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: Fangzhou Du

Heard: March 29, 2022 in Edmonton, Alberta
Decision: March 29, 2022
Reasons for Decision: May 30, 2022

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Sherri Walsh	Chair
Richard Bergeron	Industry Representative
Greg Wiebe	Industry Representative

Appearances:

Julie Grajales	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Fangzhou Du	)	Respondent, not in attendance or represented by counsel

I. INTRODUCTION

1. On May 18, 2021, the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Hearing pursuant to ss. 20 and 24 of MFDA By-law No. 1 in respect of disciplinary proceedings commenced against Fangzhou Du (the "Respondent"). The Notice of Hearing set out the following allegation:

> **Allegation #1:** Between November 2017 and May 23, 2019, the Respondent engaged in personal financial dealings with a client that gave rise to a conflict or potential conflict of interest that the Respondent failed to disclose to the Member or otherwise address by the exercise of reasonable business judgment influenced only by the best interests of the client, contrary to the Member's policies and procedures and MFDA Rules 2.1.4, 2.5.1, 1.1.2 and 2.1.1.

2. On June 16, 2021 the Respondent filed a Reply to the Notice of Hearing (the "Reply") in which he admitted all of the allegations and particulars of misconduct which were set out in that Notice.

3. On July 21, 2021, the Respondent attended the first appearance in this matter, at which time a subsequent appearance was scheduled to take place on October 27, 2021. Unfortunately, although he had participated in the previous appearance, the Respondent failed to attend the appearance held on October 27, 2021. Nonetheless a date was set for the Hearing on the Merits of this matter (the "Hearing") to take place on March 29, 2022.

4. On March 29, 2022 when the Hearing was convened, the Respondent was not in attendance at the time scheduled for the Hearing to commence.

5. Enforcement Counsel advised the Panel that they had been trying to contact the Respondent since January 2022 but had not been able to reach him via email or telephone and that the phone number that was previously used successfully to contact him, was out of service.

6. The MFDA Corporate Secretary's Office confirmed that they tried to call the Respondent at the commencement of the Hearing, and found that the phone number was out of service.

7. They also advised that they had sent the Respondent the link by email which would allow him to participate in the Hearing but had not received a response from him. They noted that they did not receive a "bounce back message" in response to their email.

8. After waiting for a period of 10 minutes, Enforcement Counsel requested that the Panel proceed in the Respondent's absence, in accordance with MFDA Rule of Procedure 7.3. That Rule states:

> 7.3 Failure to Attend Hearing
>
> (1) 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.

9. Prior to granting that request, the Panel asked Enforcement Counsel to outline in more detail the steps which had been taken to make the Respondent aware of these proceedings.

10. In response, Enforcement Counsel pointed us to the Affidavit of Caron Handsaeme sworn March 25, 2022. Ms. Handsaeme is a Senior Investigator with the MFDA.

11. In her affidavit, which was ultimately entered into evidence at the Hearing, Ms. Handsaeme referred to the Affidavit of Service of Alyson Brown sworn November 12, 2021 in which Ms. Brown said that on November 7, 2021 she served a letter on the Respondent which notified him of the date and time set for the Hearing, along with other information related to the proceeding. In this regard, Ms. Handsaeme stated:

> (a) On November 7, 2021, Ms. Brown attended at the Respondent's last known residential address and spoke to a resident who advised that the Respondent no longer lived there; the resident provided Ms. Brown with the Respondent's phone number;
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> (b) When Ms. Brown called the phone number provided to her, the Respondent's friend answered the phone and advised that the Respondent was not reachable at that phone number at the time, as he was dealing with a family matter outside of the province; the Respondent's friend provided Ms. Brown with the Respondent's email address – [email address];
>
> (c) Ms. Brown served the following documents on the Respondent via email to [email address]:
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> i. a copy of a letter dated November 4, 2021 from the MFDA to the Respondent regarding the hearing of this matter, which set out the time and date set for the hearing, the Respondent's entitlement to obtain disclosure from the MFDA and his corresponding obligation to provide the MFDA with disclosure, and the potential consequences of the Respondent's failure to participate in the proceeding (the "MFDA Notice Letter"); and
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> ii. a copy of the MFDA's News Release regarding this matter dated October 27, 2021.

12. Further, on November 9, 2021, Ms. Brown served the Respondent with the above referenced documents, by email.

13. In her Affidavit, Ms. Handsaeme also referenced Enforcement Counsel's attempts to contact the Respondent by email on January 12 and February 4, 2022. In those emails Enforcement Counsel confirmed the Respondent's entitlement to obtain disclosure and reiterated the information set out in the MFDA Notice Letter of November 4, 2021 with which the Respondent had been previously served by Ms. Brown

14. Enforcement Counsel sent a follow up email to the Respondent on March 22, 2022 to confirm that he was able to open and view her emails and a further email on March 23, 2022 asking the Respondent to contact her immediately if he wanted to receive the materials the MFDA would be relying on at the Hearing. Ms. Handsaeme's affidavit indicates that Enforcement Counsel did not receive any notifications that the emails were not successfully delivered. The Respondent did not, however, respond to Enforcement Counsel's communications.

15. According to Ms. Handsaeme's affidavit, between March 1 and March 22, 2022 Enforcement Counsel placed a total of 4 telephone calls to the Respondent at the phone number that the MFDA had previously used to communicate with him. Subsequently, as noted above, Enforcement Counsel advised that that phone number is no longer in service.

16. The evidence was clear that the residential address, phone number and email address which both the process server, Ms. Brown and Enforcement Counsel used to try to contact the Respondent about the Hearing were the same as the ones which Staff had successfully used to contact the Respondent in the past.

