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: Ilden Francis Loyola

Heard: June 2, 2021 by electronic hearing in Calgary, Alberta
Decision: June 2, 2021
Reasons for Decision: August 30, 2021

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Sherri Walsh	Chair
Kathleen Jost	Industry Representative
Sean Shore	Industry Representative

Appearances:

Sakeb Nazim	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Ilden Francis Loyola	)	Respondent, not in attendance or represented by counsel

I. INTRODUCTION

1. On December 17, 2020, the Mutual Fund Dealers Association of Canada ("MFDA") issued a Notice of Hearing pursuant to sections 20 and 24 of MFDA By-law No. 1 in respect of a disciplinary proceeding commenced against Ilden Francis Loyola ("the Respondent"), which set out the following allegations:

> Allegation #1: Between December 2017 and January 2018, the Respondent engaged in personal financial dealings with a client when he received monies of a client that he deposited into his bank account, which gave rise to a conflict or potential conflict of interest that the Respondent failed to disclose to the Member or otherwise address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1.
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> Allegation #2: Commencing in April 2019, the Respondent failed to co-operate with an investigation by MFDA Staff into his conduct, contrary to section 22.1 of MFDA By-Law No. 1.

2. On December 29, 2020, the Respondent was personally served with: the Notice of Hearing; a letter from the MFDA's Enforcement Counsel dated December 18, 2020 concerning the disciplinary proceedings that were commenced against him; and a copy of the MFDA's Rules of Procedure.

3. The letter from Enforcement Counsel identified the date for the first appearance in this matter and explained that the purpose of that appearance was to schedule a date for the hearing on the merits of the matters described in the Notice of Hearing and to permit the parties to raise any preliminary matters.

4. The letter also advised that prior to the date of the first appearance the Respondent was required to prepare and send to Enforcement Counsel a written Reply to the allegations made against him in the Notice of Hearing, within 20 days of the date he received Enforcement Counsel's letter.

5. The first appearance took place by teleconference before a Hearing Panel of the MFDA Prairie Regional Council ("the Panel") on February 26, 2021.

6. The Respondent did not attend the appearance nor did he file a Reply or respond in any way to MFDA Staff ("Staff") despite having been served with the Notice of Hearing and accompanying material, as set out above.

7. At the first appearance a date was set for the hearing on the merits to take place on June 2, 2021. Staff advised that it would send a letter to the Respondent to confirm the date of the hearing and provide him with an electronic link to allow him access to participate in the proceedings which were to be held by video conference.

8. Accordingly, on April 20, 2021, Staff served the Respondent with: a copy of the News Release which was issued on March 2, 2021 by the MFDA to announce the date for the hearing on the merits; a letter dated April 19, 2021 from Enforcement Counsel which provided information about that hearing; a copy of the MFDA's Rules of Procedure; and a copy of the MFDA Guide to the Disciplinary Hearing Process.

9. Enforcement Counsel's April 19, 2021 letter told the Respondent that he was entitled to be represented by a lawyer or an agent throughout the course of the hearing and that he was entitled to receive copies of the documents and witness statements that the MFDA would be relying on at the hearing.

10. It also said that if the Respondent failed to participate in the hearing the Hearing Panel may proceed with the hearing in his absence and in that event treat all the allegations against him in the Notice of Hearing as proven, in which case the Hearing Panel would be immediately entitled to impose penalties on him and order him to pay all or part of the costs of the investigation and disciplinary hearing in the matter, without further notice to him.

11. When the hearing on the merits was convened on June 2, 2021, the Respondent did not attend nor did anyone appear on his behalf.

12. Enforcement Counsel referred the Panel to MFDA Rules of Procedure 13.5 and 7.3 which provide that a hearing panel may proceed with a hearing on the merits in the absence of a Respondent:

13.5 Where a Respondent Fails to Attend a Disciplinary Hearing

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

7.3 Failure to Attend Hearing

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

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

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

13. In his written submission, Enforcement Counsel also addressed the significance of the fact that the Respondent had failed to serve a Reply within 20 days of being served with the Notice of Hearing.

14. Under MFDA Rule of Procedure 8.4(1), where a respondent fails to serve and file a Reply to the Notice of Hearing, a hearing panel may do one or more of the following:

8.4 Effect of Failure to Deliver a Proper Reply

(1) Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:

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

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

(c) order that the Respondent pay costs, at any stage of the proceeding, regardless of the outcome of the proceeding and in addition to any other penalties and costs imposed on the Respondent, in an amount which reflects the extent to

which, in the Hearing Panel's discretion, the hearing will be or has been unnecessarily prolonged or complicated by the failure of the Respondent to deliver a proper Reply;

(d) prohibit, restrict, or place terms on the right of the Respondent to call witnesses or present evidence at the hearing.

15. The Respondent having failed to serve a Reply to the Notice of Hearing and having failed to attend the hearing on the merits, Enforcement Counsel submitted that the Panel could: proceed in the Respondent's absence; accept the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing as proven; and impose any other penalties and costs described in sections 24.1 and 24.2 respectively, of MFDA By-law No. 1.

