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: Keith Lorne Davis

Heard: September 28, 2016, in Edmonton, Alberta
Reasons for Decision: November 15, 2016

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller, Q.C.	Chair
M. Elaine Bradley	Industry Representative
Howard R. Mix	Industry Representative

Appearances:

David Babin	)	Counsel for the Mutual Fund Dealers Association of Canada
Keith Lorne Davis	)	Not in attendance nor represented by counsel

I. INTRODUCTION

1. By Notice of Hearing dated March 9, 2016, the Mutual Fund Dealers Association of Canada (the "MFDA") made allegations against Keith Lorne Davis (the "Respondent"), which read as follows:

a. Between October 1, 2009 and September 9, 2013 the Respondent engaged in personal financial dealings with a client by borrowing at least $80,000 from the client, thereby giving rise to a conflict or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1;

b. Between October 1, 2009 and September 9, 2013, the Respondent had and continued in a dual occupation which was not disclosed to and approved by the Member, contrary to MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d)) and 2.1.1;

c. Between February 1, 2013 and March 31, 2013, the Respondent misled the Member by falsely answering the Member's Annual Compliance Certification when he stated that he did not engage in any dual occupations, thereby interfering with the ability of the Member to supervise his conduct and comply with its obligations under MFDA Rule 2.1.4, contrary to MFDA Rules 1.1.2 and 2.1.1; and

d. Between January 1, 2010 and September 9, 2013, the Respondent obtained and maintained at least 17 blank or partially completed pre-signed account forms in respect of 9 clients, contrary to MFDA Rule 2.1.1.

II. SERVICE

2. Affidavit evidence presented at the hearing showed that:

a. the Respondent was advised by email on January 14, 2016 that MFDA was contemplating disciplinary hearings against him and replied by email on January 14, 2016 that he was an undischarged bankrupt and not prepared to fight;

b. the Respondent was served with the Notice of Hearing on March 17, 2016 and replied by email on March 19, 2016 that he would not attend the hearing, was an undischarged bankrupt and could not afford legal representation;

c. the Respondent advised by email dated April 20, 2016 that he would not attend a scheduled first appearance telephone attendance on April 22, 2016 to set a date for hearing;

d. on April 22, 2016, the hearing of this proceeding on the merits was set for September 22-23, 2016;

e. the Respondent was advised by email on April 22, 2016 of the hearing dates of September 22-23, 2016;

f. on July 7, 2016 April 22, 2016, the hearing of this proceeding on the merits was rescheduled to September 28, 2016;

g. on September 9, 2016 MFDA delivered to the Respondent by email and registered mail correspondence advising the hearing would proceed on September 28, 2016, that he was entitled to receive disclosure information and a list of witnesses and that, in absence of his appearance, the Hearing Panel could proceed with the hearing on the merits.

3. Having regard to the foregoing circumstances, this Panel is satisfied that the Respondent was served with sufficient notice of the hearing.

III. PROCEEDING WITH A HEARING ON THE MERITS IN THE ABSENCE OF A RESPONDENT

4. MFDA Rule of Procedure 7.3 states:

> *Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may*:

(a) proceed with the hearing without further notice to and in the absence of the Respondent; and

(b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.

5. MFDA Rule of Procedure 13.4 states:

> *Where a Respondent, having been served with a Notice of Hearing, fails to attend the hearing of the proceeding on its merits, the Hearing Panel may proceed in accordance with Rule 7.3.*

6. Having regard to the foregoing circumstances, this Panel decided to proceed with the hearing in the absence of the Respondent.

IV. MFDA JURISDICTION OVER RESPONDENT

7. This Panel accepted submissions of Enforcement Counsel that pursuant to s. 24.1.4 of MFDA By-law No. 1 and based on the Ontario Court of Appeal decision in *Taub v. Investment Dealers Association of Canada* [2009] 98 O.R. (3d), the Respondent remains subject to the jurisdiction of the MFDA despite ceasing to be an Approved Person.

V. HEARSAY EVIDENCE AND EVIDENCE BY SWORN STATEMENT

8. This Panel received submissions of Enforcement Counsel that MFDA Rule of Procedure 1.6 specifically permits hearsay statements to be admitted as evidence as follows:

> *Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.*
> *(2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.*
> *(3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.*

9. Enforcement Counsel also noted that MFDA Rule of Procedure 13.4 permits evidence to be adduced by way of sworn statements, as follows:

> *The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination*.

