

**Decision and Reasons (Misconduct)**

**File No. 201407**



**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: Gabriel Richard Frank**

Heard: February 20, 2015 in Toronto, Ontario  
Decision and Reasons (Misconduct): May 5, 2015

**DECISION AND REASONS  
(Misconduct)**

Hearing Panel of the Central Regional Council:

Paul M. Moore Q.C.	Chair
Linda J. Anderson	Industry Representative
Kenneth P. Mann	Industry Representative

Appearances:

Shelly Feld	)	For the Mutual Fund Dealers Association of
	)	Canada
	)	
Caitlin Sainsbury	)	For the Respondent on the adjournment motion
	)	only
	)	
Gabriel Richard Frank	)	In person

## **The Allegations**

1. By Notice of Hearing, dated March 14, 2014, Staff of the MFDA (“Staff”) alleged that Gabriel Richard Frank (the “Respondent”) engaged in the following conduct:

- a) Between 2006 and April 2011, the Respondent recommended and implemented leveraged investments in the accounts of 10 clients without obtaining the approval of the Member [Investors Group Financial Services Inc.] prior to proceeding with the leveraged investments, contrary to the Member’s Policies and Procedures, thereby interfering with the ability of the Member to supervise the trading activity in the clients’ accounts and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rules 1.1.2 and 2.5.1 and 2.1.1;
- b) Between March 2011 and February 6, 2012, the Respondent engaged in personal financial dealings with client AF by borrowing approximately \$245,000 from client AF, of which amount the Respondent repaid only \$73,100, thereby creating a conflict or potential conflict of interest between the Respondent and client AF which the Respondent failed to ensure was addressed by the exercise of responsible business judgment influenced only by the best interests of client AF, contrary to MFDA Rules 2.1.4 and 2.1.1; and
- c) Commencing January 3, 2013, the Respondent failed to cooperate with an investigation of his activities by the MFDA by failing or refusing to fulfill undertakings to produce documents and information requested by the MFDA, contrary to section 22.1 of MFDA By-law No. 1.

## **Motion to Adjourn**

2. Counsel for the Respondent moved that the matter be adjourned.
3. She advised that she had been retained the previous evening solely to seek the adjournment and not to represent the Respondent at the hearing on the merits.

4. She submitted that the Respondent had been provided the previous evening with a copy of the affidavit of Robert Lamshead, an investigator with the MFDA, which the Respondent had not had the opportunity to review.

5. She also raised questions as to whether Staff had fulfilled its obligation to provide all the information it should have to the Respondent in a timely manner prior to the commencement of the hearing.

6. She argued that, based on the Ontario Court of Appeal case of *Law Society of Upper Canada v. Igbinosun* (“*Igbinosun*”), 96 O.R. (3d) 138, the Respondent should be granted the adjournment.

7. Staff opposed the adjournment.

8. Staff argued that the Respondent had a long history of seeking to delay this matter, by being uncooperative and not providing information as to his whereabouts or his email address, by refusing to fulfill undertakings, and by delaying until the last minute to retain counsel, and then only retaining counsel for the limited purpose of obtaining an adjournment but not to represent the Respondent in the matter. Staff submitted that the request for adjournment was part of the Respondent’s attempt to manipulate the process.

9. Staff submitted that the affidavit of Robert Lamshead and the material in its exhibits did not contain new material of which copies had not already been provided to the Respondent. Staff had asked Mr. Lamshead to swear the affidavit believing that the hearing would be only one day and that Mr. Lamsheads’ evidence would be all that Staff would submit to the panel. It could be submitted in evidence or Staff could put Mr. Lamshead on the stand and have him introduce the material in his affidavit through his *viva voce* testimony. Staff was of the view that it was unlikely that the Respondent would bother to attend the hearing, based on its attempts to reach him and coordinate matters for the hearing. Staff submitted that there was no reason why a copy of the affidavit was required to be given to the Respondent ahead of time, although, out of

courtesy and to make matters run smoothly, Staff tries to provide copies of such things in advance.