16. On the basis of these authorities and seeing that the Respondent was not in attendance and had not filed a Reply, the Panel proceeded with the hearing.

17. In response to Enforcement Counsel's submissions, the Panel advised that it still wanted him to proceed to prove the allegations in the Notice of Hearing. We were not prepared to simply accept the facts alleged and conclusions drawn in the Notice without being taken through the evidence, including being given the opportunity to hear from and ask questions of the witness upon whose evidence the MFDA relied, in establishing its case.

II. EVIDENCE

18. The facts in this matter were established through the evidence of Allison Howse, MFDA Manager of Investigations, in her Affidavit sworn June 1, 2021, and the testimony she gave at the hearing which elaborated on and provided clarification of the matters set out in her Affidavit.

19. With respect to relying on Ms. Howse's Affidavit, Enforcement Counsel pointed the Panel to the following MFDA Rules of Procedure which allow a Panel to admit affidavits into evidence:

1.6 Admissibility of Evidence

(1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.

13.4 Evidence by Sworn Statement

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

20. Enforcement Counsel pointed out that it is well established that MFDA hearing panels and other regulatory bodies routinely consider and rely on both hearsay and affidavit evidence in making findings of fact.

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

Registration History

21. From August 3, 2016 to May 15, 2019, the Respondent was registered in Alberta as a dealing representative with Investors Group Financial Services Inc., a Member of the MFDA (the "Member").

22. On May 15, 2019, the Member terminated the Respondent. The Respondent at the time of these proceedings was not registered in the securities industry in any capacity.

Allegation No. 1 - Personal Financial Dealings

23. On March 6, 2019, the Member filed a Member Event Tracking System ("METS") report with the MFDA. In that report, the Member advised Staff that client IL expressed concerns that a cheque of $2,604.16 from his Registered Retirement Investment Fund ("RRIF"), and a redemption of $25,000 from his Tax-Free Savings Account ("TFSA") were processed from his accounts in December 2017 and January 2018 respectively, without his authorization. Client IL maintained that he did not receive or sign the cheques that were issued and that he did not have an account at the bank where the cheques were cashed. The Member told Staff that client IL and the Respondent were father and son who lived at the same address.

24. In response to the METS report, Staff opened an investigation into the Respondent's business conduct at the Member and through that process obtained information and documents from both the Member and the Respondent regarding the latter's conduct. Much of the information Staff received was contained in the Member's Investigation Report ("the Investigation Report") which was attached as an exhibit to Ms. Howse's Affidavit. Through the Investigation Report, Staff learned the facts which are set out below.

25. The Respondent's father, client IL, held a RRIF account and a TFSA with the Member. Client IL was approximately 82 years of age at the time of the Member's investigation.

26. On or about December 1, 2017, the Respondent submitted account forms to the Member to process a $2,604 redemption from client IL's RRIF account and the Member issued a cheque for the proceeds that was payable to client IL ("Cheque #1").

27. On December 15, 2017, the Respondent deposited Cheque #1 into his personal bank account by endorsing the back of the cheque with his own signature

28. On or about January 22, 2018, the Respondent submitted account forms to the Member to process a second redemption totaling $25,000 from client IL's TFSA account and the Member issued a cheque for the proceeds that was payable to client IL ("Cheque #2").

29. On February 6, 2018, the Respondent deposited Cheque #2 into his personal bank account by endorsing the back of the cheque with his own signature.

30. The Investigation Report noted that the Respondent confirmed that the signature that endorsed the back of both cheques was his and that he had deposited them to his own account.

31. The Investigation Report then noted:

> "It should be the person whom the cheque is made to who would endorse the back of the cheque. Banks would not have caught it as both the Consultant [Respondent] and client sign 'I Loyola'."

32. Among other things, the Investigation Report also set out the explanation the Respondent gave to the Member as to why monies from his father's account were transferred to him.

33. He told the Member that the December 2017 RRIF redemption in the amount of $2,604.16 was a Christmas gift from his father and the $25,000 TFSA redemption was a loan from his father for a "Chocolate Tradeshow" he was hosting that was cancelled and for which he owed money for the venue rental.

34. He said that his father may have been confused because the loan came from his TFSA not his RBC account.

35. Prior to the Member's investigation into his conduct, the Respondent did not disclose to the Member that he deposited cheques #1 and #2 payable to client IL, into his own bank account. Further, in the Member's Annual Consultant Certificates which were completed by the Respondent in March 2017 and March 2018, the Respondent said that he had not borrowed money from any Member client. [emphasis added]

36. In March 2019, client IL complained to the Member that he had not authorized redemptions or received the proceeds of the redemptions described above.

37. When the Member contacted client IL in response to his complaint, IL denied that he had loaned or gifted the monies redeemed from his investment accounts at the Member, to the Respondent.

38. However, when the Member offered to reimburse client IL for the full amount of the monies which had been redeemed from his accounts, IL declined the offer.