10. This Panel noted that MFDA hearing panels and other regulatory bodies routinely consider and rely on hearsay and affidavit evidence in making findings of fact. See *Tonnies (Re)*, MFDA File No. 200503, Hearing Panel of Prairie Regional Council, Decision and Reasons dated June 27, 2005 ("*Tonnies*") at paras. 10-12.

11. The facts in support of the case for the MFDA were initially set out in the:

a. Notice of Hearing issued March 9, 2016; and
b. Affidavit of Patricia West sworn September 20, 2016 with attached exhibits (the "West Affidavit").

12. Ms. West gave oral testimony, was lead through certain key aspects of her affidavit and responded to all questions posed to her by this Panel. In summary, the evidence presented indicated that:

a. From February 15, 2002 to September 9, 2013, the Respondent was registered in Alberta as a mutual fund salesperson with WFG Financial Management Ltd. ("WFG");
b. On or about October 1, 2009, the Respondent borrowed $80,000 from client MJ to finance the opening of a tax preparation business, Davis and Associates, ("his business").
c. On or about October 10, 2012, the Respondent issued client MJ with a promissory note in respect of $80,000 that he had previously borrowed from client MJ as start-up funding for his business.

d. The Respondent did not disclose to WFG that he had borrowed monies from a client.

e. The Respondent has not repaid any of the $80,000 he borrowed from client MJ, and has not made any of the promised interest payments.

f. The Respondent also did not disclose Davis and Associates to WFG as being an Outside Business Activity ("OBA"), despite WFG having policies and procedures in place during the material time that required the disclosure by WFG Approved Persons, of any OBAs;

g. On February 25, 2013, the Respondent completed and submitted an Outside Business Activity Disclosure Form to WFG. In response to the question "Are you involved in any OBAs?", the Respondent answered "No".

h. Between January 1, 2010 and September 9, 2013 the Respondent obtained and maintained at least 16 blank or partially completed pre-signed client account forms in respect of 10 clients.

VI. MFDA SUBMISSIONS UNDER ALLEGATION #1

13. Enforcement Counsel submitted that the facts of borrowing $80,000 from client MJ, for the purposes of establishing his business, of failing to repay any of the borrowed funds and, as an undischarged bankrupt, of having little possibility of repaying MJ at any point in the future, constitute an actual conflict of interest that cannot be resolved in favour of client MJ, and conduct contrary to MFDA Rules 2.1.4 and 2.1.1.

14. Enforcement Counsel referenced MFDA Rule 2.1.4 which provides:

> ***Conflicts of Interest***
> *(a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.*

> *(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).*
> *(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.*
> *(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).*

15. Enforcement Counsel referenced MFDA Member Staff Notice 0047 ("MSN 0047"), which, while non-binding, provides:

> *Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA rules, MFDA staff are unaware of any circumstances where Members or Approved Persons proposing to enter into any such arrangement would be able to demonstrate that the conflict has been properly dealt with.*

16. Enforcement Counsel referred us to numerous cases of MFDA hearing panels holding that borrowing from clients constitutes a serious contravention of MFDA Rule 2.1.4, including:

> *Tonnies*, supra.
> *Nunweiler (Re)*, File No. 201030, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated May 28, 2012, ("*Nunweiler*"), at para. 51.
> *Brauns (Re)*, File No 201203, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 4, 2014, ("*Brauns*"), at para. 12.
> *Frank (Re)*, File No. 201407, Hearing Panel of the Central Regional Council, Decision and Reasons dated May 5, 2015, ("*Frank*"), at para. 69.
> *Bartolini (Re)*, File No. 201601, Hearing Panel of the Central Regional Council, Decision and Reasons dated May 24, 2016, ("*Bartolini*"), at paras. 29 – 30.

17. Enforcement Counsel submitted that the Respondent's borrowing of funds from client MJ, and the failure to repay those funds, also constitutes a breach of the standard of conduct articulated by MFDA Rule 2.1.1. which provides:

> ***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*.

