Now New Self-Regulatory Organization of Canada, a consolidation of IIROC and the MFDA

IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Roger Eldred Gebhardt

Heard: August 12, 2022, September 21, 2022 and October 31, 2022
by electronic hearing in Toronto, Ontario
Decision: October 31, 2022
Reasons for Decision: January 26, 2023

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Joan Smart	Chair
Guenther W. K. Kleberg	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

Paul Blasiak	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Chris Stribopoulos	)	Counsel for the Respondent
Brock Turville	)	Counsel for the Respondent
Roger Gebhardt	)	Respondent

I. INTRODUCTION

1. By Notice of Hearing, dated October 7, 2021, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced proceedings against Roger Eldred Gebhardt (the "Respondent"). After several appearances on interim matters, on August 8, 2022, the MFDA announced that it proposed to hold a hearing (the "Settlement Hearing") before a hearing panel of the Central Regional Council of the MFDA (the "Hearing Panel") with respect to the settlement agreement (the "Settlement Agreement") entered into between Staff of the MFDA ("Staff") and the Respondent. The Settlement Hearing commenced on August 12, 2022 and continued on September 21, 2022 and October 31, 2022.

2. After hearing submissions from counsel for MFDA Staff and the Respondent, a majority of the Hearing Panel decided to accept the Settlement Agreement. One member of the Hearing Panel dissented and decided not to accept the Settlement Agreement. The reasons for our decisions are set out below.

II. CONTRAVENTIONS

3. The Respondent admitted to the following violations:

a) Commencing on September 17, 2018, the Respondent failed to disclose to the Member a conflict or potential conflict of interest that arose when he became aware that a client had named his spouse as the sole estate trustee and sole beneficiary of the client's estate in the client's will, thereby failing to ensure that the conflict or potential conflict of interest was immediately disclosed to the Member and addressed by the exercise of responsible 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[1] and 2.1.1; and

b) Commencing no later than November 9, 2018, the Respondent failed to disclose to the Member a conflict or potential conflict of interest that arose when he became aware that he was named by a client as the recipient of a $25,000 bequest in the client's will, thereby failing to ensure that the conflict or potential conflict of interest was immediately disclosed to the Member and addressed by the exercise of

[1] On June 30, 2021, MFDA Rule 2.1.4 was amended. As the subject conduct pre-dated the amendment, all contraventions set out herein referring to that Rule relate to the version in effect between February 27, 2006 and June 30, 2021.

responsible 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 and 2.1.1.

III. TERMS OF SETTLEMENT

4. Staff and the Respondent agreed to the following terms of settlement under which the Respondent shall:

a) be prohibited from conducting securities related business in any capacity while in the employ of, or associated with, any MFDA member for eight years from the date the Settlement Agreement is accepted by a Hearing Panel, pursuant to s. 24.1.1(e) of MFDA By-law No.1;

b) pay a fine of $70,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1, payable in certified funds as follows:

   i. $27,500 on the date the Settlement Agreement is accepted by a Hearing Panel; and

   ii. $42,500 on or before December 15, 2022;

c) pay costs of $7,500, pursuant to s. 24.2 of MFDA By-law No. 1, payable in certified funds as follows:

   i. $3,750 on the date the Settlement Agreement is accepted by a Hearing Panel; and

   ii. $3,750 on or before December 15, 2022; and

d) in the future comply with MFDA Rules 2.1.4 and 2.1.1.

IV. AGREED FACTS

Registration History

5. Commencing in or about 1980, the Respondent was registered in the mutual fund industry.

6. From 2001 to January 2019, the Respondent was registered in Ontario as a dealing representative with IPC Investment Corporation (the "Member), a Member of the MFDA.

7. Prior to being registered with the Member, the Respondent was registered with AFP Wealth Management Inc. ("AFP"). In 2001, AFP amalgamated with the Member.

8. On January 25, 2019 the Respondent resigned from the Member and is not currently registered in the securities industry.

Client #1 – Failing to Disclose Conflict or Potential Conflict of Interest

9. Commencing in the mid-2000s, the Respondent was one of three mutual fund salespersons responsible for servicing client #1's investment accounts. In 2010, the Respondent became the sole Approved Person at the Member responsible for servicing client #1's investment accounts.

10. In or about 2012, client #1 informed the Respondent that he intended to name the Respondent as his estate trustee. The Respondent informed client #1 that he would be unable to accept the nomination because he was not permitted to act as estate trustee for a client.

11. On November 2, 2017, client #1 executed his will, in which he named the Respondent's spouse, XX, as the sole estate trustee and sole beneficiary of his estate.

12. There is no evidence that the Respondent or XX were involved in the preparation of client #1's will, involved in client #1's decision to name XX as his estate trustee and sole beneficiary, or aware that XX was named estate trustee or sole beneficiary of client #1's estate prior to client #1's death.

13. Client #1 was 77 years old when he executed his will in 2017.

14. The lawyer who prepared client #1's will advised that he met with client #1 at various times and he was of sound mind when executing the will.