39. With respect to the Respondent's financial situation, the Investigation Report, under the heading *Analysis* included the following information:

> **"…**
>
> - The Consultant is not in a strong financial position.
>
> - His credit bureau showed a TD Auto Loan as written off, two payday loans as written off, a write-off of over $1100 for Shaw Cable, as well as a civil judgement that appears to be related to a rental property.
>
> - His net pay by year has been:
>
> 2016 - $3,045
>
> 2017- $8,959
>
> 2018- $6,359
>
> YTD 2019 - $0"

Allegation No. 2 – Failure to Co-operate

40. Ms. Howse testified that when, following the Member's investigation, the MFDA commenced its own investigation into the Respondent's conduct the Respondent failed to respond to any of Staff's requests to communicate with him.

41. The efforts Staff made to communicate with the Respondent as part of its investigation were described in paragraphs 23 to 28 of Ms. Howe's affidavit as follows:

> "23. On April 15, 2019, Staff sent a letter by regular and registered mail to the Respondent advising him that Staff had commenced an investigation into allegations that he had redeemed funds from client IL's account without client IL's knowledge or authorization. Staff requested that the Respondent provide information regarding the circumstances surrounding the redemptions described above at paragraphs 11 and 12, and about other documentation that gave rise to concerns that other regulatory violations may have occurred. Staff requested that the Respondent respond to this letter by May 7, 2019. The Respondent received and signed for the registered mail on April 17, 2019. The Respondent did not respond to the April 15, 2019 letter from Staff.
>
> 24. On May 9, 2019, Staff sent a second letter by regular and registered mail to the Respondent, reiterating its request for the information requested in its April 15, 2019 letter. Staff also requested that the Respondent provide information about his involvement in the trade show. Staff informed the Respondent that should he fail to provide the requested information by May 24, 2019, that that matter may be referred for a review of possible commencement of disciplinary proceedings against him for failing to co-operate. An individual residing at the same address received and signed for the registered letter on May 13, 2019. The Respondent did not respond to the May 9, 2019 letter from Staff.
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> 25. On October 30, 2019, Staff sent a third letter by registered mail to the Respondent requesting that he contact Staff within ten business days to schedule an interview to give information relevant to matters under investigation. The registered letter dated October 30, 2019 was returned to the MFDA office as "Unclaimed".
>
> 26. On November 28, 2019, Staff sent a fourth letter by regular and registered mail to the Respondent, requesting that he contact Staff within ten business days to schedule an interview to answer questions relevant to matters under investigation. An individual residing at the same address received and signed for the registered mail on November 29, 2019. The Respondent did not respond to the letter from Staff.
>
> 27. On January 7, 2020, Staff sent a fifth letter via process server to the Respondent requesting that he contact Staff by January 21, 2020 to schedule an interview in February 2020. The January 7, 2020 letter also stated that if the Respondent did not respond by

January 21, 2020, an interview would be scheduled on February 6, 2020. On January 7, 2020, the letter was delivered by the process server to the Respondent's father residing at the same address as the Respondent. The Respondent did not respond to the January 7, 2020 letter, nor did he attend the interview that was scheduled to take place on February 6, 2020.

28. The Respondent has failed to provide Staff with a written statement, and did not attend an interview to give information relevant to matters under investigation by Staff."

42. Ms. Howse testified that because of the Respondent's failure to respond to Staff's attempts to communicate with him, Staff was unable to determine the full nature and extent of his conduct including, for example, whether he had deposited any other amounts from any other clients into his personal bank accounts and whether or not the redemptions were authorized.

43. She also testified that her efforts to obtain information from the Respondent's father, who was the client who had initiated the complaint, were equally unsuccessful.

III. STAFF'S POSITION ON MISCONDUCT

Allegation No. 1 – Personal Financial Dealings and Conflict of Interest

44. In Staff's submission, the evidence clearly showed that the Respondent redeemed and deposited monies from client IL's investment accounts into his own personal bank account. By doing so, Staff submitted, he co-mingled the client's money with his own, placing the money completely within his own control. Accordingly, Staff submitted the Respondent had engaged in personal financial dealings which gave rise to a conflict of interest, contrary to MFDA Rule 2.1.4 and to the MFDA's general Standard of Conduct Rule 2.1.1.

45. Rule 2.1.4 requires that Approved Persons be aware of actual or potential conflicts of interest, disclose such conflicts to the Member and together with the Member address all such conflicts by the exercise of responsible business judgment influenced only by the best interests of the client.

46. The Rule reads as follows:

2.1.4 Conflicts of Interest

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

(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).

(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

47. Rule 2.1.1 is the general standard of conduct rule. It reads as follows:

2.1.1 Standard of Conduct

Each Member and each Approved Person of a Member shall:

(a) deal fairly, honestly and in good faith with its clients;

(b) observe high standards of ethics and conduct in the transaction of business;

(c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and

(d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

48. Enforcement Counsel also turned the Panel's attention to Notices which Staff published in 2005 and 2006 entitled: "Personal Financial Dealings with Clients" and "Conflict of Interest – MFDA Rule 2.1.4" respectively, which clarify the obligations imposed on Members and Approved Persons regarding personal financial dealings with clients.