18. Enforcement Counsel submitted that the standard of conduct must be interpreted in a broad and purposive manner in furtherance of the goal of investor protection and referenced the hearing panel decision in *Smilestone (Re)*, File No 201129, Hearing Panel of the Central Regional Council, Decision and Reasons (Misconduct) dated August 8, 2013 ("*Smilestone*"), at para. 12 which stated that MFDA Rule 2.1.1 was drafted broadly:

> *"…to protect the public interest and has been applied to prohibit a large range of misconduct including misappropriation, forgery, falsification of clients' signatures, preferring Approved Persons' own interests when engaging in business dealings with clients, the possession of pre-signed forms and discretionary trading."*

19. Enforcement Counsel cited *Frank (Re)*, supra at para. 78 for the proposition that where an Approved Person borrows funds from a client, it constitutes misconduct in breach of 2.1.1.

VII. MFDA SUBMISSIONS UNDER ALLEGATION #2

20. Enforcement Counsel noted that MFDA Rule 1.2.1(c), the version of the outside business rule in force during the material time, provided:

Dual Occupations

An Approved Person may have, and continue in, another gainful occupation, provided that:

(i) Permitted by legislation. The securities commission in the jurisdiction in which the Approved Person carries on or proposes to carry on business specifically permits him or her to devote less than his or her full time to the business of the Member for which he or she acts on behalf of;

(ii) Not prohibited. The securities commission in the jurisdiction in which the Approved Person carries on or proposes to carry on business does not prohibit an Approved Person from engaging in such gainful occupation;

(iii) Member approval. The Member for which the Approved Person carries on business either as an employee or agent is aware and approves of the Approved Person engaging in such other gainful occupation;

(iv) Member procedures. Such Member establishes and maintains procedures to ensure continuous service to clients and to address potential conflicts of interest;

(v) Conduct unbecoming. Any such gainful occupation of the Approved Person must not be such as to bring the Corporation, its Members or the mutual fund industry into disrepute;

(vi) Disclosure. Clear disclosure is provided to clients that any activities related to such other gainful occupation are not business of the Member and are not the responsibility of the Member. [Emphasis added.]

21. Enforcement Counsel submitted that:

(a) by failing to disclose his business to WFG and failing to seek approval from WFG to operate his business, the Respondent engaged in conduct contrary to MFDA Rule 1.2.1(c).

(b) MFDA Rule 1.2.1(c) required Members to establish policies and procedures that address notification and approval of outside business activities, as well as subsequent compliance with MFDA Rules and By-laws as these relate to the activities. Approved Persons have a corresponding obligation to comply with these policies and procedures.

(c) WFG's policies and procedures made clear to the Respondent that, prior to engaging in any type of OBA, he was required to advise WFG of the proposed OBA, and await WFG's approval before proceeding.

(d) The hearing panel in *Vitch (Re)*, File No. 201103, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 22, 2011, ("*Vitch*"), at para. 53, described the rationale for Rule 1.2.1 as follows:

> *"The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious...The first is that a failure to know about an employee's other commercial activities impinges upon a Member's ability to properly supervise its employee. The second...the Member could be exposed to litigation alleging that the Approved Person's activity was within the scope of his/her employment with the Member."*

(e) Rule 1.2.1(c) seeks to ensure that securities legislation and internal procedures are complied with, the clients are aware that the outside activity is not the business or responsibility of the Member, any actual or potential conflicts of interest are dealt with appropriately, and the MFDA, its Members, and the mutual fund industry are not being brought into disrepute by way of improper or inappropriate outside business activities carried on by Approved Persons.

(f) MFDA hearing panels have held that at its very least, the meaning which must be given to 'gainful occupation' is that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it. *Mawer (Re)*, File No. 201331, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated April 3, 2014 ("*Mawer*") at para. 35.

(g) The Respondent admitted in his interview with the MFDA investigator that "At that time I was making --- when I was doing the taxes, I was probably making $500 or $600…" The evidence demonstrates that the Respondent intended to, and did benefit from operating his business and as such, falls within the definition of 'gainful' employment.

(h) The evidence in the present case clearly establishes that the Respondent did not disclose his tax preparation business to WFG.

(i) Having not made WFG aware of his business, it follows that WFG could not have given the Respondent formal approval to continue his tax preparation services as an OBA.

VIII. MFDA SUBMISSIONS UNDER ALLEGATION #3

22. Enforcement Counsel submitted that:

(a) At all material times, WFG's policies and procedures required their Approved Persons to disclose their involvement with any OBAs.