10. At the first appearance hearing of this matter in March 2014, Staff warned the panel that the Respondent had a history of being evasive and difficult to tie down to fulfill his undertakings and to follow through with matters. At that first appearance the Respondent expressed to us his hope that he and Staff could reach a settlement of this matter. Staff was dubious and requested that firm timelines be drawn to bring this matter on.

11. We agreed and set firm dates by which the Respondent was to deliver his Reply, and for the exchange of information by Staff and the Respondent.

12. We specifically advised the Respondent that he had a right to counsel and that he had plenty of time to exercise it in view of the lengthy time-lines we were establishing.

13. If he intended to retain counsel, we advised, he should do so in a timely fashion. We warned him, with emphasis, that we would not be favorably disposed to a last minute request for an adjournment of this matter because of delays on his part.

14. We all agreed on specific dates for a 5 day hearing on the merits well into the future. We also agreed to reserve a specific date well before the hearing on the merits to deal with motions or other matters that may be necessary or desirable to enable this matter to proceed on time.

15. Staff delivered to the Respondent the information it was required to deliver and the Respondent filed his Reply. The day set aside to address any matter brought to us by Staff or the Respondent was not necessary as neither Staff nor the Respondent brought any motion or sought instruction.

16. We denied the adjournment.

17. We found that Staff had delivered on a timely basis everything Staff was required to deliver to the Respondent prior to the commencement of the hearing.

18. We also found that the Respondent had had ample opportunity to exercise his right to be represented by counsel which he failed to do on a timely basis, and that his request for an adjournment was an attempt to delay this matter unduly.

19. Our ruling is not inconsistent with the reasoning in *Igbinosun*, although it is contrary to the result. We took into account the history of the Respondent in delaying this matter and his disregard of the express warnings we gave to him at the first appearance, and all the other circumstances of this matter.

20. Based on the Respondent's Reply, his financial situation, his history, and all the circumstances we were satisfied that our refusal of the adjournment would not be unduly prejudicial to him.

21. Furthermore, we believed that the denial was necessary in the interest of the justice system. Unnecessary delays inconvenience counsel, witness and others who expect our legal system to operate in a fair and efficient manner. Justice delayed unduly, which becomes more expensive because of the delays, brings the system into disrepute.

### **The Facts**

22. The relevant facts are set out in the Notice of Hearing that was issued on March 3, 2014; in the affidavit of Mr. Lamshead sworn February 20, 2015 ("Affidavit"); and in transcripts of interviews conducted with the Respondent and with his former client AF.

23. The material facts in this matter were substantially or completely admitted by the Respondent during his interview with Staff on November 14, 2012 and in his written responses to inquiries from the MFDA and from Investors Group Financial Services Inc.

24. Although the Respondent was not sworn to testify on his own behalf and was not subjected to cross-examination, in his closing statement he stated “I never was here to dispute....I tried to make a settlement.”

25. The Respondent’s Reply was rambling and difficult to follow. We did not find it helpful to the Respondent. The Respondent did not call any witness and did not submit any evidence of his own.

### **The Burden and Standard Of Proof**

26. The MFDA bears the burden of demonstrating, on a balance of probabilities, that each of the allegations against the Respondent has been proven. The MFDA must present evidence that is sufficiently clear, cogent and convincing to establish that it is ‘more likely than not’ that the alleged misconduct occurred.

### **Submission of Staff**

27. Staff’s written submission was most helpful and much of its wording and reasoning has been adopted and adapted by us as part of our reasons.

### **Decision**

28. We find that Staff has proven the allegations against the Respondent.

### **Reasons**

#### ***Overview***

29. Little or no disclosure about the Respondent’s business or its financial performance was provided to the lender before he advanced money to the Respondent. In fact, the lender claimed

that he was falsely informed by the Respondent that the money was being used to support the real estate business of the Respondent “and his partners”.

30. The Respondent also misrepresented client information on the Member’s back office record keeping system to conceal cases of leveraging from compliance staff and failed to comply with policies and procedures that required him to seek approval of leveraging recommendations before implementing them.

31. At various times during the investigation of the Respondent’s conduct by the Member and by Staff, the Respondent has provided misleading or false information. He has failed to provide timely responses to requests for information and he has completely refused to provide answers to some of the undertakings that were given during his interview with Staff in November 2012. In particular, he has failed to account for how he used the money that he borrowed from client AF and he has not produced documentation associated with the loans that he obtained from two other individuals, OC and JS.