15. On September 15, 2018, client #1 passed away.

16. On September 17, 2018, the Respondent was informed, he stated for the first time, that client #1 had named XX as the sole estate trustee and the sole beneficiary of client #1's estate in his will.

17. The Respondent continued to service client #1's accounts at the Member after he became aware that client #1 had named XX as the sole estate trustee and sole beneficiary of his estate.

18. At all material times, client #1 had no living relatives other than his sister and her family from whom he was estranged. Client #1's family has not made any complaints to the Member or to the MFDA or contested client #1's will.

19. The Respondent stated that he and XX had been longtime and close friends of client #1 since client #1 became a client of another financial advisor who worked at the Respondent's office.

20. At all material times, the Member's policies and procedures required its Approved Persons to immediately disclose conflicts or potential conflicts of interest to the Member. The Member prohibited Approved Persons, on the basis that it was a conflict or potential conflict of interest, from accepting "gratuities" unless nominal in amount, and required all monetary benefits received by Approved Persons from clients to flow through the Member. The Member also prohibited Approved Persons from acting as the estate trustee for clients who were not a "Related Person" of the Approved Person as defined in the *Income Tax Act* (Canada).

21. As the sole beneficiary of client #1's estate, XX inherited client #1's investment accounts at the Member valued at approximately $480,318 in mutual funds offered by four mutual fund companies, and client #1's house which was later sold to client #1's estranged sister for $164,000.

22. The Respondent did not immediately disclose to the Member that client #1 had passed away and his spouse had been named as the estate trustee and beneficiary of client #1's estate. He continued to service client #1's accounts at the Member.

23. Between October 23 and 25, 2018, the Respondent assisted XX to prepare and submit letters of direction ("LODs") to three of the fund companies, which directed those fund companies to redeem client #1's accounts and send the redemption proceeds to XX as estate trustee. The Respondent's signature guaranteed LODs that had been signed by XX as the "client" before those LODs were submitted to the fund companies. The Respondent also telephoned one of the fund companies to inform it that it would receive a LOD.

24. On October 23 and 29, 2018, XX signed estate claim forms directing the fourth fund company to redeem client #1's holdings and send the redemption proceeds to XX as estate trustee. The Respondent stated that he was not involved in submitting the estate claim forms that were signed by XX to the fund company.

25. After they received the LODs and estate claim forms, the fund companies processed the redemptions and sent the proceeds to XX as estate trustee.

26. The Respondent did not inform the Member that the holdings in the accounts of client #1 were being redeemed by his spouse as estate trustee and sole beneficiary of client #1's estate. He

also did not submit copies of the LODs, estate claim forms[2] or any other trade documents to the Member in respect of the subject redemptions. Consequently, the Member was not aware that client #1 had died or that the redemptions were being directed to XX until October 26, 2018 when the Respondent's branch manager, while conducting supervisory reviews of trades processed by Approved Persons at her branch, discovered some of the redemption transactions.

27. As a result of follow-up querying the circumstances, the Respondent informed the Member for the first time that: client #1 had passed away; client #1's will had named the Respondent's spouse, XX, as estate trustee and beneficiary of client #1's estate; and redemptions had been processed directly with mutual fund companies in order to liquidate client #1's estate. The Member then commenced an investigation.

28. On January 25, 2019, the Respondent resigned from the Member.

29. A portion of the redemption proceeds was held up pending the Member's investigation. However, in February 2019, the Member concluded that it had no basis to withhold these monies from XX and the funds were released to her.

30. By virtue of the foregoing, the Respondent failed to disclose to the Member a conflict or potential conflict of interest that arose when the Respondent became aware that a client whose accounts were serviced by the Respondent had named the Respondent's spouse as the sole estate trustee and sole beneficiary of the client's estate in the client's will, thereby failing to ensure that the conflict or potential conflict of interest was immediately disclosed to the Member and addressed by the exercise of responsible 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 and 2.1.1.

Client #2 – Failing to Disclose Conflict or Potential Conflict of Interest

31. Commencing in the 1990s, the Respondent was the mutual fund salesperson at AFP responsible for servicing client #2's investment accounts. After AFP amalgamated with the Member in 2001, the Respondent became the Approved Person at the Member responsible for servicing client #2's investment accounts.

[2] On November 6, 2018, the Respondent submitted a copy of the estate claim dated October 29, 2018 to the Member, after the Member began querying the circumstances of the redemptions as described in paragraph 27.

32. In early 2018, client #2 was approximately 93 years old and had been hospitalized.

33. While client #2 was in the hospital, the Respondent and client #2's son attended at the home of client #2 and located client #2's will and power of attorney documents.

34. The documents reflected that client #2 had named the Respondent as client #2's estate trustee, and as joint power of attorney for client #2, together with client #2's son.

35. The Respondent was aware that he could not accept the nomination as estate trustee or power of attorney for a client and therefore immediately recommended that someone else be appointed to those roles.