17. After taking a brief recess to deliberate, the Panel determined that we were prepared to proceed in the absence of the Respondent, in accordance with MFDA Rule of Procedure 7.3 cited above. We were satisfied that sufficient attempts had been made to contact the Respondent. We noted that both the process server and Enforcement Counsel used the same email address the Respondent used in filing his Reply and which had been successfully used by the MFDA to contact him in the past. Staff had not received a message to indicate that the email address was no longer functional.

18. In deciding to proceed in the absence of the Respondent, we also noted that despite the fact that the Respondent was aware of the October 27th appearance, having been present when the date was scheduled, he did not attend that appearance.

II. EVIDENCE

19. The facts in this matter were established through the evidence of Caron Handsaeme in her affidavit sworn on March 25, 2022 and the testimony she gave at the Hearing where she elaborated on and provided clarification of the matters which were set out in her affidavit.

Reliance on Affidavit Evidence

20. With respect to relying on Ms. Handsaeme's affidavit, Enforcement Counsel pointed the Panel to the following rules from the MFDA's Rules of Procedure which allow a Panel to admit affidavits into evidence:

> **1.6 Admissibility of Evidence**
>
> (1) 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.
>
> 13.4 Evidence by Sworn Statement
>
> (1) 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.

21. Relying on these Rules, the Panel had no hesitation in admitting Ms. Handsaeme's affidavit into evidence as an exhibit. We note that it is well established that MFDA Hearing Panels and other regulatory bodies routinely consider and rely on both hearsay and affidavit evidence in making findings of facts.

> *Tonnies (Re)*, MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2005 at paras 10-12

22. In light of the fact that there were a number of exhibits attached to Ms. Handsaeme's affidavit which contained information of a personal financial nature, the Panel ordered that if at

any time a non-party to the proceeding, with the exception of the body set out in s. 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, 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.

Facts Entered into Evidence through Ms. Handsaeme's Affidavit and Testimony.

Registration History

23. The Respondent was registered in Alberta as a dealing representative with CIBC Securities Inc. (the "Member"), between January 17, 2017 and May 23, 2019.

24. At all material times the Respondent was also employed with the CIBC Bank (the "Bank") which is affiliated with the Member.

25. On May 23, 2019 the Member terminated the Respondent because of his conduct which is the subject of these proceedings. The Respondent is not currently registered in the securities industry in Canada in any capacity.

The Client and Friends

26. In July 2018, YM became a client of the Member. At all material times, client YM was also a client of the Bank.

27. On May 23, 2019 a proactive detection alert flagged the Respondent's activities with CIBC Corporate Security as a result of an excessive number of inquiries on the bank account of client YM. The Bank refers to this activity as "Customer Information File ("CIF") surfing".

28. Following further review, CIBC Corporate Security learned that the Respondent had conducted CIF surfing for client YM, 115 times and 7 times for Bank client, SL.

29. CIBC Corporate Security then reviewed the Respondent's personal finances from August 1, 2018 to March 20, 2019 and identified transfers between the Respondent and client YM as well as between the Respondent and Bank clients SL and ZZ.

30. During the interview that Ms. Handsaeme conducted with the Respondent as part of the MFDA's investigation in this matter, the Respondent stated that:

a) SL is his long-time friend whom he met when he first came to Canada to attend high school;
b) The Respondent and ZZ were in a relationship at the time of the conduct which gave rise to the allegations in this matter and were still dating at the time of his interview on May 19, 2020;
c) The Respondent met client YM through ZZ while attending the University of Alberta; and
d) The Respondent, client YM, SL and ZZ are all friends and part of the same social network.

Transactions which gave rise to this proceeding

31. On November 5, 2018, the Respondent paid $5,000 on behalf of ZZ, as a deposit toward the purchase of a vehicle that ZZ intended to buy. On that same day, client YM agreed to lend ZZ $41,000 towards to the purchase of the same vehicle.

32. Client YM transferred $41,000 to the Respondent's personal bank account so that the Respondent could apply the money towards the vehicle purchase, by ZZ.

33. On November 6, 2018, the Respondent obtained a bank draft in the amount of $41,690, consisting of: the $41,000 provided by client YM; and an additional $690 from the Respondent's personal bank account, which the Respondent gave to ZZ to cover the vehicle's purchase price.

34. On November 8, 2018, ZZ gave the Respondent a bank draft in the amount of $46,690. On the same day, the Respondent transferred $40,800 to client YM as repayment of the amount that client YM had loaned to ZZ.

35. The Respondent withheld $200 from the amount he paid to client YM on the basis that this amount represented monies that he said client YM owed him for a purchase that he had previously made on client YM's behalf.

36. In December 2018, SL asked client YM to lend him $30,000 so that he could also purchase a vehicle.

37. To facilitate this loan, on December 7, 2018, client YM transferred $31,000 to the Respondent's personal bank account.

38. On December 18, 2018, the Respondent transferred $30,000 from his personal bank account to SL's bank account.

39. The Respondent's explanation for why client YM transferred $1,000 more to him than the $30,000 YM was lending to SL was because the additional $1,000 represented repayment of monies that client YM owed to the Respondent for purchases that the Respondent had previously made on client YM's behalf.

40. Between January 2019 and May 2019, SL made monthly payments of $2,800 to the Respondent's personal line of credit in order to facilitate repayment of client YM's loan to SL. The Respondent transferred those monies to client YM shortly after he received each payment.