32. The Respondent abused the trust and confidence that his clients placed in him and took advantage of his privileged position as a registrant in the industry to obtain a substantial amount of money from a client to fund his business. He failed to resolve the conflicts of interest that arose as a result of his conduct by the exercise of responsible business judgment influenced only by the best interests of his clients. He withheld disclosure of the fact that many of his clients were engaged in leveraging strategies that warranted increased scrutiny by the Member. Most recently, he failed to fulfill undertakings to provide the MFDA with important information that was requested and promised by the Respondent during the investigation of his conduct, contrary to his regulatory obligations.

### ***Leveraging***

33. The policies and procedures of Investors Group Financial Services Inc. (“IG” or the “Member”) stipulate that:

- i) All leveraged investments must be supported by a written proposal and the proposal and documentation relevant to the leverage strategy must be submitted to and approved by the Branch Manager and head office.
- ii) Approved Persons of IG are expected to make reasonable efforts to determine the source of funds used to make investments and must indicate on the IG investment instruction form whether the money invested was borrowed so that leveraged plans can be identified on the back office client information system. The failure of Approved Persons to comply with such requirements undermines the ability of the Member to properly fulfill its supervisory obligations with respect to leveraged investment accounts.
- iii) Additional suitability considerations must be taken into account and a broader suitability review process must be undertaken when evaluating the suitability of a leveraged investment strategy.

34. As part of the disposition of a complaint against the Respondent that was submitted to IG in 2009, a warning letter dated August 31, 2010 was sent by IG to the Respondent. Among other things, the letter stated that:

“In our review of the leverage strategy, we identified a recommendation to borrow to invest with a home equity line of credit which was not disclosed to IG or approved by your Branch Manager as required by our corporate leverage policy. We wish to remind you of your obligation to have all leverage strategies submitted for approval prior to implementation. We ask that you review the “*Leveraged Investments*” section of the Consultant Compliance Manual and that you ensure that you are compliant with these requirements for future leverage recommendations as discussed with your clients.”

35. In spite of the warning that the Respondent received from IG in the letter dated August 31, 2010, the Respondent did not review his client files to ensure that he had disclosed and obtained appropriate approval of all other leveraging strategies that had been implemented on behalf of his clients.

36. The Respondent also continued to submit paperwork in respect of leveraging strategies that was not compliant with IG’s leveraging policies.

37. During the MFDA investigation of the Respondent's conduct with respect to the complaint that led to the August 31, 2010 warning letter from IG, the Respondent was asked to explain why he failed to disclose that the complainant's account was leveraged. On November 25, 2011, the Respondent replied to the MFDA and acknowledged that his failure to identify the account as leveraged was an error on his part. He stated, among other things, that:

“Leverage was not disclosed as assets invested were used as a debt swap. The client's existing non-registered assets were used to pay off their mortgage and the available credit through the home equity line was subsequently used to re-invest back into a similar portfolio. With no new debt in place, and through my assessment I had felt that this was not a leverage as there was no new liability created and no additional exposure. My assessment was made in error as the borrowed funds were indeed used for investment purposes and whether short or long-term the proper procedure should have been taken to disclose the leverage. In conclusion, this was an error in the interpretation of the meaning of leverage.”

38. Subsequently, the MFDA sent a warning letter to the Respondent dated November 28, 2011, which stated, among other things that:

“Your Member's policies and procedures also require that any leveraging recommended to the client be disclosed and approved by the Member. You admitted that you did not do so with respect to the leverage you recommended to Ms. K.”

39. After receiving the warning letter from the MFDA dated November 28, 2011, the Respondent still did not review his client files to ensure that he had disclosed and obtained appropriate approval of all other leveraging strategies that had been implemented on behalf of his clients.

40. On February 6, 2012, IG terminated the Respondent for cause based in part upon “undisclosed leveraged sales.”

41. During an interview with Staff on November 14, 2012, the Respondent acknowledged that:

- i) he had received the warning letter from IG dated August 31, 2010 and the warning letter from the MFDA dated November 28, 2011; and
- ii) after receiving those warning letters, although he was aware that IG policies and procedures required him to identify all leveraged accounts, he did not correct his leveraging disclosure deficiencies or identify all leveraged accounts that he opened after receiving the warning letters.

