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: Marlene Legare

Heard: January 12, 2011 (in person) and
April 26, 2011 (by teleconference)
Decision and Reasons: June 10, 2011

DECISION AND REASONS
(Penalty)

Hearing Panel of the Pacific Regional Council:

The Hon. H. Benjamin Casson, Q.C.	Chair
Darlene Thomas	Industry Representative
Tina Coulson	Industry Representative

Appearances:

Maria L. Abate	)	For the Mutual Fund Dealers Association of
	)	Canada
Gilbert S. Wong	)	For the Respondent, Marlene Legare
	)	

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A. BACKGROUND

1. By a Decision and Reasons (Misconduct) dated October 29, 2010, the Disciplinary Hearing Panel (the "Panel") held that the Respondent, Marlene Legare (the "Respondent"), had violated Rule 2.1.4 (Conflict of Interest), Rule 2.1.1 (Standard of Conduct) and section 22.1(c) of By-law No. 1 (Failing to Cooperate in an Investigation) of the Mutual Fund Dealers Association of Canada (the "MFDA").

2. A Penalty Hearing commenced on January 12, 2011 in Vancouver, British Columbia at which time the Panel heard submissions on penalty from Enforcement Counsel for the MFDA, Maria L. Abate ("Enforcement Counsel") and the Respondent's representative, Gilbert Wong ("Respondent's Representative").

3. The Penalty Hearing was adjourned to allow Enforcement Counsel an opportunity to reply to the Respondent's submissions, by teleconference, on April 26, 2011.

4. On April 26, 2011, the teleconference proceeded with the Panel located at the MFDA offices at 1220, 650 West Georgia Street, Vancouver, British Columbia; the Respondent in Vancouver, British Columbia; the Respondent's Representative in the MFDA offices at 121 King Street West, Suite 1000, Toronto, Ontario, along with Enforcement Counsel and Edward Moran of the MFDA Staff. The proceedings were recorded.

5. The Panel heard the Reply to the Respondent's submission by Enforcement Counsel and allowed further comment, on the Reply, by the Respondent's Representative.

6. The Panel Chair stated that a Decision and Reasons (Penalty) would be forthcoming not later than June 17, 2011.

B. VIOLATION NO. 1 — RULE 2.1.4 CONFLICT OF INTEREST; RULE 2.1.1 STANDARD OF CONDUCT

a) Summary of Facts as Found by Panel

7. The essential evidence, accepted by the Panel, was as follows:

- Between November, 2005 and June 2006, S.G., a client of the Respondent, provided the Respondent with nine personal loans totaling $49,650.
- The loans were obtained by the Respondent from S.G. as follows: When the Respondent requested a loan from S.G., S.G. instructed the Respondent to redeem mutual funds in her account. The redemption proceeds were deposited into S.G.'s bank account. The Respondent then withdrew monies from S.G.'s bank account by using pre-signed cheques that S.G. had given to the Respondent and which S.G. had provided to the Respondent to keep in her client files for the purpose of executing trades.

8. Chartwell Financial Inc. ("Chartwell"), with whom the Respondent was an Approved Person, compensated S.G. by reinvesting $49,650 into her mutual fund account.

9. On April 22, 2010, the Respondent explained, under oath, that the monies she had received from her client, S.G., were not a loan but repayment of monies that she and her ex-husband had loaned S.G.'s former husband for investment purposes.

10. This explanation was given, for the first time, more than four years from the date of her termination from Chartwell and the request by MFDA for her cooperation and assistance in an MFDA investigation.

11. The Panel, for reasons stated at pp.14 and 15 of the Decision and Reasons (Misconduct) of October 29, 2010, found the Respondent's explanation to be untruthful.

12. In finding that the Respondent had violated MFDA Rule 2.1.4, the Panel observed that:

- It was not disputed that the Respondent was intimately familiar with S.G.'s personal and financial circumstances. At the time the Respondent received the loans from S.G., S.G. was under stress as a result of having recently lost her husband (July, 2005), her nephew (by suicide) in the summer of 2006 and the death of her father in April, 2006. As a client, S.G. was vulnerable.