Member's Policies and Procedures

41. In his capacity as an Approved Person, the Respondent was an employee of the Member. At the material time, the Member's Policies and Procedures stated the following:

> **9.1 Conflicts of Interest**
>
> Managing real or perceived conflicts of interest requires CIBC SI and all Registrants to identify, assess and respond to conflicts of interest. Section 4.0 of the *CIBC Code of Conduct* requires that all employees of the CIBC group of companies discuss any real, potential or perceived conflict of interest situation with their manager as soon as possible so that action or further consultations can be undertaken to resolve the situation. Sections 4.1 to 4.6 of the Code describe some situations of actual, potential or perceived conflict of interest that must be avoided, but the list is not exhaustive.
>
> Conflict of interest between clients
>
> CIBC SI procedures addressing conflicts, including relevant Job Aids, can be found at: http://bist.cibc.com/bim/en/pages/article.asp?id=17174 The following is a list of examples of potential conflicts arising between clients and is not intended to be exhaustive:
>
> Estate or inter-generational planning (such as making assets joint) where the parents and one or more adult children dealing with the same Registrant have competing goals, interests or objectives.
>
> Clients who are married or common law partners, dealing with the same Registrant, where one or both of the partners inform CIBC they are separating or divorcing and have competing goals, interests or objectives. The status of the relationship must be voluntarily supplied by the client, without probing by the registrant.

> Any connected clients (e.g., business partners, landlords/tenants) dealing with the same Registrant, who have competing goals, interests or objectives.
>
> If a Registrant is aware of a dispute between the parties and receive instructions from one party to withdraw all or part of the account assets, the employee should contact the other party to confirm the instruction. If there is no consent to the withdrawal or the other party can't be reached, the matter should be referred to the employee's manager or Wealth Management Compliance.
>
> All questions regarding potential conflicts of interest between clients should be directed to the Supervision Services, Mailbox.
>
> 9.7 Personal Financial Dealings
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> Employees may not borrow from or lend personal funds or other personal property to any client who has a relationship with CIBC, or use this relationship so that others, who are either related to the employee or are close personal friends of the employee, can do so. This restriction does not apply to transactions with clients who are financial intermediaries (such as department stores or other financial institutions) if the transaction is conducted on market terms and conditions.

42. According to Ms. Handsaeme's affidavit, on May 23, 2019 when CIBC Corporate Security interviewed the Respondent after becoming aware of his CIF surfing, the Respondent admitted that he did not disclose to the Member any conflict or potential conflict that was triggered by the transactions between him, YM, SL and ZZ, described above.

Bank's Code of Conduct

43. In addition to the Member's Policies and Procedures, the Respondent was subject to the Bank's Code of Conduct (the "Code"). The Code applied to all bank employees including Approved Persons of the Member. At the material time, the Code prohibited bank employees from directly or indirectly borrowing from or lending "personal funds or other personal property to any client."

44. During the course of Staff's investigation into this matter, the Member provided Staff with the Respondent's training transcript which showed that on June 24, 2015, November 21, 2015, January 20, 2017, December 12, 2017 and November 14, 2018 the Respondent completed the "Act with Integrity" training pursuant to which the Respondent said he acknowledged, understood and agreed to abide by the Code and attested that he had acted in accordance with the Code.

45. Further, the Respondent confirmed, during the interview CIBC Corporate Security conducted with him on May 23, 2019, that he understood the section in the Code which prohibited borrowing money from and lending money to clients.

46. In her testimony, Ms. Handsaeme said that during the interview she conducted with the Respondent, the Respondent confirmed that he accepted monies from client YM for the purposes of facilitating ZZ's purchase of a vehicle. He told her that he acted as a go between on the transaction because client YM and ZZ lived in different parts of the city and it was easier for the Respondent to intercept the monies and create the draft to lend the money to ZZ than for client YM to drive to the bank to get a bank draft to give to ZZ. In turn, the Respondent, still acting as a conduit received the monies from ZZ to repay client YM.

Admissions Contained in the Reply

47. In the Reply, which was entered into evidence, in addition to admitting the allegation and particulars contained in the Notice of Hearing, under the heading - "Additional Facts and Conclusions" the Respondent stated:

> 1, I admit that I had personal financial dealings with my friends who are also CIBC clients. I thought that lending or borrowing without any interest does not raise conflict of interest. All the funds involved in those transactions were personal, no money was taken from CIBC. All the transactions were served as helping friends which had zero connection to CIBC securities Inc. or CIBC investment.
>
> 2, I did not receive any sort of interest by lending money to ZZ to buy the vehicle.
>
> 3, I did not receive any sort of interest by helping SL to borrow money from YM. (interest was probably involved between them).
>
> 4, I had provided ZZ, SL AND YM 'S phone numbers to the investigators before to prove that I told all truth.
>
> 5, I never intended to jeopardize CIBC's reputation or put my interest prior to any client's interest. While I was working for CIBC, I always worked hard and I was top 1 SFSR in CIBC national rank. Working in financial industry is my career goal, I learned a lesson from it and I do not want this case causes negative impact on my mutual fund license or my future career plan.
>
> I sincerely hope that MFDA could excuse my misconduct and impose no penalty on me since it was unintentional and caused no actual financial loss or reputation damage to CIBC or any Clients.
>
> Thank your for your time and consideration.

III. ISSUE

48. Has the Allegation in the Notice of Hearing been proven?

IV. STAFF'S POSITION ON MISCONDUCT

49. At the outset of the Hearing, Staff confirmed that while the Notice of Hearing alleges that the Respondent's misconduct began in November 2017, Staff was only seeking a finding that the

misconduct commenced in November 2018, consistent with both the particulars in the Notice of Hearing and the evidence adduced at the Hearing.