### ***Borrowing from a client***

42. The Respondent admitted that the money that he received from client AF was deposited into his personal bank account.

43. According to Client AF, the Respondent initially told AF that as a “favour” to AF, in order to help AF to offset losses that AF had incurred on his leveraged investment portfolio (that AF had obtained based on the Respondent’s recommendation), the Respondent was prepared to pay AF a 12% investment return on money that AF agreed to loan the Respondent to support a venture that the Respondent described as one involving “property with partners and real estate and properties and apartments” and the Respondent asked AF not to discuss the investment with anyone else.

44. Client AF was subsequently informed that the Respondent had used the money borrowed from AF to pay expenses associated with his financial services business (such as expenses associated with the call centre that AF worked at).

45. The Respondent stated during his interview with Staff that he borrowed money from client AF to cover costs such as the operations costs of the call centre.

46. The Respondent claimed that the regional director of IG was aware that he was borrowing money to operate his call centre but the Respondent admitted that he had not told the

regional director the name of the lender and he did not disclose to the regional director that the lender was a client.

47. When IG management became concerned about the possibility that the Respondent was borrowing from clients, IG commenced an investigation and submitted a Member Event Tracking System (“METS”) report to the MFDA but the Respondent denied that he had borrowed money from clients.

48. During his interview with Staff on November 14, 2012, the Respondent claimed that he did not consider his statement to IG on January 3, 2012 that “I have not borrowed any money from any clients . . .” to be untruthful because he believed that it was “his business” that borrowed the money from clients.

49. During his interview with Staff on November 14, 2012, the Respondent also stated that he had borrowed from mutual fund clients other than client AF including his parents and two individuals that he identified as OC and JS. The Respondent told Staff that he believed he had borrowed \$50,000 from OC and \$50,000 from JS to finance his business expenses and that he had provided them with promissory notes in respect of those loans and later repaid the loans.

50. The Respondent and other Approved Persons of IG were asked to complete an annual “Consultant Certificate.” In 2011, for example, the Respondent indicated on his Consultant’s Certificate that statement 1 b. which reads “I have not borrowed money from or loaned money to a client” – was “True”.

51. During his interview with Staff on November 14, 2012, the Respondent admitted that by borrowing money from clients of IG, he contravened the IG policy prohibiting such conduct and he failed to disclose to IG that he borrowed money from clients.

### *Non-co-operation with the MFDA*

52. During his interview with Staff on November 14, 2014, the Respondent provided undertakings to provide certain documentation and information to Staff that was requested during the interview. Several of these undertakings remain unfulfilled.

53. The Respondent has repeatedly failed to provide timely responses to requests for information during the investigation of his conduct:

- i) one of the grounds for the termination of the Respondent's registration that was referenced by IG in a METS report filed on February 14, 2012 was the Respondent's "failure to address the concerns and requests for information [from IG] on a timely basis;"
- ii) the Respondent repeatedly requested extensions of time (between March 23, 2012 and June 1, 2012) before responding to Staff's initial inquiries about the allegations and concerns that gave rise to this proceeding; and
- iii) after initially agreeing on May 23, 2012 to attend an interview with Staff on August 28, 2012, the Respondent did not in fact attend an interview until November 14, 2012.

### **The Law**

54. The following sections of the MFDA Rules are applicable to this matter: Rule 2.1.1, Rule 2.5.1, Rule 1.1.2 and Rule 2.1.4.

55. IG's policies include one entitled "Conflict of interest and personal financial dealings with clients" which states that:

"A number of situations may arise, resulting in a potential conflict of interest for a Consultant and must be avoided. **Such conflicts may be real or perceived.** [bold in original]"

The following are examples of situations that could give rise to a conflict of interest. There may be others. All are to be avoided:

...

Borrowing from or lending to a client

Investors Consultants are not permitted, under any circumstances, to borrow from or lend to a client. [underlining added]

...

Outside activities with clients

You should avoid business relationships with clients, (i.e.: investing in a business), buying or selling property or other items from or to a client.