36. Client #2 then revised his power of attorney to appoint his son to that role alone.

37. On February 21, 2018, client #2 also executed a new will which named his son as his sole estate trustee and bequeathed $25,000 to the Respondent (the "Bequest").

38. There is no evidence that the Respondent was involved in the preparation of client #2's will dated February 21, 2018, involved in client #2's decision to leave the Bequest to the Respondent, or aware of the Bequest prior to the death of client #2.

39. On June 18, 2018, client #2 passed away.

40. On or about October 26, 2018, client #2's son provided a cheque to the Respondent in the amount of $25,000 in respect of the Bequest, which the Respondent deposited into his bank account on or before November 9, 2018.

41. Client #2's son did not complain with respect to the Bequest or object to it.

42. The Respondent did not immediately disclose to the Member that he had been named as a beneficiary in client #2's will, and that he had received a cheque in the amount of $25,000 from client #2's son in respect of the Bequest.

43. By virtue of the foregoing, the Respondent failed to immediately disclose to the Member that a conflict or potential conflict of interest arose when the Respondent became aware that he had been named as the recipient of a $25,000 bequest in the will of a client whose accounts he serviced on behalf of the Member, thereby failing to ensure that the conflict or potential conflict of interest was immediately disclosed to the Member and addressed by the exercise of responsible

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 and 2.1.1.

44. On November 16, 2018, as part of its investigation referred to in paragraph 27 above, the Member interviewed the Respondent. When the Member asked the Respondent, "And have you ever been named as Executor or beneficiary on any of your other client accounts?" the Respondent replied: "None that I'm aware of."

45. The Respondent's statement to the Member was false, because he was then aware that he:

a) had been named, but declined to serve, as client #2's estate trustee in client #2's previous will; and
b) had been named as a beneficiary in client #2's subsequent will and received a cheque for $25,000 in respect of the Bequest approximately three weeks prior to the interview.

46. On November 21, 2018, the Member requested a written statement from the Respondent concerning the matters described above and advised him that his written statement had been requested by Staff of the MFDA for the purposes of its investigation.

47. On December 5, 2018, the Respondent provided his written statement to the Member, which informed the Member for the first time that he had been named as client #2's estate trustee in client #2's previous will, and had been named as a beneficiary in client #2's subsequent will.

V. CONSIDERATIONS OF MAJORITY

Role of the Hearing Panel

48. Pursuant to s. 24.4.3 of MFDA By-law No. 1, a hearing panel may only accept or reject a settlement agreement. It is not up to the hearing panel to determine the correct penalty.

49. It is generally accepted that a hearing panel will not reject a settlement agreement unless the proposed penalty clearly falls outside a reasonable range of appropriateness. This is particularly so in situations, such as in the case at hand, where both parties are represented by experienced counsel.

Sterling Mutuals Inc. (Re), 2008 LNCMFDA 16 at para. 16

50. Settlements facilitate the MFDA in meeting its regulatory objectives in a relatively efficient manner. As was stated by the British Columbia Court of Appeal in relation to a British Columbia Securities Commission matter:

> But the power to settle, I find, is necessary if the Commission is going to carry out its purpose under a. 4(2) and its enforcement mandate under s.161 and 162 in an effective and efficient manner. Administrative tribunals do not and can not adjudicate on every matter that commences before them.
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> Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In doing so, they are effective in accomplishing the purposes of the statute. They provide a means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation…Settlements are also efficient. Both parties can forego the time and expense of a hearing.
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> *British Columbia (Securities Commission) v. Seifert,* [2006] B.C.J. No. 225 at paras. 48-49 (S.C.), aff'd [2007] B.C.J. No. 2186 at para. 31 (CA)

51. Similarly, in the case of *Milewski (Re),* the hearing panel stated:

> Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council reflect the public interest benefits of the settlement process in consideration of specific settlements.
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> *Milewski (Re),* [1999] I.D.A.C.D No. 17 at p. 10

52. In determining whether to accept the Settlement Agreement, we considered primarily whether the proposed penalty was proportionate and fell within a reasonable range of appropriateness having regard to the Respondent's misconduct and would serve as a specific and general deterrent. We also took note that the parties had reached an agreement only after extensive negotiations involving experienced counsel and that settlement agreements which involve negotiation and compromise may result in sanctions that are lower than what might be imposed after a contested hearing. In addition, we considered the public interest benefits of the settlement process as described in the cases above.

Issue Concerning Non-Unanimous Decision of the Hearing Panel

53. As previously noted, a majority of the Hearing Panel decided to accept the Settlement Agreement.

54. MFDA Staff took the position at the hearing that they would not support the Settlement Agreement if the decision of the Hearing Panel was not unanimous. MFDA Staff raised concerns,

for example, that a non-unanimous decision would be contrary to certain factors that the Hearing Panel should consider in deciding whether to accept a settlement agreement, such as whether it would foster confidence in the Canadian capital markets, the MFDA and the regulatory process. Counsel for the Respondent argued that: there was nothing in the MFDA Rules that would preclude the Hearing Panel from accepting the Settlement Agreement on a majority basis; there was no evidence that if the Hearing Panel did so that the public would lose confidence in the capital markets, the MFDA and the regulatory process; and, in any event, there are a number of other factors, in addition to such confidence, that must be considered by the Hearing Panel.