49. The Notice entitled "Personal Financial Dealings with Clients" cites MFDA Rules 2.1.1 and 2.1.4 and identifies the following as a specific example of conduct to avoid:

> ***a) Borrowing from Clients***
>
> 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 arrangements would be able to demonstrate that the conflict has been properly dealt with.
>
> MFDA Staff Notice MSN-0047 dated October 3, 2005

50. The Notice also indicates that all monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member who must be notified of any such arrangements so that the Member is in a position to determine the significance of the benefit and monitor the activity.

51. The Notice entitled "Conflicts of Interest – MFDA Rule 2.1.4" confirms that Rule 2.1.4 is intended to clarify the role of Approved Persons in the management of conflicts of interest by Members. It states:

> Approved Persons are important points of contact with clients and play an important role in ensuring that conflicts that arise in dealing with clients are properly managed. As such, it is important that Approved Persons notify the Member when they identify a potential conflict of interest and support the Member in taking appropriate action to ensure that the conflict is addressed in the best interests of the client.
>
> MFDA Staff Notice MSN-0054 dated June 22, 2006 (updated March 4, 2013)

52. The Notice goes on to confirm that Rule 2.1.4 is intended to function as a rule of general application with respect to the treatment of conflicts and that it is important to note that there are two distinct aspects to the Rule: a requirement that written disclosure be provided to clients regarding potential conflicts that have been identified; and an obligation to address the conflict by the exercise of responsible business judgment, influenced only by the best interests of the client.

53. Enforcement Counsel submitted that a conflict of interest arises when an Approved Person advances or pursues their own interest in dealing with a client to whom they have an obligation of dealing fairly, to the detriment of the client or to their own advantage.

> *Gaunt*, MFDA File No. 201232, a decision of the Hearing Panel of the Atlantic Regional Council at paras. 47 & 54

54. He pointed out that MFDA Hearing Panels have found that soliciting and accepting monies from clients puts Approved Persons in a situation of conflict of interest and is conduct that is contrary to MFDA Rules 2.1.4 and 2.1.1.

> *Visneski*, MFDA File No. 201553, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 7, 2017, at paras.15-20

55. Enforcement Counsel further submitted that panels have held that when an Approved Person holds client monies in their personal bank account, that also gives rise to a conflict of interest within the meaning of Rule 2.1.4.

> *Wang,* MFDA File No. 201762, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated October 2, 2017, at para.16

56. He pointed out that the common theme among the MFDA decisions to which he referred the Panel was that an Approved Person took control of the client's money or otherwise put it to use to the Approved Person's potential benefit. This, he submitted, is precisely what happened in this case once the Respondent placed the client's money under his own control and therefore beyond the supervision of the Member.

57. Having regard to the Respondent's conduct as a whole, Enforcement Counsel submitted that his conduct created a conflict of interest between the Respondent and the client which the Respondent did not disclose to the Member. The Respondent also failed to disclose the conduct to the client and in all of the circumstances failed to address the conflict by the exercise of responsible business judgment influenced only by the best interests of the client. Accordingly, Enforcement Counsel submitted, the Respondent's conduct clearly contravened MFDA Rules 2.1.4 and 2.1.1.

Allegation No. 2 – Failure to Co-operate – Staff's Submission

58. Enforcement Counsel submitted that by failing to co-operate with Staff's investigation into his conduct the Respondent contravened section 22.1 of MFDA By-law No. 1.

59. In making this submission, Enforcement Counsel pointed to the evidence of Ms. Howse from both her affidavit and her testimony, in which she detailed all of the efforts that MFDA Staff made to obtain information from the Respondent.

60. The Respondent's failure to respond to any of those efforts, Ms. Howse testified, prevented the MFDA from obtaining any information about the Respondent's activities including information about whether any monies were in fact repaid to the client or whether the monies were misappropriated or the transactions were unauthorized.

61. Enforcement Counsel submitted that the Respondent's failure to co-operate has had significant impact on Staff's ability to find the relevant information and on its ability to provide the requisite client and investor safeguards that might have been required were Staff able to know the extent of the Respondent's conduct in this case.

62. He submitted that Allegation No. 2, therefore, was proven and was affirmed by the fact that the Respondent chose not to participate in these proceedings.

IV. DECISION AND REASONS – MISCONDUCT

63. The Panel finds that both Allegations No. 1 and No. 2 as set out in the Notice of Hearing, have been proven.

Allegation No. 1 – Personal Financial Dealings and Conflict of Interest

64. As Enforcement Counsel noted, the allegation in this case was not that the Respondent withdrew money without the client's knowledge or consent but simply that his actions constituted personal financial dealings in breach of MFDA Rules 2.1.4 and 2.1.1.

65. The Panel agrees with Enforcement Counsel's submissions that the Respondent's conduct clearly contravened MFDA Rule 2.1.4 regarding conflict of interest and Rule 2.1.1 regarding the general standard of conduct expected of Approved Persons and, therefore, Allegation No. 1 in the Notice of Hearing, has been proven.