- Notwithstanding the relationship, through marriage, which the Respondent had with S.G., the Respondent, because of her experience as a mutual fund salesperson, would have been, or ought to have been, aware of the possibility of a conflict of interest arising between herself and client S.G. by borrowing monies from her. At no time did the Respondent disclose such conflict or the potential for such conflict to Chartwell or take any measures to ensure that such a conflict or potential conflict was addressed by the exercise of responsible business judgment influenced only by the best interests of S.G.

13. As to the violation of MFDA Rule 2.1.1 (Standard of Conduct), the Panel stated:

"The Respondent knew, or ought to have known from her experience, that borrowing monies from client S.G., who she knew was in a time of stress, placed her in a conflict of interest or potential conflict of interest which required her to inform Chartwell. Respondent's conduct offended the standard of behaviour required by the MFDA Rule 2.1.1."

b) <u>Penalty Submissions of MFDA</u>

14. With respect to the Conflict of Interest and Standard of Conduct violations, Enforcement Counsel made the following submissions:

<u>Conflict of Interest</u>

- The Respondent was in a position of trust as an Approved Person at an MFDA Member and breached this trust by requesting a series of personal loans totaling $49,650 from a vulnerable client which she failed to repay. In doing so, the Respondent also breached the policies and procedures of the Member.
- The mutual funds redeemed by the client and loaned to the Respondent were used by the Respondent for her own benefit. The Respondent testified that she used the monies to tend to a family situation but there was no evidence submitted by her to corroborate that claim.
- The Respondent took no steps to protect the client and, as found by the Hearing Panel, no record existed, documentary or otherwise, of the loans by the client to the

Respondent. As such, the terms and conditions of the loans were unclear, and relevant issues such as the rate of interest and the repayment schedule were not identified. The absence of such a record jeopardized the interests of the client in the case of a default by the Respondent (as in fact occurred). By borrowing the monies, failing to provide a record of the loans to the client and then failing to repay the loans, the Respondent placed her own interests above those of her client.

- Moreover, during the course of the hearing on the merits, the Respondent did not dispute that she was intimately familiar with the most personal details of her client's life and financial circumstances. The client and the Respondent had a close personal relationship which extended beyond business, thereby heightening the client's vulnerability.
- As the proceeding continued, it became apparent, and the Hearing Panel found, that the Respondent used her knowledge of the unfortunate circumstances in which the client found herself (such as the death of her spouse, her nephew and her father all within a short period of time) to exploit her in order to fulfill the Respondent's own personal financial needs.
- In addition to placing her own needs before those of her client and taking advantage of a vulnerable client, the Respondent ignored her duties and obligations as an Approved Person when she entered into the loan transactions with her client.
- As noted by the Hearing Panel, the Respondent had been employed in the mutual fund industry from 1991 to 2002. By virtue of her experience as a mutual fund salesperson, the Respondent would have been aware of the possibility of a conflict of interest arising between herself and the client when borrowing the monies. At no time did the Respondent disclose such conflict or potential conflict to the Member (thereby violating the policies and procedures of the Member), or take any measures to ensure that such a conflict or potential conflict was addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

Standard of Conduct

- The Respondent's long history and experience in the mutual fund industry is also relevant to considerations on the standard of conduct. In its decision, the Hearing Panel held that the Respondent knew or ought to have known from her experience that borrowing monies from a client, especially a client in the midst of great personal

distress, placed her in a grave conflict of interest which would require her to inform the Member. By entering into the transactions and by failing to inform the Member or take steps to protect the client, the Respondent's conduct fell far below any reasonable standard of conduct expected of Approved Persons.

15. As to penalty, Enforcement Counsel emphasized the following aggravating factors:

(a) the Respondent's misconduct occurred on 9 occasions over a 7 month period – it was not a case of an isolated or momentary lapse in judgment;
(b) the Respondent exploited the close personal relationship between herself and the client for her own benefit;
(c) the Respondent failed to disclose the conflict of interest to the Member and to document each of the 9 occasions where she requested a loan from the client;
(d) the Member only became aware of the transactions when the client called to complain that the Respondent had attempted to cash a cheque against her account without authority;
(e) the Respondent allowed the Member to compensate the client in the amount of $49,650;
(f) the Respondent then attempted to portray herself at the hearing as the victim of a conspiracy orchestrated by representatives of her former Member to deprive her of that same amount;
(g) the Respondent has not been forthright in describing the events between herself and S.G.;
(h) the Respondent has not demonstrated any remorse; and
(i) the Respondent personally benefitted from her misconduct in the amount of $49,650.