55. The Hearing Panel was unanimous in the view that we could decide to accept the Settlement Agreement on a majority basis. Neither counsel could direct us to any previous MFDA cases or Rules that would preclude us from doing so. In the case of the Investment Industry Regulatory Organization of Canada ("IIROC"), their Rule 8408.11 specifically provides that, "A decision of a hearing panel must be made by a majority of its members, and if the hearing panel consists of two members, must be unanimous." We were of the opinion that MFDA Staff, having executed the agreement, could not then withdraw its support for the agreement on the basis that the Hearing Panel was not unanimous in its decision with respect to it. Furthermore, we did not share the concern of MFDA Staff about the impact of a non-unanimous decision on public confidence.

Misconduct

56. Pursuant to MFDA Rule 2.1.1, each Approved Person must: deal fairly, honestly and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

57. At all material times, MFDA Rule 2.1.4 required Approved Persons to be aware of the possibility of conflicts of interest arising in connection with dealings with clients. If such a conflict or potential conflict arose, Rule 2.1.4 required that the Approved Person immediately disclose the conflict to the Member and required that the Approved Person and the Member ensure that the conflict was addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

58. In addition, MFDA Staff Notice 0047 – re Personal Financial Dealings with Clients, dated October 3, 2005, stated,

> All monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member. The Member must be notified of such arrangements, so that the Member is in a position to determine the significance of the benefit and to monitor the activity.

59. The Hearing Panel was unanimous in finding that, as admitted by the Respondent, he acted contrary to his Member's policies and procedures and MFDA Rules 2.1.4 and 2.1.1 when he failed to disclose to the Member a conflict or potential conflict of interest that arose when he became aware that:

a) client #1 had named the Respondent's spouse as the sole estate trustee and beneficiary in client #1's will; and
b) he was named by client #2 as the recipient of a bequest in client #2's will, thereby failing to ensure that the conflicts or potential conflicts of interest were immediately disclosed to the Member and addressed by the exercise of responsible business judgement influenced only by the best interests of the clients.

Penalty

60. In deciding whether to accept the proposed penalty in the Settlement Agreement, the majority of the Hearing Panel considered a number of factors as described below. In our view the sanction was proportionate to the misconduct and reflected the mitigating and aggravating factors.

Seriousness of the Misconduct

61. In our view, the Respondent's misconduct was serious. Approved Persons hold a position of trust in the securities industry. As a result, it is critical to the reputation of the industry that Approved Persons avoid situations that may give rise to a conflict of interest between their interests and those of their clients and inform their member firms immediately of any such conflict or potential conflict so that the issue can be appropriately managed to protect the interests of the clients. The evidence before us indicated this was not a case where the Respondent knowingly put himself into a position of conflict or potential conflict of interest, and he was not aware of it until after the death of the subject clients. However, by not then immediately informing the Member, he deprived the firm of the ability to immediately make the necessary inquiries and address the conflict or potential conflict that had arisen.

62. The Member only became aware of the conflict or potential conflict in the course of its supervisory activity. We note that the firm then conducted an investigation and ultimately released the portion of the redemption proceeds that it had withheld in relation to client #1's will and took no action with respect to the Bequest from client #2.

63. An aggravating factor for us in considering the penalty was the fact that the Respondent appears to have taken steps to make it less likely that the Member would discover that his spouse was an executor and beneficiary of client #1's estate and that he was a beneficiary of client #2's estate by:

a) not submitting paperwork to the Member that was submitted directly to the fund companies to redeem assets in client #'s accounts; and
b) falsely denying to the Member that he had been named as an estate trustee or beneficiary of a client's estate when he had been named but declined to serve as client #1's estate trustee and had accepted a $25,000 bequest from client #2.

64. We also considered it to be an aggravating factor that there were two incidents in 2018 of the Respondent failing to inform the Member of a conflict or potential conflict of interest. However, there was otherwise no evidence before us that this was a pattern of behaviour.

Client Harm

65. We did not find that there was any harm to the Respondent's clients as a result of his misconduct. There was no evidence before us that the Respondent was involved in the preparation of the subject clients' wills or in their decisions respecting their wills or was aware before the clients' deaths that XX had been named as estate trustee and sole beneficiary of client #1's estate and the Respondent was a beneficiary under client #2's estate. Consequently, there was no evidence that the Respondent coerced or manipulated the clients into leaving bequests to him or his wife or that he otherwise took advantage of them.

66. We also noted that there were no complaints by any relatives of the subject clients about the dispositions relating to the Respondent and his wife in the clients' wills. Also, there was no evidence before us that the Member, upon becoming aware of the conflict or potential conflict, required that the bequests be relinquished.