These actions can affect your dealings with the client causing a potential conflict of interest and may constitute outside business activities.

56. MFDA Rule 2.5.1 requires Members to establish, implement and maintain policies and procedures to ensure that the handling of its business is in accordance with MFDA By-laws, Rules and Policies and with applicable securities legislation.

57. Such policies and procedures are meaningless and cannot achieve their intended objectives if Approved Persons are not required to comply with them. MFDA Rule 1.1.2 is clear that Approved Persons share the responsibility of ensuring that obligations set out in the MFDA Rules are followed and must do their part to support the Member's obligations to be compliant with its regulatory obligations.

58. In the context of policies and procedures of a Member, and especially policies designed to facilitate regulatory supervision by the Member, the failure of an Approved Person to comply with the Member's policies constitutes a regulatory violation.

59. In circumstances where clients are advised to borrow money to invest, there is a magnification of the investment risk associated with the strategy because clients must be able to cover the interest costs of the strategy and repay the loans even if the investments purchased with borrowed money perform poorly. In this case, IG implemented clear procedures to enable the

Member to identify leveraged accounts on its back office system so that the Member could direct special supervisory scrutiny to leveraged accounts.

### ***Leveraging***

60. The Respondent repeatedly failed to comply with the Member's policies requiring Approved Persons to properly identify, disclose and seek approval of leveraging strategies recommended to clients of the dealer whose accounts he serviced.

61. Even after receiving warning letters from IG and from the MFDA clarifying to him that his failure to follow these procedures constituted a contravention of the Member's Policies and Procedures and MFDA regulatory obligations, the Respondent persisted with the conduct.

62. This misconduct was one of the reasons why the Member terminated the Respondent's registration in February 2012.

63. MFDA Rule 2.1.1 articulates the standard of conduct imposed upon all Members and Approved Persons. The Rule encompasses the most fundamental professional and fiduciary obligations of all registrants in the securities industry. It requires each Member and Approved Person to:

- a) deal fairly, honestly and in good faith with clients;
- b) observe high standards of ethics and conduct in the transaction of business;
- c) refrain from engaging in 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 of the industry.

64. In many cases, Hearing Panels have determined that an Approved Person's failure to comply with policies and procedures of the Member (and in particular, policies that are designed to ensure compliance with the regulatory obligations of registrants and/or facilitate the

fulfillment of the Member's supervisory obligations) constitutes a contravention of the standard of conduct as set out in MFDA Rule 2.1.1.

*Tonnies (Re)*, 2005 LNCMFDA 7 (“*Tonnies*”) at para. 39. *Nunweiler (Re)*, 2012 LNCMFDA 46 (“*Nunweiler*”) at paras. 24-26, *Lui (Re)*, 2012 LNCMFDA 59 (“*Lui*”) at para. 46.

65. By failing to comply with policies of IG requiring disclosure and approval of leveraged accounts and leveraging recommendations, the Respondent also contravened MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

### ***Borrowing from clients***

66. Since February 27, 2006, Rule 2.1.4 explicitly imposes obligations on Approved Persons to be aware of the possibility of conflicts of interests or potential conflicts of interest with clients, to disclose such conflicts to the Member and together with the Member, to ensure that any conflict is addressed by the exercise of responsible business judgment influenced only by the best interests of the client. The Rule states:

#### **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. In *Tonnies*, at para. 26, the Hearing Panel considered the meaning and implications of the previous version of Rule 2.1.4 (which contained much of the same language as the current version of the Rule) and stated that:

The phrase “responsible business judgment”, which is contained in the Rule, is not defined by the Rules. However, a reasonable interpretation would suggest that it requires the exercise of care and diligence in the circumstances to address the conflict or potential conflict of interest always subject to being in the best interest of the client. . . . *In cases involving a significant and actual conflict of interest, the exercise of responsible business judgment may require a blanket prohibition on, or refusal to proceed with, the type of transaction giving rise to the conflict.* (Emphasis added).

68. MFDA Staff Notices provide non-binding guidance to the industry about Staff’s position with respect to certain types of conduct and Staff’s interpretation of the application of MFDA Rules and Policies. In MFDA Staff Notice MSN-0047 dated October 3, 2005, Staff informed the industry of the MFDA’s view that:

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.