66. To quote the Hearing Panel in *Larson*, a case where the Respondent had directed a client's redemption proceeds into his personal bank account:

> [I]t is axiomatic that, having chosen to direct client funds outside the auspices of the Member, the respondent was engaging in personal financial dealings with the clients in breach of Rules 2.1.4 and 2.1.1.

Larson, MFDA File No. 200826, a decision of the Hearing Panel of the Prairie Regional Council dated August 27, 2009, at p. 25

67. As Enforcement Counsel pointed out in answer to a question from the Panel, the Respondent's explanation for why he put the client's monies into his own account – that they represented gifts and loans from the client to him – was not an answer to the allegation of misconduct in this case. Regardless of the Respondent's reasons for his actions, his conduct still amounted to personal financial dealings with his client's funds, in a manner that was contrary to the obligations imposed on him under the MFDA Rules.

68. The Hearing Panel in *Gaunt* explained that:

> the very nature of the relationship between a financial advisor and his client demands that the client's best interests are the basis of any and all transactions performed on behalf of the client. This obviously precludes activities and transactions which are directed in any way for the benefit of the financial advisor's self-interest.
>
> *Gaunt, supra,* at para. 54

69. Any borrowing by an Approved Person from a client immediately creates a conflict of interest or potential conflict of interest which must be immediately disclosed to the Member under MFDA Rule 2.1.4.

> *Gaunt, supra,* at para. 65

70. In this case, the Respondent acted in a manner which was completely contrary to the standard of conduct required of an Approved Person. In borrowing and accepting money from his client, he commingled the client's funds with his own. In doing so he placed himself in a conflict of interest, putting his own interests ahead of the interests of his client – all the while failing to disclose this situation either to the client or the Member.

71. The Panel finds that the Respondent's conduct fell far short of observing high standards of ethics and conduct in his dealings with his client and, therefore, clearly breached Rules 2.1.1 and 2.1.4.

Allegation No. 2 – Failure to Co-operate

72. Pursuant to section 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations of a Member, an Approved Person and any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that

Member, or Approved Person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA.

73. In carrying out this duty, section 22.1 of MFDA By-law No. 1 says the MFDA is authorized to request and oblige a Member, Approved Person or any other person under its jurisdiction to:

a) Submit a report in writing with regard to any matter involved in any investigation;
b) Produce for investigation and provide copies of the books, records and accounts of such person relevant to the matters being investigated;
c) Attend and give information respecting such matters; and
d) Make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the MFDA.

74. Section 22.1 also says that the Member, Approved Person or other person under investigation is obliged to co-operate with the examination and investigation the MFDA conducts in accordance with its duty under section 21.

75. There is no question that an Approved Person must provide Staff with information and documentation when requested to do so. To hold otherwise would hinder the MFDA's ability to investigate the conduct of registrants in the mutual fund industry and would prevent the MFDA from fulfilling its regulatory mandate to protect the public.

> *Armani (Re)*, MFDA File No. 201701, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 3, 2017 at para. 9

76. An Approved Person's obligation to co-operate with an MFDA investigation is consistent with the duties which are owed by all members of self-governing professions. In *Artinian v. College of Physicians and Surgeons of Ontario*, for example, the Ontario Divisional Court stated that:

> Fundamentally, every professional has an obligation to co-operate with his self-governing body.
>
> > *Artinian v. College of Physicians and Surgeons of Ontario*, [1990] OJ No. 1116, at p. 4

77. In this case, the evidence clearly shows that the Respondent failed to submit information and documents which were requested by Staff during the course of its investigation into his

conduct. He therefore failed to co-operate with Staff's investigation, contrary to section 22.1 of MFDA By-law No. 1.

78. Accordingly, the Panel finds that Allegation No. 2 has been proven.

79. After the Panel delivered its decision on the issue of misconduct, Enforcement Counsel provided the Panel members with his written submission on the issue of penalty. The Panel took a brief adjournment to review that submission and then returned to hear Enforcement Counsel's oral submissions.

V. STAFF'S POSITION REGARDING PENALTY

80. Enforcement Counsel submitted that the Panel should impose the following penalties against the Respondent:

a) a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;
b) a fine of at least $60,000; and
c) costs in the amount of $5,000.

81. In his written submission, Enforcement Counsel highlighted the following factors upon which MFDA Hearing Panels repeatedly rely in determining the appropriateness of a penalty:

a) The seriousness of the allegations proved against the Respondent;
b) The Respondent's experience in the capital markets;
c) The level of the Respondent's activity in the capital markets;
d) The harm suffered by investors as a result of the Respondent's activities;
e) The benefits received by the Respondent as a result of the improper activity;
f) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
g) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
h) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

i) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and

j) Previous decisions made in similar circumstances.

Breckenridge (Re), MFDA File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para. 77

Sanction Guidelines

82. Staff also pointed out that the Panel may refer to the MFDA's Sanction Guidelines which came into effect on November 15, 2018. Those Guidelines, as their name suggests, are neither mandatory nor binding on a Panel but they provide a summary of the key factors upon which a Panel can rely so as to exercise its discretion in a consistent and fair manner.

83. As Staff submitted, many of the same factors that were listed by the Panel in *Breckenridge (Re)* above, regarding considerations for determining an appropriate penalty, are reflected and described in the Guidelines.