(b) the Respondent, by attesting to WFG that he was not involved in any OBAs when he was operating his business, fell short of the standard of conduct expected of an Approved Person.

(c) The evidence demonstrates that on February 25, 2013, the Respondent completed and submitted an Outside Business Activity Disclosure Form to WFG. In response to the question "Are you involved in any OBAs?", the Respondent answered "No", whereas the Respondent had not ceased his operation of his business as of the date of his attestation to WFG.

(d) MFDA Rule 2.1.1 requires all Approved Persons to observe high standards of ethics and conduct in the transaction of business and to not engage in any business conduct or practice that is unbecoming or detrimental to the public interest. The Respondent's false attestation as to his operation of an OBA violates both central tenets of MFDA Rule 2.1.1.

(e) Where an Approved Person provides false information to a Member regarding their involvement in OBAs, they impede the Member's ability to supervise the actions of the Approved Person. Approved Persons are expected to conduct themselves in a forthright and transparent manner when reporting OBAs to their Members in order to, among other considerations, ensure that they are not engaged in outside activities that may present a risk to investors, or result in a real or apparent conflict of interest.

(f) Where a Member remains unaware of an OBA because of an Approved Person's obfuscation, the Member cannot undertake those vital supervisory steps to protect investors.

(g) A Respondent's failure to comply with the policies and procedures of the Member constitutes a breach of an Approved Person's standard of conduct and of MFDA Rule 2.1.1. *Franco (Re)*, File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011 at para. 43.

(h) A Respondent's failure to accurately complete a Member's annual attestation with respect to disclosing any OBAs, constitutes misleading a Member, and is a breach of an Approved Person's standard of conduct and of MFDA Rule 2.1.1. *Sarang (Re)*, File No. 201535, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated March 21, 2016 at para. 13.

IX. MFDA SUBMISSIONS UNDER ALLEGATION #4

23. Enforcement Counsel submitted that:

(a) The MFDA has made clear to Approved Persons via Member Staff Notice 0066: Pre-Signed Forms, dated October 31, 2007 that possessing and/or using pre-signed forms is contrary to the obligations articulated by MFDA Rule 2.1.1.

(b) The Respondent stated in his interview with the MFDA investigator that he would collect two sets of forms from clients, including a blank signed set to be used in case a mistake was made on the original forms. The blank signed forms included as Exhibit 22 to the West Affidavit confirm that the Respondent actively collected pre-signed forms from his clients.

(c) As such, the Respondent breached MFDA Rule 2.1.1 by obtaining and possessing at least 16 blank or partially completed pre-signed client account forms in respect of 10 clients.

(d) Hearing Panels of the MFDA, IIROC, and provincial securities commissions have held that the possession and use of pre-signed forms is prohibited. *Price (Re)*, MFDA File No. 200814, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 18, 2011 ("*Price*"), at paras. 118 – 121.

X. DECISION AS TO ALLEGATION #1

24. This Panel finds on the evidence presented that the Respondent borrowed $80,000 from client MJ, for his own purposes, i.e. to establish a business, has not repaid the sum to MJ and, as an undischarged bankrupt, is unlikely to be able to repay it in the future.

25. This Panel noted the numerous cases of MFDA Hearing Panels holding that borrowing from clients constitutes a serious contravention of MFDA Rule 2.1.4, including, *Tonnies*, supra, *Nunweiler (Re)*, supra, *Brauns (Re)*, (supra) *Frank (Re)*, supra, and *Bartolini (Re)*, supra.

26. Moreover, this Panel notes that there existed a specific MFDA Member Staff Notice 0047 which, while not of binding effect, clearly was intended to give special notice to Approved Persons of the problem that borrowing from clients would raise a significant and direct conflict that usually could not be resolved in favour of the client and would put the onus on the Approved Person to demonstrate the conflict had been properly dealt with.

27. This Panel finds that the conduct described in paragraph 24 breached Rule 2.1.4 (a) in that the Respondent failed to disclose this borrowing to the Member.

28. This Panel finds that such conduct also breached Rule 2.1.4 (b) in that by failing to disclose the borrowing to the Member, the Respondent did not ensure this conduct was addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

29. This Panel finds that such conduct also breached Rule 2.1.4 (c) in that the Respondent did not immediately disclose the borrowing in writing to the client as the Member directed, prior to the Member or Approved Person proceeding with the proposed transaction which gave rise to the conflict of interest.