50. Staff provided the Panel with a comprehensive written submission in support of their position that, based on the evidence adduced at the Hearing, they had met their burden to prove the allegation in the Notice of Hearing, on a balance of probabilities.

51. Staff submitted that Ms. Handsaeme's affidavit and testimony provide cogent evidence that the Respondent engaged in the following personal financial dealings with client YM:

- He accepted monies from client YM into his personal bank account to facilitate loans to ZZ and SL;
- He then accepted monies from ZZ and SL through his personal bank account to facilitate the repayment of those loans to client YM; and
- Through his personal bank account, he made purchases on client YM's behalf totaling at least $1,200 which, Staff submitted, amounted to loans from the Respondent to client YM.

52. By engaging in these various personal financial dealings with client YM, Staff submitted that the Respondent clearly breached the sections of the Member's Policies and Procedures cited above, and MFDA Rules 2.1.4, 2.5.1, 1.1.2, and 2.1.1.

53. With respect to the Respondent's breach of MFDA Rule 2.1.4, Staff submitted that the Respondent's personal financial dealings with client YM gave rise to conflicts or potential conflicts of interest which he did not disclose to the Member, or disclose in writing to the client; nor did he take steps to ensure that the conflict or potential conflict was addressed by the exercise of responsible business judgment, influenced only by the best interests of the client.

54. Staff also submitted that the Respondent's contravention of MFDA Rule 2.1.4 was not obviated by the fact that client YM was fully repaid the loans which the Respondent had facilitated, to ZZ and SL.

55. In response to questions from the Panel as to how to characterize the Respondent's personal financial dealings with client YM, Staff submitted that the conduit role that the Respondent played between the parties in facilitating the loans and their repayment, was analogous to the conflict of interest that arises when an Approved Person borrows money from or lends money to a client.

56. In that regard, Enforcement Counsel submitted that based on the facts of this case, where the Respondent accepted and became a custodian of client YM's monies, even for a temporary amount of time, there was still the potential for those monies to be lost, whether intentionally if the Respondent, for example, unilaterally decided to reject client YM's intentions as to where the money was supposed to go, or ZZ and SL's intentions for repayment, or if the monies went astray due to an unanticipated calamity that the Respondent simply was not able to foresee.

57. It was Staff's submission, therefore, that a conflict arose from the potential for harm which flowed from the Respondent's personal financial dealings with client YM, which the Respondent failed to address in accordance with the provisions of MFDA Rule 2.1.4.

58. With respect to the Respondent's breach of MFDA Rules 2.5.1 and 1.1.2, Staff submitted that the Respondent disregarded the Member's Policies and Procedures by engaging in the personal financial dealings that he facilitated between client YM, ZZ and SL, described above.

59. With respect to the Respondent's breach of MFDA Rule 2.1.1, Staff submitted that the Respondent's conduct amounted to a failure to deal fairly, honestly and in good faith with the client by engaging in conduct that gave rise to an actual or potential conflict of interest and failing to appropriately address that conflict. They also submitted that the Respondent's conduct constituted a failure to observe high standards of ethics and conduct in the transaction of business by disregarding the Member's Policies and Procedures and the requirements of MFDA Rule 2.1.4.

V. ANALYSIS AND DECISION

Jurisdiction

60. Pursuant to s. 24.1.4 of MFDA By-law No. 1, an Approved Person remains subject to the jurisdiction of the MFDA notwithstanding the fact that such individual has ceased to be an Approved Person. The MFDA is entitled to commence disciplinary proceedings against an Approved Person for up to five years from the date upon which the individual ceases to be an Approved Person.

61. In the present case, the Respondent was an Approved Person registered with the Member until May 23, 2019. These disciplinary proceedings which were commenced on May 18, 2021 were, therefore, commenced within the time allowed by the provisions of MFDA By-law No. 1.

62. Further, the personal financial dealings which gave rise to the allegation in these proceedings involved the Respondent's dealings with client YM who was at all material times, a client of the Member.

63. Accordingly, the Panel is satisfied that the MFDA has the jurisdiction to bring the within proceedings.

Standard of Proof

64. As set out in Staff's written submissions, the standard of proof in this case, as it is in all MFDA and other regulatory proceedings in the securities industry, is the civil standard of proof known as a "balance of probabilities".

65. MFDA Hearing Panels frequently cite the Supreme Court of Canada's statement in *H. v. McDougall* that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize relevant evidence with care to determine whether it is more likely than not that an alleged event occurred." Evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

See for example: *Desgroseilliers (Re)* (2018), MFDA File No. 201790 at para 15

Violation of The Rules

Rule 2.1.4

66. Rule 2.1.4 reads as follows:

> 2.1.4 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).

67. MFDA Hearing Panels have determined that the potential for conflicts of interest arises in circumstances where an Approved Person deposits client money into the Approved Person's own bank account or lends money to a client.

Shaw (Re), 2017 LNCMFDA 129 at paras 53-55

Wang (Re), 2017 LNCMFDA 209 at para 16

Pekel (Re) (2021), MFDA File No. 202007 at paras 39-46

Rahman (Re) (2021), MFDA File No. 202007 at para 32

Yalkezian (Re) (2022), MFDA File No. 202164 at para 12

68. Having regard to the facts in this case, the Panel finds that the evidence, from both Ms. Handsaeme's affidavit and testimony and the admissions contained in the Respondent's Reply, is cogent evidence that the Respondent:

a) Accepted monies from client YM into his personal bank account to facilitate loans from YM to ZZ and SL;
b) Accepted monies from ZZ and SL into his personal bank account or line of credit to facilitate the repayment of their loans from client YM; and
c) Made purchases on client YM's behalf totaling at least $1,200 which amounted to loans in that amount, from the Respondent to client YM.