Application in the Present Case

(i) Nature of the misconduct – personal financial dealings

84. Enforcement Counsel submitted that the Respondent's misconduct was very serious, pointing out that between December 2017 and January 2018 he redeemed approximately $27,604 from his client's investment accounts which he then deposited into his own personal bank account.

85. In doing so, Enforcement Counsel submitted, the Respondent: placed his own interests ahead of those of his client; disregarded his responsibilities as an Approved Person; and obtained a substantial personal benefit to which he was not entitled due to his regulatory obligations.

86. Enforcement Counsel submitted that MFDA Rule 2.1.4 concerning conflicts of interest exists to protect clients and that even in cases where there is no client harm, MFDA Hearing Panels have recognized the seriousness of contravening MFDA Rule 2.1.4. In *Sarang,* for example, the Hearing Panel stated:

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

87. Enforcement Counsel also submitted that by placing the client's monies into his personal bank account, the Respondent removed his activities with the client from the Member's supervision. This not only removed an important safeguard for the client but also exposed the Member to liability. In this case, for example, as a result of the Respondent's misconduct, the client complained to the Member resulting in the Member offering a financial settlement (which the client declined).

88. Enforcement Counsel submitted that the following aggravating factors supported the penalties that the MFDA was seeking:

- the Respondent took the money without the client's consent as evidenced by the fact that the client complained to the Member that he did not know the funds had been redeemed;
- there was no evidence that the Respondent ever paid the client back; and
- the Respondent took advantage of the client, who was his 82 year old father.

89. Enforcement Counsel submitted that this last point was, in his view, the most serious aggravating factor because it demonstrated that the Respondent took advantage of his relationship with his father with whom he had a position of trust and that this was compounded by the fact that as an 82 year old, his father, was a vulnerable senior citizen.

90. Enforcement Counsel expressed concern that senior citizens are often taken advantage of because they trusted someone who breached that trust.

91. In making these submissions, Enforcement Counsel acknowledged that the MFDA was not alleging misappropriation because it had limited information as to the details of what transpired, which, of course, was attributed directly to the Respondent's misconduct in failing to co-operate with Staff's investigation.

(ii) Nature of the Misconduct – Failure to Co-operate

92. With respect to the failure to co-operate, Enforcement Counsel pointed to Ms. Howse's evidence that indicated there were several issues that could not be investigated thoroughly because of the Respondent's failure to co-operate. Enforcement Counsel submitted that where there are such allegations, MFDA Hearing Panels generally impose a minimum fine of $50,000.

93. In this case, involving two allegations, Enforcement Counsel submitted that a fine of $60,000 was very well justified because of the serious nature of the facts which had been proven.

(iii) Respondent's Past Conduct

94. Enforcement Counsel submitted that although the Respondent has no past disciplinary history with the MFDA, this factor should be given very little weight in light of the seriousness of his misconduct which included subverting the regulator's ability to fully investigate the Respondent's conduct to determine all of the relevant facts.

(iv) Respondent's Experience in the Securities Industry

95. Enforcement Counsel submitted that since the Respondent was registered as a mutual fund dealing representative starting in August 2016, he ought to have known and respected both the MFDA's and the Member's compliance requirements.

(v) Respondent's Recognition of the Seriousness of the Misconduct

96. Enforcement Counsel submitted that the Respondent's failure to participate in these proceedings demonstrates that he does not recognize the seriousness of his misconduct, shows no remorse and demonstrates an unwillingness to comply with the regulatory requirements of the securities industry.

(vi) Client Harm and Benefits Received by the Client

97. The Respondent deposited approximately $27,604 of client monies into his own bank account and there is no evidence that he ever repaid those funds. However, because of the Respondent's failure to co-operate, Enforcement Counsel pointed out that Staff was unable to ascertain whether the client authorized the redemptions and deposit of the redemption proceeds into the Respondent's personal bank account or whether the Respondent misappropriated monies from his client. Staff was also unable to determine whether the Respondent deposited other amounts in his personal bank accounts either from client IL or other clients.

(vii) Risk to Investors and the Capital Markets

98. Enforcement Counsel submitted that the Respondent's actions constitute an example of the type of conduct that brings the reputation of the industry into disrepute because his misconduct was deliberate, targeted a vulnerable client, and ran contrary to both the nature of the advisor-client

relationship and the expectation that Approved Persons will comply with their regulatory obligations and the policies and procedures of their Member.

99. Enforcement Counsel further submitted that due to the Respondent's failure to co-operate with Staff's investigation, he has demonstrated that he is ungovernable and would therefore pose a risk to investors and the capital markets were he to be able to continue to operate in the industry.

(viii) Deterrence

100. Enforcement Counsel submitted there is a strong need to demonstrate both general and specific deterrence in this case in particular because of the Respondent's failure to co-operate with Staff's investigation.

101. Accordingly, Enforcement Counsel submitted, the proposed penalties were necessary in order to communicate to other Approved Persons that failing to co-operate with an MFDA investigation has no place in the mutual fund industry.