30. This Panel further finds that such conduct also breached Rule 2.1.4 (d) in that the Member could not ensure its policies and procedures were complied with.

31. This panel further finds that the Respondent also breached MFDA Rule 2.1.1, and noted the decisions of *Smilestone (Re)*, (supra) at para. 12 and *Frank (Re)*, supra at para. 78 apposite to the case at hand.

32. On the evidence, this Panel is satisfied that MFDA Rule 1.2.1(c) (iii) was also breached.

XI. DECISION AS TO ALLEGATIONS #2, #3 and #4

33. This Panel accepts that MFDA Rule 1.2.1(c) seeks to ensure that securities legislation and internal procedures are complied with, clients are aware that the outside activity is not the business or responsibility of the Member, any actual or potential conflicts of interest are dealt with appropriately; and the MFDA, its Members and the mutual fund industry are not being brought into disrepute by way of improper or inappropriate outside business activities carried on by Approved Persons.

34. This Panel accepts that 'gainful occupation' includes as an ingredient that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it. *Mawer (Re)*, supra at para. 35.

35. This Panel finds that the admissions of the Respondent in his interview establish that he both intended to and did benefit from operating his business and this fulfils the definition of 'gainful' employment.

36. This Panel accepts that, as stated in *Vitch Re*, (supra), Approved Persons have a corresponding obligation to comply with policies and procedures established by Members under MFDA Rule 1.2.1(c) as well as MFDA Rules and By-laws that relate to the activities.

37. This Panel accepts that there were in place at the material times polices and procedures established by WFG that made clear to Approved Persons, including the Respondent that, prior

to engaging in any type of OBA, they were required to advise WFG of the proposed OBA, and await WFG's approval before proceeding.

38. Since, on the evidence, WFG was not aware of the Respondent's tax preparation business, it is clear that the Respondent did not disclose his tax preparation business to WFG and deprived WFG of the opportunity to consider whether to grant or withhold approval and, in the latter case, to take steps to protect the investor. This conduct clearly put the Respondent in breach of MFDA Rule 1.2.1. (c).

39. This Panel noted that:

a. MFDA Rule 2.1.1 requires all Approved Persons to observe high standards of ethics and conduct in the transaction of business and to not engage in any business conduct or practice which is unbecoming or detrimental to the public interest.
b. A Respondent's failure to comply with the policies and procedures of the Member constitutes a breach of an Approved Person's standard of conduct and of MFDA Rule 2.1.1. *Franco (Re)*, File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011 at para. 43.
c. A Respondent's failure to accurately complete a Member's annual attestation with respect to disclosing any OBAs, constitutes misleading a Member, and is a breach of an Approved Person's standard of conduct and of MFDA Rule 2.1.1. *Sarang (Re)*, File No. 201535, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated March 21, 2016 at para. 13.

40. This Panel noted the evidence establishing that on February 25, 2013, the Respondent completed and submitted an Outside Business Activity Disclosure Form to WFG in which he actively answered in the negative the question "whether he was involved in any OBAs?", whereas he was continuing his operation of his business as of the date of his attestation to WFG.

41. Moreover, in reviewing the transcript of the Respondent's answers to the MFDA investigator, this Panel noted that his testimony revealed he well knew that he was giving a false

response to the written attestation, and further attempted to justify his wrongful conduct by claiming that WFG did not care about outside activities if the income earned was modest. These answers revealed that he evidently engaged in active conduct to conceal his wrongdoing both at the material time and later when his conduct was investigated by MFDA.

42. The decision of *McWhirter (Re)* File No. 201541, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 19, 2016 at para. 10, stated succinctly as follows:

> *The misleading of investigators or Compliance staff, whether of the MFDA or of the Member in fulfilling its regulatory obligations to supervise, interferes with the reasonable supervisory role and may result in an investigation being closed down prematurely or diverted down an avenue of inquiry that wrongly implicates others, both of which may result in misconduct going undetected*.