69. The Panel finds while the Respondent was not the intended beneficiary of the funds that he accepted from client YM, his role as a "conduit" for client YM's loans to ZZ and SL and ZZ's and SL's repayments to client YM, gave rise to a significant conflict of interest between him and client YM, within the meaning of Rule 2.1.4.

70. In this regard the Panel agrees with Staff's submission that there was a potential for YM to suffer substantial losses, for example, if the Respondent intentionally retained the money that was transferred to his account to facilitate the loans between client YM and ZZ and SL or if an unanticipated calamity such as a car accident undermined the Respondent's good intentions and the money did not reach the third party for whom it was intended. Alternatively, looking at the potential for harm generally, while in an Approved Person's account, money could be frozen or seized as a result of a garnishment order or other unanticipated action taken against the account.

71. We further find that in making purchases on client YM's behalf for which he sought repayment, the Respondent was effectively advancing a loan in the amount of those monies to client YM, which also gave rise to a conflict or potential conflict of interest.

72. Lending money to clients can result in a significant conflict or potential conflict of interest for the following reasons:

a) An Approved Person who is owed money from a client may be hesitant to execute trades in mutual funds at all or to execute trades in higher risk funds, even if suitable, due to a fear that the Approved Person would not be repaid;

b) An Approved Person may persuade a client to sell Deferred Sales Charge load mutual funds earlier, despite the fees associated with such a transaction, in order to free the proceeds to facilitate repayment of the amounts owed to the Approved Person; or

c) An Approved Person may persuade a client to buy mutual funds that attract higher commissions for the Approved Person as part of a proposal to repay the Approved Person.

Yalkezian (Re), *supra* at para 12

Shaw (Re), *supra* at para 55

73. For all of these reasons, the Panel finds that the Respondent engaged in personal financial dealings with client YM which gave rise to a conflict or potential conflict of interest.

74. The Respondent admitted that he did not disclose the conflict of interest to the Member at any time. The Member only became aware of the matter when CIBC Corporate Security investigated the Respondent's CIF surfing activity.

75. We find, therefore, that the Respondent failed to disclose the conflict or potential conflict of interest to the Member, in breach of the requirements of MFDA Rule 2.1.4(a).

76. We further find that the Respondent failed to ensure that the conflict was addressed by the exercise of responsible business judgment influenced only by the best interest of the client and, by failing to disclose the conflict to the Member, he also deprived the Member of the opportunity to do so, as required by MFDA Rule 2.1.4(b).

77. As stated by previous MFDA Hearing Panels and as set out in MFDA Member Notice MSN-0047 (the "Notice"), there are times when the exercise of responsible business judgment will require the prohibition of certain arrangements. It cites as an example of this - borrowing from and lending money to clients.

MFDA Notice MSN-0047

Yalkezian (Re), supra at para 9

78. With respect to lending money to clients, the Notice specifically states that "… Approved Persons are prohibited in any case from directly or indirectly entering into arrangements that involve lending to clients."

79. By failing to disclose the conflict or potential conflict of interest to the Member, the Respondent not only prevented the Member from exercising responsible judgment about the transaction he was conducting with YM, he also prevented the Member from ensuring that the conflict was disclosed in writing to the client prior to the Respondent proceeding with the transaction, as required by Rule 2.1.4(c).

80. Finally, the Panel agrees with Staff's submission that the Respondent's contravention of MFDA Rule 2.1.4 is not obviated by the fact that the loans from client YM to ZZ and SL for which the Respondent was a conduit, were fully repaid.

81. An Approved Person contravenes MFDA Rule 2.1.4 even when there is no client loss and all monies are returned to the client.

Piper (Re), 2018 LNCMFDA 98 at paras 19-20

Shaw (Re), *supra* at paras 53-55

Wang (Re), *supra* at paras 17-18

Alam (Re), 2020 LNCMFDA 98

82. For all of the above reasons, the Panel finds that the Respondent contravened MFDA Rule 2.1.4.

Compliance with the Member's Policies and Procedures

83. MFDA Hearing Panels have held that when an Approved Person fails to comply with a Member's policies and procedures they act contrary to MFDA Rules 1.1.2 and 2.5.1. As the Hearing Panel stated in *Franco (Re)*:

> The obligation of the Approved Persons to comply with the policies and procedures of the Members that they are registered with is a cornerstone of the self-regulatory system … When Approved Persons disregard those obligations, the Member's ability to supervise the conduct of such Approved Persons and protect the interests of clients and the public is undermined.
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> *Franco (Re)* (2011), MFDA File No. 201016 at para 38

84. MFDA Rule 2.5.1 requires Members to establish, implement and maintain policies and procedures to ensure the handling of its business is conducted in accordance with the MFDA By-laws, Rules and Policies. The Rule reads as follows:

> **2.5.1 Member Responsibilities**. Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.

85. MFDA Rule 1.1.2 places a corresponding obligation on Approved Persons to comply with the policies and procedures that the Member establishes and implements to comply with its regulatory obligations. The Rule reads as follows:

> **1.1.2 Compliance by Approved Persons**. Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1.(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.

86. The evidence in this case demonstrated that the Member's policies and procedures prohibited Approved Persons from borrowing from or lending personal funds or other personal property to a client or from using the relationship so that others who are either related to the employee or are close personal friends of the employee can do so.

87. The Member's policies and procedures also required Approved Persons to report to the Member any real, potential or perceived conflict of interest.