67. We considered the factors set out in the two preceding paragraphs to be significant mitigating factors in our decision as to an appropriate penalty.

Benefits Received by the Respondent

68. As a result of the will of client #1 naming XX as the beneficiary under his will, she received a total of approximately $649,000 and, as a result of client #2 naming the Respondent as a beneficiary under his will, the Respondent received $25,000. We note that the benefits that the Respondent received were not actually as a result of his misconduct, but rather were the result of his clients' actions. However, the evidence in this case suggests he may have been concerned about losing those benefits had he informed the Member about them.

The Respondent's Past Conduct

69. The Respondent had been registered in the securities industry for almost 40 years and there had been no prior MFDA disciplinary proceedings against him.

The Respondent's Recognition of the Seriousness of the Misconduct

70. By entering into the Settlement Agreement, the Respondent accepted responsibility for his misconduct and saved the MFDA the time and expense of a contested hearing on the merits.

Deterrence

71. In our opinion, the sanction imposed in this case will serve as a serious deterrent to the Respondent to ever engaging in this misconduct again. Indeed, given that the Respondent has already been out of the industry for over three years and will be subject to a further eight year prohibition, it is unlikely he will ever re-enter the securities industry. We note that in respect of penalties in regulatory proceedings, the primary purpose is more to protect the public than punish the respondent.

72. We are also of the view that the sanction involving both a significant prohibition and a fine will send a clear message to the industry that the failure to immediately inform a Member of a conflict or potential conflict will not be tolerated by the MFDA and will likely deter others in the industry from engaging in similar conduct. Of particular concern to most registrants would be the eight year prohibition which would have the effect of seriously limiting, if not ending, a career in the industry. The size of the fine, which resulted in the Respondent relinquishing all that he

received directly in this case, but only a portion of what he received indirectly, is still in our view, sufficient to generally serve as a deterrent to others. We believe the proposed sanction strikes an appropriate balance between the Respondent's specific conduct and an appropriate sanction to be imposed.

Previous Cases

73. MFDA Staff submitted that the proposed resolution was within a reasonable range of appropriateness having regard to other regulatory decisions and provided us with the following summary of cases:

CASE	FACTS	PENALTIES
McCullough (Re), 2017 IIROC 27	The Respondent: • accepted a gift of $750,000 from a client, without the knowledge of his Dealer Member; and • failed to report to his Dealer Member that he had been served with a Notice of Civil Claim relating to his dealings with that client. *The Respondent's 85 year old client, BT, told the Respondent she wanted to give him some money. The Respondent prepared a document entitled "considerations for will" for BT to take to a lawyer that listed the Respondent as POA and executor for BT's estate and set out several *inter vivos* gifts, including $750,000 to the Respondent. *BT's first lawyer had concerns about BT's mental competency. The Respondent then obtained the name of another lawyer to facilitate the *inter vivos* gifts. *BT then liquidated her entire account at the Member worth over $900,000 and deposited the proceeds in her bank account. *The Respondent then accompanied BT to her bank where she obtained a bank draft to fund, among other things, the $750,000 gift to the Respondent. *The Respondent received a Deed of Gift and $750,000 from BT. BT died six months later. *The civil claim was dismissed. Also, the next of kin of BT brought an action contesting the validity of the $750,000 gift that was settled out of court.	Settlement Agreement: • 5 year prohibition • Fine of $80,000 • Costs of $5,000

CASE	FACTS	PENALTIES

Smith (Re), 2013 IIROC 27	The Respondent:
	• failed to disclose the following personal financial dealings with two clients (spouses):
	  ○ the clients sold property to the Respondent and his wife for approx. $300,000;
	  ○ after one client died, the other client:
	  ▪ gave each of the Respondent's two children a $30,000 monetary gift; and
	  ▪ executed a new will naming the Respondent and his family as a 75% beneficiary of the client's estate (the client later died and the Respondent and his wife received approx. $917,000).
	*The clients were elderly and close friends of the Respondent's family. However, there was no basis to conclude that the Respondent took advantage of them.
		Settlement Agreement:
		• 4 year prohibition
		• Fine of $50,000
		• Costs of $5,000

Plentai (Re), 2022 LNIIROC 4	The Respondent: • accepted payments from client RC for activities not related to an approved outside activity; • conducted activities for RC that went beyond the POA for personal care that he held for the client; and • failed to take steps to ensure that RC did not name him as a beneficiary under RC's will, directly or indirectly via his spouse. * RC was approx. 88 years old and had been diagnosed with Alzheimer's disease, of which the Respondent was aware. *The Respondent failed to disclose to the Member that he was POA for personal care for RC and exceeded his authority under the POA, including by instructing a lawyer and accountant on RC's behalf. *By draft will dated May 2018, the Respondent was named beneficiary of ten parts of RC's estate valued at approx. $260,000. The Respondent then arranged a meeting between RC and a lawyer, during which RC executed a will naming the Respondent's spouse as beneficiary of the ten parts of her estate. The Respondent then forwarded to his spouse an email from RC's lawyer, attaching the will. *Following intervention by RC's accountant, RC executed a new will which did not name the Respondent's spouse as beneficiary.	Settlement Agreement: • 2 year prohibition • $6,170 disgorgement of payments for unapproved outside activities • Fine of $45,000 • Costs of $10,000 • Ethics course