16. Enforcement Counsel proposes a fine in the amount of $50,000 for Conflict of Interest and Standard of Conduct violations.

c) <u>Penalty Submissions of Respondent</u>

17. With respect to Conflict of Interest and Standard of Conduct violations, the Respondent

made the following submissions:

- The Respondent submits that the settlement agreement recently accepted by a Hearing Panel of the Pacific Regional Council of the MFDA *In the Matter of Zenon Smiechowski* is the most appropriate authority for any penalty being considered in the current proceeding with respect to conduct contrary to MFDA Rules 2.1.4 and 2.1.1.
- On April 12, 2010 MFDA Staff alleged that Smiechowski contravened the MFDA's Rules and By-Laws on five occasions with respect to a $25,000 loan Smiechowski had received from his client F.P. Allegation #2 in *Smiechowski* is equivalent to Allegation #1 in the current proceeding.
- Smiechowski borrowed the $25,000 in July 2004 whilst he was employed as a salesman ("Approved Person") at Clarica Investco Inc. ("Clarica"). Clarica's Policies and Procedures specifically prohibit Approved Persons from lending to or borrowing from clients. Smiechowski did not disclose to Clarica that he had borrowed monies from a client nor did he receive permission from Clarica to do so.
- In November 2006 Smiechowski joined Hub Capital Inc. ("Hub") as an Approved Person. In January 2008 Hub first became aware of FP's $25,000 loan to Smiechowski.
- As a result of the disclosure of his personal financial dealings with F.P. on March 24, 2008, Hub terminated Smiechowski's employment.
- Despite Smiechowski's misconduct with respect to the prohibited $25,000 loan on November 5, 2008 Hub, with the permission of the MFDA, re-instated Smiechowski as an Approved Person and additionally granted him approval as a Branch Manager. On January 7, 2010 Hub again terminated Smiechowski.
- In December 2010 Smiechowski entered into a Settlement Agreement with the MFDA wherein he admitted to Allegations #1, 2, 3 and 5. The terms of settlement includes a six month suspension from acting as a mutual fund salesman, a $10,000 fine and $5,000 in costs.

18. The Respondent draws the following comparisons between MFDA and Zenon Smiechowski ("Smiechowski") and the current proceeding:

- In *Smiechowski*, the respondent admitted to four allegations. In the *Legare*

proceedings, two allegations proven against the Respondent.

- In *Smiechowski* the borrowed monies did not involve a relative or family member. In the *Legare* proceedings the conduct involves client S.G. who is a family relation of the Respondent.
- In *Smiechowski*, the amount borrowed was $25,000. In the *Legare* proceedings the amount was $49,650.
- In *Smiechowski*, the respondent was a Branch Manager who, as a pre-condition of his approval and qualification by the MFDA, would have been especially knowledgeable about the MFDA's By-Laws and Rules. The Respondent Legare has never taken courses beyond those required to be a salesperson and never served as a branch manager.
- In *Smiechowski*, the policies and procedures of his Member firm Clarica expressly prohibited lending to or borrowing from clients. This contrasts with the *Legare* proceedings where the Respondent's Member firm Chartwell Financial Inc.'s ("Chartwell") policies and procedures did not expressly prohibit lending to or borrowing from clients.
- Smiechowski, contrary to the policies and procedures of his Member firm Clarica, failed to disclose his personal financial dealings with his client. This contrasts with the *Legare* proceedings where the Respondent's Member firm Chartwell's policies and procedures did not expressly prohibit lending to or borrowing from clients.
- Smiechowski's misconduct was more egregious than the misconduct in the *Legare* proceedings. Smiechowski's conflicts of interest were maintained for much longer, a period of four years beginning in July 2004.
- The Smiechowski Settlement Agreement includes a six month suspension from acting as a mutual fund salesman, a $10,000 fine and $5,000 in costs. Based on the four allegations admitted, the suspension is 1.50 months per allegation, the fine is $2,500 per allegation and the costs order are $1,250 per allegation.