(ix) Previous Decisions Made in Similar Cases

102. In his written submissions, Enforcement Counsel provided the following chart setting out previous decisions made in similar circumstances:

CASE	MISCONDUCT	PENALTIES
Okopny, MFDA File 201512	Allegation #1: Respondent borrowed $40,000 from a client Allegation #2: Respondent engaged in undisclosed and unapproved dual occupation Allegation #3: Respondent failed to co-operate with MFDA investigation Relevant Factors: • Senior vulnerable client • Respondent repaid only $6400 out of the $40k borrowed • Client loss reimbursed by Member	• Permanent prohibition • Fine of $40,000 for personal financial dealings • Fine of $25,000 for undisclosed and unapproved dual occupations; • Fine of $50,000 for failure to co-operate • costs of $7,500

CASE	MISCONDUCT	PENALTIES
Lipovetsky, MFDA File No. 201252	Allegation #1: Respondent borrowed a total of $20,000 from two clients. Allegation #2: Violation of Member Policy (for same facts as above) Allegation #3: Respondent failed to co-operate with Staff s investigation. Relevant Factor: • Respondent repaid the loan	• Permanent prohibition • Fine of $30,000 for personal financial dealings • Fine of $50,000 for failure to co-operate • Costs of $7,500
Cudmore, MFDA File No. 201737	The Respondent failed to co-operate with an investigation into his activities conducted by Staff of the MFDA	• Permanent prohibition • Fine of $125,000 • Costs of $7,500
Armani, MFDA File No. 201701	The Respondent failed to co-operate with MFDA Staff during the course of an investigation into his conduct.	• Permanent prohibition • Fine of $75,000 • Costs of $7,500
McBurney, MFDA File No. 201522	The Respondent failed to co-operate with MFDA Staff during the course of an investigation into his conduct	• Permanent prohibition • Fine of $75,000 • Costs of $7,500

103. In addition to the cases described in this chart, Enforcement Counsel also provided the Panel with two other decisions – *Sarang* and *Itturalde*, which will be discussed below.

VI. DECISION AND REASONS ON PENALTY

104. Having considered Staff's submissions, both written and oral, the Panel has decided to impose the following penalty:

a) a permanent prohibition on the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member;
b) a fine of $60,000; and
c) costs in the amount of $5,000.

Permanent Prohibition

105. We agree with Staff's submission that the misconduct in this case was extremely serious. In particular, by failing to co-operate with Staff in the course of its investigation into his conduct,

the Respondent has hindered Staff's ability to provide effective oversight over the mutual fund industry.

106. Further, the Respondent has shown neither recognition of the seriousness of his misconduct; nor remorse for his actions.

107. A permanent prohibition is clearly required in this case. We find that the Respondent's failure to co-operate with Staff's investigation demonstrates that he is ungovernable and would therefore pose a risk to investors and the capital markets if he were allowed to continue to operate in the capital markets.

Armani, supra, at para.18

Monetary Penalty

108. In submitting that the Panel should award a penalty in the amount of at least $60,000, Enforcement Counsel provided us with a number of cases which, he submitted, set out previous decisions made in similar circumstances and which identified a range of penalties. Enforcement Counsel did not, however, provide any further guidance with respect to where in that range the penalty should fall.

109. The Panel notes that the cases given to us by Enforcement Counsel show that for circumstances involving the type of misconduct identified in Allegation No. 1, the monetary penalties ranged from $7,500 to $40,000.

110. In *Sarang*, for example, the respondent admitted in a Settlement Agreement to three allegations of misconduct which he carried out while he was the Branch Manager of a Member, one of which included borrowing $29,015 from a client. The parties agreed to a penalty consisting of a permanent prohibition, a fine of $7,500 and costs of $2,500.

Sarang, MFDA File No. 201535

111. In *Itturalde*, the respondent admitted to three allegations of misconduct, one of which included accepting a $20,000 bank draft from a client payable to her personally which she deposited into her own bank account. The parties agreed to a penalty which included being suspended from authority to conduct securities related business in any capacity for eighteen weeks; a fine of $10,000 and costs in the amount of $5,000.

Itturalde, MFDA File No. 201684

112. We recognize that the *Sarang* and *Itturalde* decisions were based on settlement agreements which had been approved by MFDA Hearing Panels and that a factor which would have mitigated the amount of the penalty in those two decisions was the fact that the respondent in each of those cases acknowledged their wrongdoing and saved the MFDA from having to incur the costs of a full hearing. Settlement Hearing Panels are also not privy to all of the negotiations that go into reaching a settlement agreement and are encouraged not to reject agreements for fear of dissuading parties from entering into such agreements.

113. However, a Hearing Panel will only approve a settlement agreement if it determines that the proposed penalty in that agreement falls within a reasonable range of appropriateness having regard to the circumstances of the case.

114. In the *Okopny* decision, involving a hearing on the merits where the respondent borrowed $40,000 from a client and failed to co-operate with the MFDA's investigation into his conduct, the Hearing Panel imposed the following penalty: a) a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member; b) a fine of $40,000 with respect to the first allegation of personal financial dealings; and c) a fine of $50,000 with respect to the allegation relating to the failure to co-operate; and d) costs of $7,500.