43. The hearing Panel in *McWhirter (Re)* (supra), further noted *Richardson Re* 2015, October 2, 2015, MFDA File No. 201536 in which a hearing panel found a contravention of MFDA Rule 2.1.1 when an Approved Person failed to accurately respond to the Member's Annual Attestation by incorrectly affirming that he did not obtain or possess any pre-signed account forms.

44. This Panel is satisfied based on the foregoing that the Respondent's conduct also amounts to a breach of MFDA Rule 2.1.1.

45. The MFDA has made clear to Approved Persons since October 31, 2007, with its Member Staff Notice 0066: Pre-Signed Forms that possessing and/or using pre-signed forms is contrary to the obligations articulated by MFDA Rule 2.1.1.

46. This Panel is satisfied the Respondent breached MFDA Rule 2.1.1 by obtaining and possessing at least 16 blank or partially completed pre-signed client account forms in respect of 10 clients.

47. This Panel is also satisfied from the Respondent's interview that he consciously collected two sets of forms from clients, including a blank signed set that he claimed were to be used in case a mistake was made on the original forms.

48. This Panel rejects the Respondent's supposed rationale for possessing the second set of forms as disingenuous since if a mistake was made on the original form, the appropriate conduct is to re-execute the forms in the client's presence. Accordingly, this Panel finds that Allegation #4 was proven.

49. After concluding that the evidence established breaches of all the allegations against the Respondent, this Panel then invited Enforcement Counsel to make submissions as to penalties.

XII. PROPOSED PENALTIES

50. Enforcement Counsel submitted the following penalties should be imposed:

a. A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
b. A fine in the range of $80,000 to $150,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
c. Costs of $10,000 pursuant to s. 24.2 of MFDA By-law No. 1.

51. Previously decided cases have established that the primary goal of securities regulation is the protection of the investor, but additional goals of securities regulation are to foster public confidence in the capital markets and securities industry.

> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 ("*Pezim*"), at paras. 59, 68,
>
> *Breckenridge (Re)*, File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 ("*Breckenridge*"), at para. 74.

52. In determining the appropriate sanction to further attainment of the above goals, Hearing Panels must keep in mind that the purposes of sanctions are protective and exercised to prevent

future harm to markets, not to punish past conduct. As concisely stated in *Tonnies (Re)*, supra, at para. 45:

> *The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in Re Mithras Management Ltd. et al. (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:*
>
> *…[T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient*.

53. As also stated in *Tonnies (Re)*, supra, at para. 46: in determining the appropriate penalty, the Hearing Panel should consider:

(a) the protection of the investing public;
(b) the integrity of the securities markets;
(c) specific and general deterrence;
(d) the protection of the MFDA's membership; and
(e) the protection of the integrity of the MFDA's enforcement processes.

54. Other facts frequently considered by Hearing Panels when determining whether a penalty is appropriate include:

(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.

Breckenridge, supra, at para. 77.

56. The MFDA Penalty Guidelines are an additional resource that a Hearing Panel may consult when determining the appropriateness of the penalty to be imposed and provide a basis upon which a Hearing Panel's discretion can be exercised consistently in like circumstances. However, the ranges set out in the Penalty Guidelines are not binding.

57. While Enforcement Counsel sought a global fine for the conduct referenced in the four allegations, this Panel, in its deliberations, considered the appropriate penalty for each of the allegations in turn and then considered the totality of the sanctions having regard to the circumstances of the case at hand.

Penalty for Allegation # 1

58. The Respondent borrowed $80,000, a significant sum of money, from his client for the purpose of establishing his own business. He has never repaid the funds and, as an undischarged bankrupt, likely never will. In the view of this Panel, such conduct is an actual conflict of interest between his duties to his client and his own personal business interests and as such, constitutes serious misconduct that violates MFDA rules 2.1.4 and 2.1.1. Moreover, he benefitted through his misconduct in securing funds for his venture.