19. As to penalty, the Respondent emphasizes the following mitigating factors:

- The Respondent submits that the MFDA's Rules do not expressly prohibit personal financial dealings between Approved Persons and clients or family members who happen to be clients.

- The Respondent submits that the Respondent's Member firm Chartwell did not have policies or procedures that expressly prohibit personal financial dealings with clients or family members who happen to be clients.
- The Respondent testified she was in Manitoba in November 2005 and did not attend the seminar with Chartwell's lawyers Linda Murray where personal financial dealings with clients were discussed. The Respondent also testified that she never received the November 2005 seminar information from Chartwell.
- The Respondent was registered as a securities salesperson/mutual fund salesperson continuously from March 1992 until July 2006 and has not been subject to any prior disciplinary action or sanctions.
- In context of the Respondent's long career in the industry and the number of clients she has served, her conduct with respect to S.G. was an isolated event and MFDA Staff has not provided evidence otherwise.
- Client S.G. was a relative of the Respondent.
- Client S.G. authorized and assisted the Respondent's conduct.
- Client S.G. has been reimbursed for the entire amount of the impugned transactions and the Panel has accepted this as fact.
- The Respondent suffered significant financial losses arising from GCPL's non-payment for her book of business.
- In 2009 the Respondent lost her insurance license (that she had held since 1991) due to circumstances that arose with the issuance of the MFDA's June 12, 2008 Notice of Hearing.
- MFDA Staff has provided no evidence that damage was done to the integrity of the capital markets.
- It has been almost five years since the impugned conduct and MFDA Staff has not provided any evidence that demonstrates the Respondent continues to be a risk to investors or the capital markets.

20. The Respondent proposed the following penalty for Violation No. 1:

- A three month suspension from acting as a mutual fund salesperson (1.50 months per allegation multiplied by two as $49,650 is twice the amount in *Smiechowski*); and

- A fine in the amount of $5,000 ($2,500 per allegation multiplied by two as $49,650 is twice the amount in *Smiechowski*).

C. VIOLATION NO. 2 SECTION 22.1(c) BY-LAW NO. 1 OF MFDA FAILING TO COOPERATE IN AN INVESTIGATION

a) Summary of Facts as Found by Panel

21. The essential evidence, accepted by the Panel, was:

- The Respondent signed an Agreement of Approved Person document which required her to be bound by, observe and comply with the MFDA Rule and submit to the jurisdiction of the MFDA. MFDA By-Law No. 1, Section 22, requires an Approved Person to cooperate in an investigation of alleged misconduct.
- Between July 20, 2006 and May 29, 2008, the Respondent, on the advice of her counsel, K.A.G.B., failed to participate in any investigatory proceedings required of her as an Approved Person and, by accepting and acting on such advice, breached her obligations under the terms of the Agreement of Approved Person and thereby violated Section 22.1(c) of By-Law No. 1 of the MFDA.

b) Penalty Submissions of MFDA

22. With respect to Violation No. 2 (Failing to Cooperate in an Investigation), Enforcement Counsel made the following submission:

> By failing to comply with s.22 of MFDA By-Law No. 1 and by violating the terms of the Agreement, the Respondent interfered with a full, complete and timely investigation into her conduct, delayed the commencement of disciplinary action against her and created increased difficulties in the conduct of a disciplinary hearing as Staff was not able to collect, nor did she provide, any information regarding the allegations against the Respondent.

23. This violation, it is argued, served to prolong the hearing on the merits as no Reply or

explanation was given by the Respondent until she testified, under oath, on April 22, 2010, which was approximately four years after the commencement of the proceedings.

c) Penalty Submissions of the Respondent

24. With respect to Violation No. 2 (Failing to Cooperate in an Investigation), the Respondent made the following submissions:

- The Respondent submits that the decision by a Hearing Panel of the Ontario Regional Council of the MFDA *In the Matter of Scott Andrew Stevens* is the most appropriate authority for any penalty being considered in the current proceeding with respect to conduct contrary to section 22.1(c) of MFDA By-Law No. 1. The Respondent submits that Allegation #2 in *Stevens* is equivalent to Allegation #2 against the Respondent in the current proceeding.
- In *Stevens*, the MFDA alleged that the respondent misappropriated $77,500 from four clients between December 2004 and February 2005 (Allegation #1) and commencing August 2005 failed to cooperate with the MFDA's investigation (Allegation #2).
- At the hearing held April 28, 2006, Stevens admitted the misconduct captured by Allegation #1. In defence of Allegation #2, Stevens submitted that any perceived lack of cooperation with the MFDA's investigation was based on:
    a) concerns that his cooperation with the investigation might jeopardize concurrent criminal charges arising from the same alleged misappropriation; and
    b) legal advice he had received not to participate with the investigation until certain questions of law were resolved.
- In its decision the Hearing Panel in *Stevens* had this to say about Stevens' alleged failure to cooperate:
    a) "However, as was said at the Hearing, the actions of the Respondent and his solicitor did not, in our view, justify a finding of failure to cooperate; and
    b) "The second allegation was the failure to provide a written response. The Respondent did not ignore the request. An effort was made to deal with the request and, as already noted, the conduct of the Respondent did not amount to a failure to cooperate."

- In *Stevens*, the Hearing Panel ordered a fine of $1,000 with respect to Allegation #2.

25. The Respondent drew the following comparisons between the Stevens case and the subject proceedings:

- It was alleged by MFDA Staff that commencing August 2005 Stevens failed to provide a report in writing as required by Section 22.1 of MFDA By-Law No. 1;
- Stevens failed to respond to the MFDA's August 23, 2005 request for a written report and failed to meet the MFDA's September 6, 2005 deadline for delivery of the written report;
- Stevens did not have legal counsel on August 23, 2005 and September and September 6, 2005 so he could not have relied on legal advice when he failed to provide a written report;
- Stevens retained legal counsel on September 26, 2005 (at the earliest) and his lawyer first contacted the MFDA on September 29, 2005;
- Stevens retained legal counsel only after the alleged contravention of Section 22.1;
- Stevens' objections to the MFDA's investigation were based on concerns of self incrimination in relation to concurrent criminal charges, not jurisdiction issues; and
- Stevens did not support his objections with jurisprudence until October 21, 2005, some two months after the alleged contravention of Section 22.1.

26. The Respondent submitted that in the *Legare* case:

- it is alleged by MFDA Staff that commencing August 24, 2007 the Respondent failed to attend and give information, contrary to Section 22.1(c) of MFDA By-Law No. 1;
- the Respondent has never failed to respond to the MFDA's letters or meet the MFDA's deadlines;
- the Respondent retained, and relied on advice from, legal counsel since August 2006, a full year prior to the alleged contravention of Section 22.1(c);
- the Respondent's objections to the MFDA's investigation were based on valid jurisdiction challenges raised by *Dass* and *Taub* in 2007 and 2008;
- the jurisprudence and legal argument with respect to jurisdiction was advanced by the

Respondent's legal counsel in May 2007, three months before the alleged contravention of Section 22.1(c);

- once the Respondent was informed that the *Dass* matter had been resolved, the Respondent conceded jurisdiction to the MFDA on December 4, 2008; and
- since December 4, 2008 the Respondent has made herself available to the MFDA investigative powers under Section 22.1 of MFDA By-Law No. 1.

27. The Respondent submitted that the Hearing Panel in *Stevens* found that the respondent's conduct did not amount to a failure to cooperate even though he:

- failed to respond to the initial request for a written report;
- failed to produce a written report by the first deadline;
- only retained legal counsel after these failures; and
- failed to advance a legal argument to justify his objections until three months after his initial failures.

28. The Respondent submitted that she is far less culpable of a failure to cooperate than Stevens as she:

- has never failed to meet any deadlines;
- retained and followed the advice of legal counsel a year before the alleged failure to cooperate; and
- advanced and supported her objections with valid legal arguments three months before the alleged failure to cooperate.

29. As to penalty, the Respondent emphasized the following as mitigating factors:

- This Panel found, that between July 20, 2006 and May 29, 2008 the Respondent, on the advice of her counsel, did not participate in the MFDA's investigatory proceedings.
- The Respondent submits that she received appropriate legal advice questioning the MFDA's jurisdiction over former Approved Persons. The Respondent submits there

were two cases before the courts [*Dass* and *Taub*] challenging the jurisdiction of self-regulatory organizations such as the MFDA over former Approved Persons.