88. The Panel finds that the Respondent directly contravened the requirements contained in the Member's policies despite his being aware of them. For example, the Respondent's training transcript confirmed that he acknowledged, understood and agreed to abide by the Bank's Code of Conduct which also prohibited borrowing from and lending to clients.

89. The Respondent in his Reply admitted that he failed to disclose to the Member any conflict or potential conflict that was triggered by his personal financial dealings with client YM, again in breach of the requirements of the Member's policies and procedures.

90. Accordingly, the Panel finds that the Respondent disregarded the Member's policies and procedures, contrary to MFDA Rules 2.5.1 and 1.1.2 when he:

- Accepted monies from client YM into his personal bank account to facilitate loans to ZZ and SL;
- Accepted monies from ZZ and SL to facilitate the repayment of their loans to client YM through his personal bank account; and
- Made purchases on client YM's behalf totaling approximately $1,200, for which repaid himself by retaining monies that flowed through his personal bank account when he acted as a conduit between client YM, ZZ and SL.

Standard of Conduct Rule 2.1.1

91. MFDA Rule 2.1.1 requires Approved Persons to uphold the standard of conduct applicable to all registrants in the mutual fund industry. The Rule reads as follows:

> **2.1.1 Standard of Conduct**. Each Member and each Approved Person of a Member shall:
>
> (a) deal fairly, honestly and in good faith with its clients;
>
> (b) observe high standards of ethics and conduct in the transaction of business;
>
> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
>
> (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

92. Compliance with this Rule is essential to the MFDA's mandate to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.

> *Breckenridge (Re)*, 2007 LNCMFDA38 at para 71

93. MFDA Panels have consistently held that an Approved Person who engages in personal financial dealings or enters into a conflict of interest position with a client has engaged in conduct that contravenes MFDA Rule 2.1.1.

> *Rosicki (Re)* 2019, MFDA File No. 201826 at para 63
>
> *Wang (Re), supra*

94. MFDA Panels have also held that an Approved Person who breaches the Member's policies and procedures has engaged in conduct that is contrary to MFDA Rule 2.1.1.

Davis (Re), 2016 LNCMFDA 172 at para 39

Tonnies (Re), 2005 LNCMFDA 7 at para 39

95. The Panel finds that the Respondent's personal dealings with client YM described above constituted a failure to:

a) deal fairly, honestly and in good faith with a client by engaging in conduct that gave rise to an actual or potential conflict of interest and failing to appropriately address that conflict; and

b) observe high standards of ethics and conduct in the transaction of business by disregarding the Member's policies and procedures and the requirements of MFDA Rule 2.1.4.

96. The Respondent's conduct also constituted business conduct or practice that was unbecoming and detrimental to the public interest.

97. We find, therefore, that the Respondent's conduct contravened MFDA Rule 2.1.1.

VI. CONCLUSION (MISCONDUCT)

98. For all of these reasons, the Panel finds that Allegation #1 set out in the Notice of Hearing, with the change of the date from November 2017 to November 2018 as per Enforcement Counsel's advice to the Panel, has been proven. In making this finding, we note that the particulars in the Notice of Hearing, which the Respondent admitted in his Reply identified the conduct commenced in November 2018.

VII. PENALTY

99. After the Panel deliberated and gave its decision on the issue of misconduct, we took a recess to review and consider Enforcement Counsel's written submissions on the issue of penalty.

100. The Hearing then resumed to allow Enforcement Counsel to make oral submissions as to the appropriate penalty we should impose.

Proposed Penalty

101. Staff submitted that the following sanctions should be imposed against the Respondent:

- At least a six month prohibition from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member;
- A fine in the amount of at least $15,000; and
- Costs.

VIII. ANALYSIS AND DECISION

102. The primary goal of securities regulation is protection of the investor. In addition to protecting the public, the goals of securities regulation include fostering public confidence in the capital markets and the securities industry as a whole.

> *Pezim* v. *British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557 at paras 59 & 68

103. The Hearing Panel in *Tonnies (Re)* described the role of a Hearing Panel when imposing sanctions in furtherance of the above goals as follows:

> 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.
>
> *Tonnies (Re)*, *supra* at para 45

104. The Panel went on to say that the following facts should be take into account in determining the appropriate penalty:

> (a) the protection of the investing public;
>
> (b) the integrity of the securities market;
>
> (c) specific and general deterrents;
>
> (d) the protection of the governing body's membership; and
>
> (e) the protection of the integrity of the governing body's enforcement processes.
>
> *Tonnies (Re)*, *supra* at para 46

105. Other factors that Hearing Panels frequently consider 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.

Tonnies (Re), *supra* at para 48

106. A Hearing Panel may also refer to the MFDA's Sanction Guidelines (the "Guidelines"), which came into effect on November 15, 2018. The Guidelines are not mandatory or binding on a Panel, but they provide a summary of the key factors upon which a Panel can exercise its discretion to sanction, consistently and fairly. Many of the same factors which have been considered in previous decisions of MFDA Hearing Panels listed above, are reflected and described in the Guidelines.

Application in the Present Case

Nature of the Misconduct

107. Staff submitted that the various instances of personal financial dealings in which the Respondent engaged with client YM constitute serious misconduct.

108. We agree.

109. Conflicts of interest can result in client harm, expose the Member to liability and undermine trust in the mutual fund industry. Approved Persons are expected to be aware of conflicts and potential conflicts of interest and to advise the Member when such conflicts arise.