59. This Panel also noted that in *Brauns (Re)*, (supra) the hearing panel considered the seriousness of the conduct in light of the Respondent's inability to pay the fine and stated at para 16:

> *"In our view, any inability to pay the fine (while relevant) is trumped by the need to articulate the seriousness of the Respondent's misconduct, and to at least impose a fine that bears some relationship to the benefit obtained as a result of the misconduct and/or the loss to those affected."*

60. This Panel notes that MFDA has given ample warning to Approved persons that borrowing money from clients will be treated as misconduct. The panel in *Bartolini*, supra, at para. 30 noted the panel in Re *Muchoki Fungai Simba* (File No. 201114) at para 14 stated:

> *"The present case and many other MFDA cases show the danger of borrowing from clients. There are many such cases on the MFDA website. See for example some of those decided in 2011: Carmel Toussaint in September 2011, James Woloshen in June 2011; Michael Ryan in April 2011; and Christopher Jones in February 2011. As the panel stated in the Ryan case: Borrowing money from a client has been consistently held by other panels to be a conflict of interest under Rule 2.1.4…even though borrowing is not specifically mentioned in the Rules."*

61. The Supreme Court of Canada in *Cartaway Resources Corp.* and MFDA hearing panels have held that it is appropriate for deterrence to be among the factors taken into account when determining penalty. *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672 at paras. 52 – 62; *Tonnies*, supra at para. 47.

62. Also, as the Supreme Court of Canada stated in *Cartaway Resources Corp*. at para 61:

> *A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction . . . The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged…*

63. Despite the fact that MFDA has given ample warning to Approved Persons that borrowing money from clients will be treated as misconduct, the Respondent has not demonstrated that he recognizes the seriousness of his misconduct. Instead, his responses indicated he was focused entirely on his own gain as he exited the mutual fund industry. He has displayed no remorse for his actions and declined to participate in the disciplinary process.

64. As a mitigating factor, this Panel notes that the Respondent was not subject to any discipline proceedings from February 15, 2002 to September 9, 2013.

65. Considering all the foregoing, this Panel concluded that the Respondent should be fined $90,000 for the breach of 2.1.4 and 2.1.1 referenced in Allegation #1.

Penalty for Allegation # 2 and #3

66. Allegation #2, which was established on the evidence, was a contravention of Rules 1.2.1(c) and 2.1.1. As stated in *Mawer*, supra, at para. 32, an Approved Person's failure to disclose and obtain approval of his or her outside business activities is serious misconduct as it deprives the Member of a proper opportunity to: supervise the Approved Person, prevent the Approved Person from contravening regulatory requirements, and protect itself from the risk of litigation.

67. Allegation #3 which was also established on the evidence, was a contravention of Rules 1.1.2 and 2.1.1. Whereas under Allegation #2, the failure to disclose to the Member for approval the fact that the Respondent engaged in a dual occupation might be viewed as passive conduct and an error of omission, this Panel finds that the conduct under Allegation #3 involved deliberate and active conduct of making false statements to the Member in his Annual Compliance Certification.

68. This active misleading of the Member was in the view of this Panel, egregious in that the Respondent's statements to the investigator revealed that he well knew his conduct was wrong at

the material times and subsequently endeavoured to excuse his behaviour by further falsely claiming that the Member condoned such activity.

69. The problem for the Respondent is that his false statements were internally inconsistent, since if indeed the Member was aware of and condoned his having dual occupations, (and there is no evidence to that effect,) then the Respondent would have had no reason to avoid disclosure in the Annual Compliance Certification.

70. However, by continuing to obfuscate his wrongful conduct even during the investigation, the Respondent actively demonstrated that he had no remorse for misleading the Member or for suggesting to the MFDA that the Member was somehow implicated. These are aggravating circumstances to be considered in imposing the penalty.

71. Previous hearing panels have held that misleading a member is worthy of significant sanction. *Nunweiler*, supra, at para. 31.

72. Having regard to the foregoing, this Panel concludes that the circumstances surrounding the contravention of MFDA Rules 1.1.2 and 2.1.1. warrant a significant penalty. However this Panel also recognizes that the contravention in Allegation #2 constituted certain conduct also captured in Allegation #3 and for that reason, has determined it appropriate to impose a global penalty for Allegations #2 and #3 to account for some component of overlap. Accordingly, the Panel imposes a fine of $50,000 for the conduct under Allegations #2 and #3.

Penalty for Allegation # 4

73. Previous decisions were cited to this Hearing Panel in respect of use of pre-signed forms. For example, the MFDA Hearing Panel in *Price (Re)* supra, at paras. 122 – 124, identified the dangers posed by pre-signed forms which can be summarized as follows:

(a) pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading;

(b) at worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client; and

(c) pre-signed forms subvert the ability of a Member to properly supervise trading activity.