- The Respondent submits that she should not be held responsible for failing to co-operate when she did so by acting reasonably and relying on appropriate advice received from legal counsel. The Respondent submits that her reliance on legal advice mitigates any length of suspension from approval a mutual fund salesperson and that her misconduct warrants, at most, a nominal fine for a technical breach of section 22.1(c) of MFDA By-Law No. 1.

30. As to penalty, the Respondent submitted that her conduct is less egregious than that found in *Stevens* and warrants a smaller, if any, penalty.

31. The Respondent submitted that the maximum penalty for Violation No. 2 should be a fine of $500 or 50% of the penalty in *Stevens*.

D. COSTS

a) Submissions of Respondent

32. As to costs, the Respondent's position was as follows:

- The Respondent submits that MFDA Staff has failed to provide any evidence, records or accounting in support of its request for costs, as required in enforcement proceedings before self-regulatory organizations such as IIROC or statutory regulators such as the British Columbia Securities Commission. Given this failure, it would be contrary to fairness or natural justice for the Panel to order costs against the Respondent.

Re: Steinhoff, [2010] IIROC 42 dated September 17, 2010 at Tab 5

Securities Regulation,, B.C. Reg. 196/97 Part 7, Section 22 items 27, 28 at Tab 6

2000/08/14 ERON MORTGAGE CORPORATION et. al. [Sec. 174 Order for costs] British Columbia Securities Commission, August 9, 2000 at Tab 7

2001 BCSECCOM 1024 RANDALL KANE GAAROD [Sec. 174 Order for costs] British Columbia Securities Commission, October 26, 2001 at Tab 8

2002 BCSECCOM 241 Adam Guerrini [Sec. 174 Order for costs] British Columbia Securities Commission, March 20, 2002 at Tab 9.

- The failure of MFDA Staff to provide an accounting of their costs denies the Respondent:
  a) the ability to question their reasonableness; and
  b) a foundation for a review of any costs ordered against her, as provided under section 179 of the British Columbia *Securities Act.*

  Securities Act, R.S.B.C. 1996, c.418, Section 179 at Tab 10

- In the alternative, the Respondent submits that the proceedings were prolonged unnecessarily by MFDA Staff's failure until March 2010 to provide (to the Respondent) the majority of their disclosure materials. This disclosure was some 14 months after the commencement of the hearing on the merits on December 15, 2008. Given that the MFDA's failures contributed to the length and costs of the hearing, any costs that would otherwise be ordered against the Respondent should be waived.

b) <u>Submissions of MFDA</u>

33. As to Costs for an MFDA Disciplinary Hearing, the Enforcement Counsel submits as follows:

- Section 24.2 of MFDA By-Law No. 1 governs the award of costs for an MFDA disciplinary proceeding and states as follows:

  > A Hearing Panel may in any case in its discretion require that the Member or Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section 24.3 and any investigations relating thereto.
  >
  > *Section 24.2, By-Law No. 1, Mutual Fund Dealers Association of Canada*

- In paragraph 45 of her submissions, the Respondent states that the MFDA is required to provide evidence, records and accounts in support of a costs request. Staff submits that section 24.2 of MFDA By-Law No. 1 does not expressly impose such a requirement on Staff and that the ultimate decision remains with the Hearing Panel as

to the amount of costs, if any, to be ordered in a given case. The process by which the appropriate amount of costs to impose is determined is a matter left to the discretion of the Hearing Panel to be determined on a case by case basis.

E. ANALYSIS AND PENALTY

a) VIOLATION NO. 1

34. In her submission, the Respondent stated that "the settlement agreement recently accepted by a Hearing Panel of the Pacific Regional Council of the MFDA *In the Matter of Zenon Smiechowski* is a most appropriate authority for any penalty being considered in the current proceeding with respect to conduct contrary to MFDA Rules 2.1.4 and 2.1.1."