69. MFDA Hearing Panels have consistently held that borrowing from clients gives rise to a conflict of interest and the failure of an Approved Person to address the conflict by the exercise of responsible business judgment influenced only by the best interests of the client constitutes a serious contravention of MFDA Rule 2.1.4.

*Brauns, Tonnies, Brown-John*, 2005 LNCMFDA 6 (“*Brown-John*”), *Greyeyes (Re)*, 2006 LNCMFDA 11 (“*Greyeyes*”) at p. 9, *Ryan (Re)*, 2011 LNCMFDA 54 (“*Ryan*”), and *Wellings*, 2011 LNCMFDA 73 (“*Wellings*”).

70. In *Brauns*, the Respondent arranged for his client VK to loan substantial amounts of money to the Respondent's company, Cesis, a holding company which owned and operated a hotel in Latvia. The Hearing Panel stated:

When the Respondent became VK's "partner" in the hotel project, and caused VK to loan him and Cesis well over \$500,000, he was in a blatant conflict of interest. He had a personal and financial interest in VK investing significant unsecured sums of money in his hotel project and in doing so on favourable terms to him and to Cesis. The conflict of interest was exacerbated by his obligation to his employer as a mutual fund dealer, since he was advising VK to divest herself of her mutual fund portfolio in favour of investments in the hotel. This conflict of interest was so profound that he could not conceivably exercise responsible business judgment influenced only by VK's best interests. This was the classic situation in which the conflict could only be resolved by an absolute prohibition on obtaining monies from VK, whether their relationship is described as a partnership or as one of lender-borrower, while he was her mutual fund advisor.

*Brauns, supra* at para. 58.

71. In our case, the Respondent:

- a) failed to request authorization from IG prior to borrowing money from client AF (and clients OC and JS) and failed to disclose to IG that he had borrowed money from one or more clients, thereby depriving the Member of the ability to ensure that any resulting conflict of interest was appropriately addressed;
- b) disregarded the explicit prohibition on borrowing from clients that is contained in IG's policies and procedures manual; and
- c) falsely denied that he borrowed from clients on his 2011 Consultant Certificate and in response to explicit inquiries from IG when he stated in an e-mail dated January 3, 2012 "To respond, I have not borrowed any money from any clients."

***Does A Conflict Of Interest Arise If The Respondent Arranged A Loan To His Company Rather Than Borrowing Money From His Client Personally?***

72. There is no evidence to support the Respondent's contention that the loans from client AF were provided to a company rather than the Respondent. First of all, the wording of the

promissory notes that were signed by the Respondent to acknowledge the loans from Client AF appears to indicate that the Respondent personally is indebted to client AF as the notes state that “For Value Received, the undersigned, Gabriel Frank, hereby acknowledges itself indebted to [AF]”.

73. Secondly, the Respondent has not produced evidence indicating that he incorporated any company that was the borrower of the funds in this case.

74. Thirdly, during his interview with Staff on November 14, 2012, the Respondent admitted that:

- a) he did not register a company called “Frank on Finance”;
- b) to the extent that there is a company called “Frank on Finance”, the Respondent is the controlling mind of that entity;
- c) there are no officers of “Frank on Finance”; and
- d) Frank on Finance does not have a separate bank account, all money associated with the operation of the Respondent’s business (e.g.; revenue, loan proceeds and expenses) flowed through the Respondent’s personal bank account.

75. In any event, in previous cases, Hearing Panels have consistently held that the solicitation of client money to a company that an Approved Person controls gives rise to a conflict of interest that must be addressed by the exercise of responsible business judgment in the best interests of the client in the same way that solicitation of client money for a personal loan to the Approved Person gives rise to such a conflict of interest.

*Nunweiler* at paras. 17-18, *Lui* at paras. 44 and 45, and *Brauns* at para. 61.

76. In the case of *Nunweiler*, the Hearing Panel considered whether a conflict of interest arose when an Approved Person solicited clients to lend money to a numbered company that he operated. The Hearing Panel at para. 17 held that:

Where an Approved Person borrows money from a client, or arranges investments by clients in companies in which the Approved Person has a personal interest, such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that facilitating investments by a client in your company, or borrowing money from a client is not the exercise of responsible business judgment in the best interests of clients.