110. Even where a client has not suffered an actual loss, Hearing Panels have found that failing to avoid conflicts of interest is serious misconduct. As the Panel in *Sarang (Re)* stated:

> However, the remaining considerations warrant the imposition of a significant penalty. Financial dealings with a client create a conflict of interest and are permitted in limited situations and only where appropriate safeguards are in place. Even though the loan was repaid after demand was made, and the client suffered no loss, conflicts of interest seriously undermine public confidence in the integrity of the market and its regulation.

Sarang (Re), 2016 LNCMFDA 22 at para 11

see also: *Wang (Re)*, *supra* at para 16;

and *Shaw (Re)*, *supra* at para 55

111. Citing the decision in *Yalkezian, supra,* Staff submitted that an aggravating factor for the Panel to consider, consistent with the findings of other MFDA Panels, is the fact that the Respondent's misconduct involved more than simply one isolated incident, pointing to the fact that there were several transactions which took place between the Respondent and client YM to facilitate the lending arrangements which were processed over a span of several months.

Yalkezian (Re), *supra* at para 29

112. Staff pointed out that by failing to disclose to the Member the conflict or potential conflict of interest that arose as a result of the Respondent's various personal financial dealings with client YM, the Respondent also prevented the Member from complying with its own obligations under Rule 2.1.4. In particular, the Respondent prevented the Member from immediately disclosing the conflict or potential conflict to client YM in writing, as well as ensuring that the conflict or potential conflict was resolved in client YM's best interests.

113. The Panel agrees with these submissions.

114. We find that the Respondent's misconduct exposed client YM to the potential for serious harm. Ensuring that conflicts or potential conflicts of interest are addressed by the exercise of responsible business judgment influenced only by the best interests of a client is one of an Approved Person's most important responsibilities. Unfortunately, in this case, the Respondent failed to discharge that responsibility and in doing so engaged in serious misconduct.

Investor Harm and Benefits Received by the Respondent

115. The Respondent did not receive any financial benefit from facilitating client YM's loans to ZZ and SL. His conduct did, however, expose YM to the risk of financial harm as discussed earlier in these Reasons, thereby disregarding YM's best interests. The fact that client YM's loans to ZZ and SL were eventually repaid in full does not nullify the risk of harm to which client YM was exposed.

116. The Respondent also exposed client YM to risk of financial harm when he advanced loans to client YM to make certain purchases. Again, as discussed above in our Reasons, MFDA Hearing Panels have determined that where an Approved Person loans money to a client, they place themselves in a conflict or potential conflict of interest by exposing the client to the potential for harm.

Shaw (Re), *supra* at para 55

Yalkezian (Re), *supra* at para 12

The Respondent's Recognition of the Seriousness of the Misconduct

117. The Respondent filed a Reply in which he admitted the Allegation and particulars set out in the Notice of Hearing. He also participated in the first appearance in these proceedings.

118. We agree with Staff's submissions, however, that the Respondent's failure to participate in these proceedings after the first appearance, demonstrates a failure on his part to fully appreciate the seriousness of his misconduct.

The Respondent's Past Conduct

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

Deterrence

120. As Staff submitted, it is a long standing and accepted principle in the securities industry that penalties should be imposed on wrongdoers that are sufficient to advance the objectives of both specific and general deterrence by preventing wrongdoers from engaging in similar misconduct and by discouraging others from doing so.

Cartaway Resources Corp. (Re), 2004 SCC 26 at para 610

121. Staff submitted that the penalty it was proposing will prevent the Respondent from contravening regulatory requirements by prohibiting him from engaging in securities related business on behalf of any Member of the MFDA for at least six months. Should he return to the industry after serving his prohibition, the serious consequences that have been imposed on him are likely to deter him from engaging in similar misconduct in the future.

122. As well, by demonstrating that substantial sanctions will be imposed on an Approved Person who engages in the type of behaviour that is the subject of these proceedings, thereby emphasizing the seriousness of such misconduct, Staff submitted that the proposed penalty will deter other licensed individuals from engaging in similar conduct.

123. The Panel agrees with these submissions.

Previous Decisions Made in Similar Cases

124. While no two cases are exactly alike, consideration of decisions made by previous MFDA Panels in cases where the facts are sufficiently similar, is a useful and appropriate exercise for a Panel to perform when deciding the appropriate penalty in a matter.

125. Staff submitted that the proposed penalty is appropriate having regard to the previous decisions made in similar circumstances as set out in the chart below:

CASE	MISCONDUCT	PENALTIES
Alam (Re), 2020 LNCMFDA 98	The Respondent: • Solicited and borrowed $15,000 from a client. • Engaged in a transaction with the client whereby the client paid $17,000 to the Respondent and at approximately the same time a third party paid the equivalent of $17,000 CAD to the client's brother outside Canada. Other Factors: • No client complaint or evidence of client harm. • The client was repaid with interest.	**Settlement:** • $7,500 fine. • $3,750 costs. • Six month prohibition.
Wang (Re), *supra*	• Allegation #1: Respondent accepted $15,000 cash from client PL, and deposited the monies into her own bank account prior to transferring the monies to the client PL's bank account. • Allegation #2: Respondent deposited $15,000 cash from client PL into her own bank account in two separate transactions, thereby circumvented the large cash transaction reporting	**Settlement:** • $20,000 fine. • $5,000 costs. • Six month prohibition