35. The essential facts in *Smiechowski* are set out in the Settlement Agreement at pp. 3 and 4 and are as follows:

- On February 24, 2003, FP became a client of Sun Life/Clarica when she opened an RRSP account. The Respondent was the Sun Life/Clarica salesperson responsible for servicing client FP's mutual fund and insurance accounts.
- In July 2004, the Respondent asked client FP for a personal loan in the amount of $25,000.
- On July 23, 2004, client FP lent $25,000 (the "Loan") to the Respondent. In order to do so, client FP carried out the following transactions:
    a) On July 15, 2004, she surrendered $20,520.40 from her Standard Life segregated funds (non-registered Income Balanced Fund), for which she incurred surrender fees in the amount of $520.40; and
    b) On July 16, 2004, she surrendered a further $5,130.36 from her Standard Life segregated funds (non-registered Income Balanced Fund), for which she incurred surrender fees in the amount of $130.36.
- On July 23, 2004, immediately prior to client FP making the Loan, the Respondent send an email to client FP requesting that she transfer the Loan funds to his personal bank account instead of writing him a cheque. The Respondent's bank account number and information was included in his email. Client FP agreed and transferred

$25,000 from her bank account into the Respondent's bank account.

- On the same date the Loan was made, the Respondent prepared and signed a document entitled "Memorandum of financial agreement" (the "Memorandum") stipulating the terms of the Loan. The Memorandum permitted the Respondent to repay the Loan in full with a variable interest component in one of three ways: in one payment after six months; in two payments after 12 months; or in one payment after 12 months. The Memorandum described the terms in the following manner:

> A personal loan of $25,000 (twenty five Thousand) from [client FP] to Zenon Smiechowski.
>
> Loan provisions – Return after 6 months - $27,500 (02/05) or $15,000 (02/05) + $13,750 (06/05) for a total of $28,750 or [sic] return after 12 months - $30,000 (06/05).

- Contrary to the terms of the Memorandum, the Respondent failed to repay the Loan to client FP, either in part or in full, when the Loan became payable after six months and after twelve months.
- The Loan was a violation of Clarica's Policies and Procedures, which specifically prohibited Approved Persons from lending to or borrowing from clients.
- At no time did the Respondent obtain permission from, or disclose to, Clarica that he had borrowed monies from client FP.
- Effective October 27, 2006, the Respondent resigned from Clarica. On December 4, 2006, client FP closed her account at Clarica.

36. The Panel does not find the decision approving the Settlement Agreement in the matter of MFDA and Zenon Smiechowski to be a persuasive authority in reaching an appropriate, reasonable and proportionate penalty on Violation No. 1.

37. The Panel agrees with the following submission of Enforcement Counsel in paragraph 3 of her Reply to the Submission of the Respondent:

> "3. In *Smiechowski*, the Approved Person (Smiechowski) borrowed $25,000 from a client but documented the $25,000 loan by providing the client with a promissory note which set out the terms of repayment. Further, the Approved Person did not dispute the existence of the loans and repaid the loans in full prior to appearing before the Hearing

Panel and even prior to having a Notice of Hearing issued against him. The proceeding was resolved by way of a settlement agreement in which the Approved Person admitted the material facts and his misconduct, a well as the appropriate penalty to be imposed. By ensuring the client was repaid in full and by entering in to the settlement with Staff, the Respondent demonstrated that he recognized his wrongdoing and was remorseful. By entering into the settlement, Smiechowski also saved the MFDA from the time and expense of a lengthy and costly hearing process."

38. In imposing a penalty on Violation No. 1, the Panel has reviewed and considered the factors which Enforcement Counsel has listed at pp. 3 and 4 of the Submission of Staff of the MFDA. They are:

- the protection of the investing public;
- the integrity of the capital markets;
- specific and general deterrence;
- the protection of the MFDA's membership;
- the protection of the integrity of the MFDA's enforcement processes;
- the seriousness of the allegations proved against the Respondent;
- the Respondent's past conduct, including prior sanctions;
- the Respondent's experience in capital markets;
- the level of the Respondent's activity in the capital markets;
- whether the Respondent recognizes the seriousness of the improper activity;
- the harm suffered by investors as a result of the Respondent's activities;
- the benefits received by the Respondent as a result of the improper activity; and
- previous decisions made in similar circumstances

39. Of particular importance to the Panel in imposing a penalty on Violation No. 1 are the following aggravating factors:

- The violations occurred and continued over a seven month period and involved nine separate payments.
- The Respondent was related, through marriage, to the client, S.G., and knew of the circumstances that made her vulnerable.

