take into account the alleged error in rendering this decision. The reasons of the Panel may be found in the transcript of the hearing.

52. Second, after the conclusion of the evidence and before oral arguments, the Respondent brought a motion to dismiss the proceeding on the grounds that (1) the Respondent was an agent or employee of FundTrade and not FundEX and accordingly the MFDA had no jurisdiction over him as FundTrade was no longer a member of the MFDA; and, (2) the conduct of the MFDA and FundEX with respect to Schedule C of the employment agreement between the Respondent and FundEX was such that the proceedings should be dismissed. After argument, the Panel dismissed the motion, finding that the Respondent was an agent of FundEX at the relevant times and that the conduct of the MFDA was part of the evidence of the hearing to be considered and dealt with by the Panel. The Panel also found that the absence of a signature by a witness on the employment agreement between the Respondent and FundEX did not invalidate the agreement. The reasons of the Panel may also be found in the transcript of the hearing.

VI. Conclusion

53. The MFDA has established all three allegations on the balance of probability. It should now make written submissions on penalty within 21 days of the release of these reasons. The Respondent has a further 21 days to reply.

DATED this 20th day of October, 2014.

"Edward Saunders"
The Hon. Edward Saunders, Q.C.
Chair

"Brigitte Geisler"

Brigitte Geisler
Industry Representative

"Robert C. White"

Robert C. White
Industry Representative

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