115. In the *Lipovetsky* case, there were three allegations of misconduct made against the respondent: having engaged in personal financial dealings with at least two clients by borrowing $10,000 from each of them; failing to comply with the Member's policies and procedures prohibiting Approved Persons from borrowing from clients; and failing to co-operate with the MFDA's investigation.

116. The Hearing Panel in that case imposed: a permanent prohibition; a fine of $30,000 for the personal financial dealings; $50,000 for the failure to co-operate; and costs of $7,500.

117. In this case, the Panel has determined that a global fine of $60,000 is proportionate and reasonable having regard to the totality of the evidence.

118. In reaching this determination we note that we do not agree with all of Enforcement Counsel's submissions concerning the facts which, he said, we should find to be aggravating factors, in part because there is simply not sufficient evidence to support such findings.

119. For example, Enforcement Counsel submitted that the client's age demonstrated that he was vulnerable and that this was, therefore, an aggravating factor.

120. The Panel is not prepared to find that all 82 year olds are vulnerable, however, by virtue of their age alone. We note, for example, that at the time of writing this decision, the President of the United States is 79. Age alone, is not evidence of vulnerability although it certainly can be a relevant factor depending on the specific circumstances of a given matter.

121. Ms. Howse in her Affidavit described the client as vulnerable but again, did so without stating any other evidence to support that description other than the fact of his age.

122. This may be contrasted with the facts set out, for example, in the *Okopny* decision, where the Hearing Panel made a finding that it was highly unlikely that the client would have been able to appreciate the conflict of interest, not only because she was 82 but also because she was in severe pain as a result of having suffered a hand injury. In this case, however, the Panel does not find any evidence which would support a finding that the client was more vulnerable than any client who trusts their advisor.

123. Enforcement Counsel submitted that the fact the client was the Respondent's father should also be considered an aggravating factor. Although we acknowledge that the Respondent's father brought this complaint forward to the Member, there was no evidence surrounding the nature of any discussions or dealings between the Respondent and his father. There was no evidence to support a finding, for example, that the Respondent had taken advantage of his client because of the specific nature of their relationship. That said, the Panel emphasizes that any time an Approved Person enters into personal financial dealings with a client contrary to the MFDA Rules, as was the case here, such conduct constitutes serious misconduct.

124. The other factor that the Panel took into consideration in determining the monetary penalty in this case was one which the Sanction Guidelines identify may be considered by a Hearing Panel - a respondent's ability to pay.

Respondent's Ability to Pay

125. Although the Sanction Guidelines say that the onus should be on a respondent to provide evidence of inability to pay, the Guidelines are not mandatory and are simply there to guide a Hearing Panel in exercising its discretion to make an appropriate award in the circumstances of a specific case.

126. The evidence which was set out in the Member's Investigation Report, as described above, showed that the Respondent was not in a strong financial position.

127. According to that Report, the Respondent's net pay by year had been:

2016	$3,045
2017	$8,959
2018	$6,359
YTD 2019	$0

128. Accordingly, the Panel has no hesitation in determining that a fine of $60,000, coupled with an order to pay costs of $5,000, represents a significant penalty to the Respondent.

129. Both the Supreme Court of Canada and MFDA Hearing Panels have held that deterrence is an appropriate factor to be taken into account when determining an appropriate penalty.

> *Cartaway Resources Corp. (Re),* [2004] 1 SCR 672 SCC, at paras. 52-62
>
> *Tonnies (Re), supra,* at para. 47

130. As the Supreme Court identified, the effect of general deterrence should advance the goal of protecting investors. The penalty levied should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry:

> A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventive. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction … The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged …
>
> *Cartaway Resources Corp. (Re), supra,* at para. 61

131. In our view, the fine we are imposing, combined with a permanent prohibition, satisfies both the goal of deterrence and the primary goal of securities regulation which is protection of the investor.

132. The penalty we are imposing is consistent with the minimum penalty that Staff requested, is reasonable and proportionate and falls within the range of decisions rendered by other MFDA Hearing Panels in similar cases.

133. It also supports the integrity of the securities markets and protects the integrity of the MFDA's enforcement process.

Costs

134. With respect to the issue of costs, Enforcement Counsel submitted a Bill of Costs indicating that the total costs incurred by the MFDA amounted to $8,050.

135. He requested that an order for costs be made against the Respondent for $5,000 as this amount will permit the MFDA to recover from the Respondent a portion of the costs which were attributable to conducting the investigation and prosecution of the matter.

136. The Panel agrees that an award of costs of $5,000 is reasonable under the circumstances.

137. Accordingly, for all of the reasons stated above, the Panel orders that the Respondent:

a) is permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member;
b) pay a fine in the amount of $60,000; and
c) pay costs in the amount of $5,000.

DATED this 30th day of August, 2021.

"Sherri Walsh"
Sherri Walsh
Chair

"Kathleen Jost"
Kathleen Jost
Industry Representative

"Sean Shore"
Sean Shore
Industry Representative

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