- The Respondent did not disclose her financial involvement with S.G. to the Member, Chartwell.
- There was no evidence to suggest that the Respondent was remorseful for her conduct at any time.
- The Respondent received a total of $49,650 and has not paid Chartwell for reimbursing S.G.
- The Panel found that the Respondent had not been truthful in her evidence of April 22, 2010, as to the reason why the monies were received by her from S.G.
- The Panel recognizes that a penalty for this violation must have regard for the protection of investors, the integrity of the markets, the integrity of the regulatory system of the MFDA and general deterrence of those who may have a propensity to commit a similar violation.

40. The Panel imposes a permanent prohibition on the authority of the Respondent to conduct securities-related business in any capacity while in the employ of or associated with an MFDA Member and a fine in the amount of $50,000 for Conflict of Interest and Standard of Conduct violations contrary to MFDA Rules 2.1.4 and 2.1.1.

b) VIOLATION NO. 2

41. The Panel has stated, briefly, under "C" of this Decision and Reasons (Penalty), the essential evidence on which it held that the Respondent had violated Section 22.1(c) of MFDA By-Law No. 1 (Failing to Cooperate in an Investigation).

42. The Panel is not unmindful of the evidence that the Respondent had consulted a lawyer, K.A.G.B., and that she accepted his advice not to submit to the jurisdiction of the MFDA and its Disciplinary Process.

43. In doing so, the Respondent abandoned her obligations under the Approved Person agreement which she had signed on becoming an Approved Person. A penalty for that violation will follow.

44. The Respondent submits that the decision by a Hearing Panel of the Ontario Regional Council of the MFDA in the matter of Scott Andrew Stevens is the most appropriate authority for any penalty being considered in this proceeding with respect to conduct contrary to section 22.1(c) of MFDA By-Law No. 1.

45. The Panel finds that, apart from the fact that both Stevens and the Respondent violated the same section of MFDA By-Law No. 1, the cases are markedly dissimilar. Unlike the Respondent, Stevens was facing criminal charges at the time the MFDA requested of him a report in writing. The Stevens decision was based on its own very unique set of facts and is, therefore, of no persuasive value in imposing a penalty in the present case.

46. The Panel recognizes the importance of the MFDA Rules which require the cooperation and assistance of an Approved Member in conducting an investigation of alleged misconduct.

47. The Panel imposes a fine in the amount of $25,000, however, having regard to the penalty imposed on the Respondent on Violation No. 1, the fine will be concurrent.

c) COSTS

48. On the issue of costs, the Panel agrees with the position taken by Enforcement Counsel in her submission as follows:

> "Section 24.2 of MFDA By-Law No. 1 governs the award of costs for an MFDA disciplinary proceeding and states as follows:
>
> > A Hearing Panel may in any case in its discretion require that the Member or Approved Person pay the whole or part of the costs of the proceedings before the Hearing Panel pursuant to Section 20 and Section 24.1 or Section 24.3 and any investigations relating thereto.
> >
> > *Section 24.2, By-Law No. 1*, Mutual Fund Dealers Association of Canada.
>
> In paragraph 45 of her submissions, the Respondent states that the MFDA is required to

> provide evidence, records and accounts in support of a costs request. Staff submits that section 24.2 of MFDA By-Law No. 1 does not expressly impose such a requirement on Staff and that the ultimate decision remains with the Hearing Panel as to the amount of costs, if any, to be ordered in a given case. The process by which the appropriate amount of costs to impose is determined is a matter left to the discretion of the Hearing Panel to be determined on a case by case basis."

49. The Panel recognizes that in a given case it will be reasonable for a Party to have to account for costs claimed. This is not such a case.

50. The Panel, in its decision of October 29, 2010, reviewed the proceedings in this matter from December 15, 2008. The proceedings were protracted as a result of numerous motions made by, or on behalf of, the Respondent.

51. It is clear to the Panel that the amount sought by MFDA in costs represents a very small fraction of the actual cost of this proceeding.

52. Although the Panel finds the high end of the proposed range not to be unreasonable in the circumstances (i.e. $15,000), it will allow $10,000 in costs.

DATED this 10th day of June, 2010.

"Benjamin Casson"
The Hon. H. Benjamin Casson, Q.C.
Chair

"Darlene Thomas"
Darlene Thomas,
Industry Representative

"Tina Coulson"
Tina Coulson,
Industry Representative

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