CASE	MISCONDUCT	PENALTIES
	requirements to the Financial Transactions and Report Analysis Centre of Canada. • Allegation #3: Respondent falsely represented to the Member that she had returned $15,000 cash received from client PL when she had in fact deposited the monies into her own bank account. • No client harm. • No benefit to Respondent.	
Yalkezian (Re), supra	The Respondent: • Engaged in personal financial dealings with clients by borrowing money from an 82-year-old client ($123,283.66 total) to pay personal and business expenses. • Paid the borrowing costs associated with the leveraged investment strategies that he had recommended to 3 clients. • Lent a total of $142,400 to 9 clients ($139,317 of which was repaid to the Respondent by those clients). • Misled the Member regarding the source of the monies that three clients used to pay the borrowing costs of their leveraged investments. • Engaged in an unapproved outside activity. Other Factors: • The Respondent fully repaid the client loan that he had obtained. • The Respondent paid more than $93,000 to cover borrowing costs of the clients in leveraging strategies that were not repaid to him. • No clients complained with regard to the Respondent's conduct. • The Respondent had not previously been the subject of MFDA disciplinary proceedings.	**Settlement:** • $25,000 fine. • $5,000 costs. • Five-year prohibition**.**
Rahman (Re) (2021), MFDA File No. 202074	The Respondent: • Engaged in personal financial dealings with clients by borrowing monies (roughly $74,000) from clients, lent monies to a client, and deposited monies belonging to clients into his personal bank account. • Aided a client to falsely portray monies as a gift to assist the client in securing a mortgage. • Deposited $20,000 in cash, which he borrowed from a client, into bank accounts that he controlled in three separate transactions of less than $10,000 each, thereby circumventing the	**Settlement:** • $20,000 fine. • $5,000 costs. • Five year prohibition.

CASE	MISCONDUCT	PENALTIES
	large cash transaction reporting requirements to the Financial Transaction and Reports Analysis Centre of Canada. • Made false or misleading statements to the Member during an investigation into his conduct. Other Factors: • All client money obtained by the Respondent was repaid by the Respondent. • There was no evidence of client complaints. • Investors did not suffer any financial harm because of the Respondent's misconduct.	
Shaw (Re), supra	• Allegation #1: Respondent provided a short term loan of $440,000 to a client. • Allegation #2: Respondent obtained, possessed, and in some instances, used to process transactions, 31 pre-signed account forms. • Allegation #3: Respondent altered 4 account forms without having the clients initial the alterations.	**Settlement:** • $20,000 fine • $2,500 costs
Sarang (Re), supra	• Allegation #1: Respondent engaged in personal financial dealings with a client when he borrowed $29,015 from the client, or arranged for the client to loan $29,015 to a third party, for investment in a non-arm's length corporation. • Allegation #2: dual occupation (same as Allegation #1). • Allegation #3: Respondent misled the Member by falsely answering the Member's annual compliance certification. • No client harm.	**Settlement:** • $7,500 fine. • $2,500 costs. • Permanent prohibition.

126. The Panel very much appreciated the time that Enforcement Counsel took in their oral submissions to highlight how the circumstances of the cases referenced in this chart compare to the facts in this matter.

127. Staff acknowledged that the Respondent's conduct in this case, while serious, was less serious than many other typical personal financial dealing cases in the sense that he did not maintain custody of the money that he received from client YM for very long; nor did he ever intend to do so.

128. Staff also pointed out that although the Respondent's conduct gave rise to the risk for harm as described above, he acted in a manner which was consistent with client YM's instructions and intentions.

129. Accordingly, Staff submitted that compared with most of the other personal financial dealing cases they cited, the conflict arising in these circumstances was less egregious. For that reason, Staff was seeking a penalty that it viewed as being at the lower end of the range of other personal financial dealing cases.

130. Staff also noted that the cases set out in the chart above all involved settlement agreements and that generally the penalties in settlement agreements tend to be on the lower end of the range of what is considered an appropriate penalty.

131. In comparing the decisions set out in Staff's chart with the circumstances of this case, the Panel agrees that in many of those other decisions, the conduct was more egregious than was the Respondent's conduct in this case. We agree with Staff that such distinctions support the higher fines which were agreed upon and accepted by the Panels in those cases.

Costs

132. Staff entered a Draft Bill of Costs into evidence which showed incurred costs totaling $13,850.

133. Staff confirmed that the reason why the costs they were seeking in this matter were so much higher than the costs imposed in the decisions set out in the chart was because those decisions involved settlement hearings.

134. The Panel asked Staff why they were seeking costs in the full amount set out in the Bill of Costs noting that historically Staff have advised that although the Bill of Costs is a guide on which a Panel can rely to determine the appropriate amount of costs, if any, to be imposed, because Staff are on salary, it is not a true representation of costs incurred.

135. After seeking a brief recess to obtain instructions, Staff submitted that costs in the amount of $7,500 to $10,000 would be a reasonable range for the Panel to award, given that the matter proceeded as a one day contested hearing.

IX. CONCLUSION (PENALTY)

136. After taking a recess to deliberate, the Panel made the following decision with respect to penalty, taking into account all of the circumstances of this case, our findings on misconduct, and Staff's submissions on penalty, both written and oral:

- A six month prohibition from conducting securities related business in any capacity while in the employ of or in association with any MFDA Member, commencing on March 29, 2022;
- A fine in the amount of $15,000; and
- Costs in the amount of $7,500.

137. In the Panel's view, this penalty is reasonable and proportionate and falls within the range of decisions rendered by other MFDA Hearing Panels in similar cases. It satisfies the goals of both specific and general deterrence and the primary goal of securities regulation – protection of the public. It also supports the integrity of the securities markets and the MFDA's enforcement process.

DATED this 30th day of May, 2022.

"Sherri Walsh"
Sherri Walsh
Chair

"Richard Bergeron"
Richard Bergeron
Industry Representative

"Greg Wiebe"
Greg Wiebe
Industry Representative

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