Price (Re), supra.

74. In *Wellman (Re)*, MFDA File No. 201529, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 21, 2015, at para. 10, it was succinctly stated that the prohibition on the use of pre-signed account forms applies regardless of whether the client was aware, or authorized the use, of the pre-signed forms, and whether the Approved Person ultimately used the forms.

75. However, the evidence in this case established only possession, as distinct from possession and use of pre-signed forms. The only case located that dealt specifically with a case of possession but not use of pre-signed forms was that of *McWhirter (Re)* (supra), where the facts were that the Respondent obtained and possessed eleven (11) blank pre-signed forms in respect of eleven (11) clients, and then mislead the Member by affirming that he did not obtain or possess any pre-signed forms when completing the Member's Annual Attestations for Approved Persons.

76. In *McWhirter (Re)* (supra), a fine of $12,500 was imposed after acceptance of a settlement agreement.

77. This Panel finds no justification for Approved Persons to possess pre-signed forms for any reason. Although there was no evidence in this case that anyone was actually harmed by mere possession of the pre-signed forms, that very practice is clearly contrary to the MFDAStaff Notice 0066.

78. Further, this type of wrongful conduct, while on its face may seem innocuous, tends to put an Approved Person in a state of future intention to use pre-signed forms. Worse, as in the case at hand and *McWhirter (Re)* (supra), an Approved Person who has taken the steps of

possessing pre-signed forms, on discovery may then be tempted to mislead others in authority as to the reason for such possession. Such reactions then aggravate the initial wrongful conduct.

79. For these reasons, this Panel imposes a separate fine of $10,000 for this conduct in the case at hand, as a clear reminder that possession of pre-signed forms is serious conduct.

Application for Permanent Prohibition

80. In addition to the individual fines imposed in respect of Allegations #1-#4, this Panel considered whether the circumstances warranted also the imposition of a permanent prohibition.

81. Depending on the circumstances of individual cases, it may be appropriate for a hearing panel to impose a fine and then conditions the fulfillment of which might justify allowing a Respondent to remain in the mutual fund industry. For example, where a Respondent had repaid funds borrowed from a client, or undertook additional education and training to prevent recurrence of the impugned conduct or demonstrated understanding that the conduct was wrongful and presented persuasive evidence of remorse such that it could be concluded with confidence that the conduct would not be repeated, a hearing panel might see fit to decline an application of this nature.

82. However, in the case at hand, there were several separate acts of wrongdoing, creating a cumulative effect of conscious active contravention of the MFDA Rules, including deliberate deceit toward the Member and the MFDA.

83. The Respondent has not made any effort to repay even a portion of the funds borrowed from his client, has refused to participate in the disciplinary process, and declined to take seriously his obligations as a registrant with the MFDA.

84. Based on the foregoing, it is apparent to this Panel that the Respondent poses a significant risk to other investors and the market at large if he is allowed to return to the industry.

85. In addition to the monetary penalties imposed, it is apparent to this Panel that a permanent prohibition is also necessary in order to:

a. communicate to other Approved Persons that the misconduct engaged in by the Respondent in the present case has no place in the mutual fund industry.
b. strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons.
c. prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, and ensure that the primary goal of securities regulation is the protection of the investor.

86. Finally, this Panel is satisfied that the costs award of $10,000 is consistent with the awards in similar cases.

87. In summary, this Panel imposed the following penalties in this case:

(a) A direction that the Respondent pay a fine of $90,000 for engaging in personal financial dealings as described in Allegation # 1,
(b) A direction that the Respondent pay a fine of $50,000 for engaging in outside business activities and misleading the Member as described in Allegations # 2 and #3,
(c) A direction that the Respondent pays a fine of $10,000 for possession of blank or partially completed pre-signed account forms as described in Allegation #4,
(d) A permanent prohibition of the Respondent's authority to conduct securities related business in any capacity over which the MFDA has jurisdiction,
(e) A direction that the Respondent pays to the MFDA $10,000 for costs of the investigation.

88. This Panel also orders that if at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA

Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 15th day of November, 2016.

"Shelley L. Miller"

Shelley L. Miller, Q.C.
Chair

"M. Elaine Bradley"

M. Elaine Bradley
Industry Representative

"Howard R. Mix"

Howard R. Mix
Industry Representative

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