CASE	FACTS	PENALTIES
Salina (Re), [2022] Hearing Panel of the Pacific Regional Council, MFDA File No. 202081, Reasons for Decision dated August 30, 2022	The Respondent: • recommended for the account of 95 year old client FD a switch of approximately $498,511 from a no-load mutual fund to the same mutual fund which was subject to a 7 year deferred sales charge (DSC) schedule, generating a commission for the Respondent to which he would not otherwise have been entitled; • failed to disclose to the Member that he had been named a beneficiary in deceased FD's will; and • obtained and possessed 24 pre-signed account forms in respect of 13 clients. *The Member clawed back the commission of approx. $19,000 the Respondent received as a result of the switch. *After FD died, her estate redeemed the investments she held at the Member, which resulted in DSC fees of approx. $25,000. The Member compensated the estate for the DSC fees incurred. *The Respondent had been bequeathed approx. $185,000 from FD's estate. At the direction of the Member, the Respondent disclaimed the bequest.	Settlement Agreement: • No prohibition • Fine of $30,000 • Costs of $5,000
Karasick (Re), [2015] Hearing Panel of the Pacific Regional Council, MFDA File No. 201427, Reasons for Decision dated June 18, 2015	The Respondent: • accepted and held a POA from client FM in respect of the sale of FM's condominium; • was designated as a beneficiary of FM's in-trust account at the Member; • accepted a monetary gift from FM in the amount of $309,474; and • misled the Member by falsely answering the Member's Annual Consultant Certifications. *Around the time of FM's death, the Respondent advised the Member in writing he had been named as the beneficiary of the in-trust account. The Respondent did not accept any of the proceeds from the account, which went instead to FM's children. *The monetary gift from FM was made with the benefit of independent legal advice and without solicitation from the Respondent. *Following a complaint from FM's daughter after FM's death, the Respondent returned the monetary gift to FM's daughter.	Settlement Agreement: • 1 year prohibition • Fine of $10,000 • Costs of $2,500

CASE	FACTS	PENALTIES
Sukman (Re), [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201519, Reasons for Decision dated May 9, 2016	The Respondent: • held a POA for property from client XX, and was appointed as estate trustee, executor and trustee of XX in her Will; and • engaged in personal financial dealings with XX by: (a) accepting an entitlement to a $10,000 legacy in lieu of executor fees; and (b) accepting joint ownership in one account and designation as beneficiary of two accounts held by XX at the Member. *The client was a 91 year old widow with no immediate family. *There was no evidence that the Respondent received any financial benefit or that the client suffered harm (the Member removed the Respondent's designation as beneficiary and reversed the transfer of the client's account to the joint account held by the Respondent and the client).	Agreed Statement of Facts: • 1 year prohibition • Fine of $10,000 • Costs of $2,500
Fairclough (Woods) (Re), [2022] IIROC 20	The Respondent: • acted as POA for a client MB; and • accepted a monetary gift of $50,000 from MB to act as the client's executor. *In Jan. 2019, the Respondent received and deposited a personal cheque from MB in the amount of $50,000. She did not advise the Member. *Commencing Jan. 2019, the Respondent also acted as POA on 5 occasions to assist MB who was living abroad. She did not advise the Member. *In July 2020, MB died. The Respondent began acting as her executor, and did not advise the Member. *MB's beneficiaries then filed a complaint, and IIROC launched an investigation. *During IIROC's investigation, Respondent ceased acting as executor and repaid the $50,000 monetary gift to MB's estate. *The Respondent was subject to internal Member discipline: • For acting as POA: fine of $12,500 donated to charity; industry course • For receiving gift: fine of $7,500 donated to charity	Settlement Agreement: • Fine of $17,500 • Costs of $5,000

74. We did not find the cases presented to us to be particularly instructive in relation to the case before us, with the exception of the Smith case which involved somewhat similar facts and resulted in a lesser sanction being imposed. Unlike the case at hand, in the other cases the Respondent was involved in creating the conflict of interest or at least was aware of it prior to the death of the clients. In those cases a relative or a third party complained or intervened and the

Respondent did not ultimately retain the benefit, with the possible exception of the McCullough case in which the amount of the benefit retained is unknown due to an out of court settlement. As a result, the combined sanctions imposed in those cases were generally lower than the proposed sanction in this case, with the prohibitions ranging from 0 to 5 years and fines ranging from $10,000 to $80,000.

VI. CONCLUSION OF MAJORITY

75. The majority of the Hearing Panel concluded that the proposed penalty was proportionate and fell within a reasonable range of appropriateness, having regard to the Respondent's specific misconduct. It should also act as a specific and general deterrent. Accordingly, we decided to accept the Settlement Agreement.