77. In *Brauns* at para. 16, the Hearing Panel stated that “there can be no distinction drawn between loans to the Respondent personally and loans made to [his company].”

### ***Personal Financial Dealings Contravene The Standard Of Conduct***

78. MFDA Hearing Panels have consistently held that an Approved Person who engages in personal financial dealings with a client by borrowing money from a client, and particularly in circumstances where the Approved Person later fails to pay back or otherwise account for all or part of the amount obtained, the conduct contravenes the standard of conduct, contrary to MFDA Rule 2.1.1.

*Tonnies, supra* at para., *Brown-John, supra* at p. 4, *Greyeyes, supra* at paras. 16-17, *Lui, supra* at paras. 41-42 and 44, and *Nunweiler, supra* at p. 6 and para. 19.

### ***Failure To Co-Operate With Staff’s Investigation***

79. Section 22.1 of MFDA By-law No. 1 states that:

For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

- a) To submit a report in writing with regard to any matter involved in any such investigation;
- b) To produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
- c) To attend and give information respecting any such matters;

This provision of the By-law empowers the MFDA to compel individuals under its jurisdiction to attend interviews and to provide information and produce documents relevant to investigation undertaken by Staff.

80. Pursuant to s. 24.1.4 of MFDA By-law No. 1, for purposes of the enforcement processes set out in sections 20-24 of MFDA By-law No. 1, the MFDA retains jurisdiction over a Member, Approved Person or other person subject to the jurisdiction of the MFDA notwithstanding the fact that the person has ceased to be an Approved Person. Accordingly, the Respondent continued to be bound to comply with section 22.1 of MFDA By-law No. 1 even after his registration was terminated by IG.

81. In this case, the Respondent did attend an interview on November 14, 2012 and he did answer questions posed by Staff during that interview. However, the Respondent failed to produce additional documents and information that he undertook to produce after the interview was completed.

82. Some of the information and documentation that the Respondent withheld was highly material to Staff's investigation including documentation relating to loans that the Respondent admitted that he had obtained from individuals OC and JS who he identified as clients and information and documentation accounting for how the money borrowed from client AF was used by the Respondent.

83. Hearing Panels have consistently held that failure to co-operate with an investigation by the MFDA by attending interviews if requested and by providing relevant information and documentation requested by Staff constitutes a contravention of section 22.1 of MFDA By-law No. 1 and subverts the MFDA's ability to perform its regulatory functions.

*Tonnies, supra* at paras. 40-42, *Brown-John, supra* at paras. 16-17, *Ryan, supra* at paras. 23-28, *Wellings, supra*. *Nunweiler, supra* at paras. 34-38, *Headley, supra* at paras. 73-77.

84. In the cases of *Brown-John* and *Ryan*, the Hearing Panels made findings that the Respondents contravened s. 22.1 of MFDA By-law No. 1 even though they had partially co-

operated with Staff's investigation of their conduct by attending interviews with Staff and providing some of the documentation that was requested from them. Like in the present case, the Hearing Panel in the *Ryan* case supported its holding by noting that "It took a year to receive anything concerning the undertakings and . . . the information was not very helpful."

## **Conclusion**

85. In summary, the evidence and the law support findings that each of the allegations of Staff as set out in the Notice of Hearing have been established on a balance of probabilities and accordingly, that the Respondent has contravened his regulatory obligations and engaged in regulatory misconduct as Staff has alleged by:

- a) disregarding the Member's policies and procedures with respect to the disclosure and approval by the Member of leveraged accounts and recommendations;
- b) borrowing money from a client to sustain his own insolvent business and failing to repay more than \$170,000 of the total amount borrowed; and
- c) failing to co-operate with Staff's investigation of his conduct.

**DATED** this 5<sup>th</sup> day of May, 2015.

"Paul M. Moore"

Paul M. Moore, Q.C.  
Chair

"Linda J. Anderson"

Linda J. Anderson  
Industry Representative

"Kenneth P. Mann"

Kenneth P. Mann  
Industry Representative