DATED this 26th day of January, 2023.

"Joan Smart"
Joan Smart
Chair

"Guenther W. K. Kleberg"
Guenther W. K. Kleberg
Industry Representative

VII. CONSIDERATIONS OF MINORITY – DISSENTING OPINION

76. The minority rejects the proposed Settlement Agreement for the reasons that follow. The Agreed Facts are set out above.

Factors to be Considered in a Proposed Settlement Agreement

77. The minority adopts Staff's submission on the factors to be considered by the Hearing Panel. In its submissions Staff stated:

> MFDA Hearing Panels have taken into account the following considerations when determining whether a proposed settlement should be accepted:
>
> a) whether acceptance of the settlement agreement would be in the public interest and whether the penalty imposed will protect investors;
> b) whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
> c) whether the settlement agreement addresses the issues of both specific and general deterrence;
> d) whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future;
> e) whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;
> f) whether the settlement agreement will foster confidence in the integrity of the MFDA; and
> g) whether the settlement agreement will foster confidence in the regulatory process itself.
>
> *Jacobson (Re)*, 2007 LNCMFDA 27, at para. 68.

78. Many Panels have described the deterrence test as requiring a deterrent to the Respondent in the matter at hand and to others in the industry. In my view, the deterrence test should be read as requiring a deterrence to all others in the industry.

> *Re Sharon June Fauth*, MFDA 201610 Jan.20, 2017, Prairie Regional Council, paras. 15 and 18
>
> *Re James Andrew Phillips,* MFDA 2018117, March 16, 2020, Atlantic Regional Council, para. 28

79. Hearing Panels should also consider the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets.

> *Re Phillips*, supra, para 28

80. Staff submitted:

> A Hearing Panel should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness having regard to the conduct of the Respondent.
>
> *Jacobson*, supra para. 70

The Marrone Case: The Failure to Disclose Conflicts or Potential Conflicts

81. Staff also provided the recent *Marrone* case (Re *Marrone*, 2022 ON CMT 13). The *Marrone* matter has similar facts and was apparently referred to the Ontario Securities Commission, and later to the Capital Markets Tribunal (CMT).

82. Certain passages from *Marrone* relevant to our matter are reproduced below.

> The duty of any registrant, including any individual registrant, to act fairly, honestly and in good faith to their client, is a fundamental obligation under Ontario securities law and is a cornerstone of the relationship between an individual registrant and their client. This duty is engaged and of particular importance when an actual conflict of interest or the potential for conflict of interest presents in the context of the relationship between a registrant and their client. When the client is a vulnerable client, the duty to act fairly, honestly and in good faith is of even greater importance and needs to be front and centre in the registrant's thoughts and actions in relation to the client.
>
> The manner in which this duty is to be addressed with respect to actual or potential conflicts by Mutual Fund Dealers Association of Canada (MFDA) members and their Approved Persons, is set forth in the MFDA Rules and member firm policies and procedures. These Rules, policies and procedures require an individual registrant to engage with their firm at the earliest moment when an issue arises that raises a conflict of interest or the potential for conflict of interest. The MFDA Rules set out a tripartite test, requiring the registrant to engage as soon as they know or reasonably ought to know, that there is an actual or potential conflict of interest. The test is well designed to ensure that such issues are resolved objectively in dialogue with the firm and not subjectively by the registrant who has an actual or potential conflict. This is to ensure that the firm's resources and objectivity are brought into these circumstances and to ensure the client's interests are protected in accordance with the duty owed to the client by the individual registrant and the firm. {paras 1 and 2}

83. The CMT also emphasized the importance of a registrant's requirement to follow firm policies. It detailed the firm's regulatory obligations required in these circumstances for investor protection under the MFDA Rules (para. 162ff).

84. In this case, the Respondent has admitted not only to the failure to follow firm policies and the MFDA Rule regarding disclosing potential conflicts, but also engaged in a pattern of conduct to avoid the Member's scrutiny.

85. The CMT noted at paras 155-156:

> In addition to Rule 2.1.4 the MFDA has released guidance, on accepting monetary benefits from clients in the form of a Member Regulation Notice issued on October 3, 2005. The Notice stated, among other things:
>
> All monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member. The Member must be notified of any such arrangements, so that the Member is in a position to determine the significance of the benefit and to monitor the activity.

> Although MFDA Member Regulation Notices are not binding, they do provide guidance to the industry, and equally important, place Members and Approved Persons on notice respecting the issues which they must direct their attention to and appropriately address.

86. The CMT stated at para 163:

> … the requirements in Rule 2.5.1 that Members establish 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.

87. It does not matter that the *Marrone* matter was contested and that this matter is a negotiated settlement. The legal analysis of the regulatory framework with respect to the misconduct in *Marrone* applies.

Settlement Hearing Considerations

88. The CMT said in *Marrone*:

> The seriousness of a breach of securities law depends on the context and the consequences of that breach. (para. 188)

89. In a proceeding to accept or reject a proposed settlement a Hearing Panel does not always have the luxury of full context, a complete evidentiary record and consequences of the breach. The Panel must consider only the "agreed facts" and any presented at a hearing on consent. Those facts are often bare bones and the Panel is asked to look only at those facts in considering the seriousness of the breaches of securities law, and make a finding as to: 1) whether the settlement is within a reasonable range of appropriateness, and 2) whether the settlement meets the other tests outlined in the Rules and the cases.

90. The Supreme Court of Canada has stated:

> The primary goal of securities regulation is the protection of the investor. In addition to the protection of the public, the goals of securities regulation also includes the fostering of public confidence in the capital markets and the securities industry.
>
> *Pezim v. British Colombia (Superintendent of Brokerages)*, [1994] 2 S.C.R. 557 at 59, 68.

This Proposed Settlement Agreement Fails to Meet Two Tests

91. In my view, the Settlement Agreement is not a deterrent to this Respondent nor is it a deterrent to others in the industry.

92. In my opinion, the Settlement Agreement fails to fall within "a reasonable range of appropriateness".

93. The two tests above are separate and distinct. Neither test can be said to be paramount. However, in a proceeding to accept or reject a proposed settlement agreement a Hearing Panel is given these tests and the Settlement Agreement must pass each test.

The Deterrence Test

94. The "deterrence" test is a very important test and a public interest consideration. Application of the test should advance the primary regulatory objective of protecting investors and affirm public confidence in the regulatory system.

Re Fauth, supra; *Pezim*, *supra*

95. This Respondent has admitted to facts constituting a breach of an important investor protection provision. This misconduct defeated the objectives of the regulatory framework.

96. When the potential benefit to be gained is sufficiently large as in this matter, the quantum of the fine in this settlement is not, in my view, a deterrent to other registrants. The fine leaves this Respondent with a significant benefit indirectly through his spouse. The proposed settlement allows the Respondent to retain a significant benefit after breaching the requirement to disclose a conflict or potential conflict, which also deprived the Member firm of the opportunity to perform its investor protection obligations under the Rules. I believe that many registrants may be willing to breach the regulatory requirement to disclose a potential conflict to the Member firm. These registrants would seek to avoid the Member firm's possible adverse decision, and would be willing, if ultimately found out, to test the regulator's enforcement process.

97. In my view, the prohibition in this settlement is not a deterrent to registrants who are not threatened by a long suspension or prohibition.

98. It follows that if a settlement is not a deterrent it should be rejected.

Reasonable Range of Appropriateness Test

99. In my opinion, the proposed settlement also fails as it does not fall within a reasonable range of appropriateness. Of the seven cases submitted for the Panel's consideration five were settlements where the Respondent did not retain a significant benefit. The sixth case was under

civil litigation with respect to the benefit and the Panel was not given information with respect to retention of the benefit.

100. In the last case, *Re Smith*, (2013 IIROC 21), the Respondent retained a significant benefit. The Hearing Panel in that case considered a proposed settlement where the misconduct alleged and admitted was personal financial dealings with a client and the failure to disclose the potential conflict to the Member firm at the material time. The Hearing Panel only briefly mentioned that the Respondent failed to disclose the conflict. There was no detailed discussion in the Reasons for Decision of the importance of the regulatory framework around the failure to disclose. There was no discussion of the deterrence test. The minority finds *Re Smith* is not helpful to our analysis and concludes that this proposed settlement fails the test.

101. In any event, although tasked with the test by the regulatory framework, the minority believes the "reasonable range of appropriateness" test is not an appropriate test for the facts and issues of this proposed settlement. In my view, the consideration of this proposed settlement should not be reduced to a mere comparison of quantum of fines and lengths of prohibition.

102. The Panel's task in this matter involves the defense of a primary investor protection objective and a detailed regulatory framework: the requirement to disclose potential conflicts as the registrant becomes aware of them, and the Member firm's obligations under the Rules to investigate in a timely manner and exercise judgment as required by the Rules.

103. In my view, our Panel is essentially being asked, years after the fact, to consider "agreed facts" and make the decision that the Member firm is tasked with under the regulatory framework but was prevented from doing at the material times as a result of the registrant's misconduct. A Hearing Panel should not assume the role that the Member firm is given under the Rules. The Panel need only defend the regulatory framework.

104. It is unknown and not relevant how the Member firm may have dealt with the disclosures if it had been given the opportunity to perform its regulatory obligations at the requisite time.

105. In the minority view, a Hearing Panel should be reluctant to allow an avenue to a significant benefit that may have otherwise been unavailable, and should, except on the clearest facts, reject proposed settlements where a registrant retains a significant benefit from misconduct.

MFDA (Rojas Diaz) (Re), 2021 ONSEC 24 (Decision: October 5, 2021), paras. 28-32

106. The minority finds that rejecting this proposed settlement does not amount to "lightly interfering in a negotiated settlement."

DATED this 26th day of January, 2023.

"Joseph Yassi"
Joseph Yassi
Industry Representative

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