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: Edward Andrew Rempel

Heard: November 24-28, 2014, January 12-14, 2015, February 4, 2015 and
May 6, 2015 in Toronto, Ontario
Decision and Reasons (Misconduct): September 3, 2015

DECISION AND REASONS
(Misconduct)

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Brigitte J. Geisler	Industry Representative
Vlasios Kardaras	Industry Representative

Appearances:

Shelly Feld	)	Counsel for the Mutual Fund Dealers
	)	Association of Canada
	)	
Ellen Bessner	)	Counsel for the Respondent
	)	
Cynthia Spry	)	
Julia Webster	)	
	)	

A. THE ALLEGATIONS

1. By Notice of Hearing, dated October 15, 2013, the Mutual Fund Dealers Association of Canada ("MFDA") made the following Allegations against Edward Andrew Rempel (the "Respondent" or "Rempel"):

Allegation #1: On September 19, 2011, without the knowledge or prior written consent of the Member, the Respondent contacted client KS, who had filed a complaint against the Respondent with the Member, by telephone in order to:

(a) persuade client KS to withdraw part of his complaint against the Respondent;
(b) offer to compensate client KS for the deferred sales charges he would incur if he withdrew his complaint and collapsed the leveraged investment strategy that was the subject matter of the complaint; and
(c) impose conditions on his proposal to client KS in order to keep the proposal secret;

contrary to MFDA Rules 2.1.1 and 2.1.4, MFDA Policy No. 3 and the Policies and Procedures of the Member.

Allegation #2: On November 28, 2011, prior to learning that client KS had recorded the telephone conversation of September 19, 2011 referred to in Allegation #1, the Respondent sent a written statement to the MFDA in which he falsely denied that he had attempted to:

(a) persuade client KS to withdraw all or part of his complaint; and
(b) negotiate a settlement with client KS without the prior written consent of the Member;

contrary to MFDA Rule 2.1.1 and section 22.1 of MFDA By-law No.1.

B. HISTORY OF PROCEEDINGS

2. A condensed time-line of the proceedings follows:

October 15, 2013	Notice of Hearing
November 11, 2013	Respondent's Reply
November 27, 2013	First Appearance (Hearing on the Merits scheduled for June 23-27, 2014)

June 12, 2014	News Release re: Hearing on the Merits adjourned, on consent, to November 24-28, 2014
November 24-28, 2014	Hearing on the Merits
January 12-14, 2015	Hearing on the Merits
February 4, 2015	Hearing on the Merits
May 6, 2015	Hearing on the Merits completed. Hearing Panel reserves judgment

C. THE EVIDENCE

3. The Hearing on the Merits took place in Toronto over a period of ten (10) days, stretching from November of 2014 to May of 2015. Staff of the MFDA ("Staff") called a total of three (3) witnesses. The Respondent called five (5) witnesses.

4. There was extensive documentary evidence. Twenty seven Exhibits were entered as evidence, including a large binder of documents from Staff (separated by 59 tabs), which was entered as Exhibit 4, and a three (3) volume cerlox bound compendium of documents (separated by 110 tabs), prepared by the Respondent's counsel, which was entered as Exhibit 7. There was also the audio recording of the September 19, 2011 telephone call made by the Respondent to KS as well as a transcript of that recording made by Staff (Ex. 24).

5. Subsequent to the completion of the testamentary evidence on February 4, 2015, the parties served and filed extensive written submissions as well as Books of Authorities. Oral Argument was heard on May 6, 2015, at which time the matter was reserved by the Hearing Panel.

6. The Respondent made certain admissions in his Reply. Certain of the documentary and testamentary evidence was undisputed. There was a general agreement as to the times, dates and authorship of the correspondence.

7. There was a significant dispute with respect to the September 19, 2011 telephone conversation, including the authenticity of the tape recording as well as the time, length and content of the call.

8. There was a wide variance between a number of the witnesses as to their recollection of events, as well as the meaning and intent of certain documents.

9. Finally, there was a dispute between the parties as to the relevance and probative value of some of the evidence tendered.

10. What follows is a synopsis of the evidence, as well as our comments with respect to same.

i) The Respondent

11. According to the records of the Ontario Securities Commission [Ex. 23], the Respondent has been registered in Ontario as a mutual fund salesperson since September 19, 1994. He has been registered with Armstrong & Quaile Associates Inc. ("A & Q") since November 14, 2001.

12. The Respondent is also registered as a Dealing Representative in Alberta (since January 30, 2006), Saskatchewan (May 30, 2006 to November 30, 2009, reinstated on February 2, 2010 to present), British Columbia (January 13, 2009 to November 30, 2009, reinstated on February 2, 2010 to present) and Manitoba (since January 22, 2009).

13. The Respondent is also a certified management accountant, a professional accountant and a licensed insurance agent.

14. The Respondent operates a sub-Branch Office for A & Q under the trade name of Ed Rempel & Associates.

15. The Respondent and his wife, AH, live in Brampton, and operate the business out of an office located on the same street as their family home.

ii) Employment of KS by the Respondent

16. Ed Rempel & Associates employed KS from July 9, 2008 to May 25, 2011. His role in the office was that of administrative assistant, although he was also hired to service their information technology ("IT") needs.

17. Prior to working for the Respondent, KS had no experience at all in finances and had never owned investments.

18. On or about December 4, 2008, KS became a client of A & Q. His accounts were serviced by the Respondent.

19. While KS was employed with the Respondent, the Respondent also provided him with financial planning and tax preparation services.

20. One of the investment strategies employed by KS, to the knowledge of the Respondent, was known as the "Smith Manoeuvre". This was a leveraging strategy, which involved obtaining investment loans from a company called B2B Trust. The proceeds from these loans were invested in mutual funds at A & Q in accounts serviced by the Respondent. KS also obtained a line of credit secured against his home. Each time KS made a payment towards his mortgage, an amount equal to the mortgage payment would be borrowed from the line of credit and invested in mutual funds at A & Q by way of a pre-authorized contribution plan ("PAC").

21. NS, the wife of KS, was involved with her husband in these investments.

22. It would appear that, for a while, there was a close personal and working relationship between KS, his wife, NS, and the Respondent and his wife, AH.

23. Between November or December of 2010 and May of 2011, the relationship began to sour. We heard testimony from KS, AH and the Respondent as to their respective views on the reasons for the deterioration. The positions of the parties were also set out in an exchange of e-mails.

24. The employment of KS with Ed Rempel & Associates was terminated by letter dated May 25, 2011.

25. Shortly after being terminated, KS was out of the country for approximately 6 weeks.

26. Between June 30, 2011 and July 15, 2011, there was an exchange of e-mails between KS and the Respondent concerning employment related issues, such as how KS could:

(a) obtain his final pay cheque;
(b) obtain a corrected Record of Employment; and
(c) calculate a pre-assessment of his tax liability for the year.

27. It was the position of Staff, at the Hearing on the Merits, that KS never retained counsel, issued demands for additional severance or threatened to take legal action to seek compensation for wrongful dismissal or other causes of action associated with the termination of his employment. The Respondent agreed with this assessment except that he felt that, although not expressly so stated in the correspondence, the demand of KS for the reimbursement of his DSC (deferred sale charge) fees was linked to his termination.

iii) Written Complaint of KS to Respondent on July 25, 2011

28. By e-mail, dated July 23, 2011, KS informed the Respondent that he would be transferring out his RRSP and RESP accounts and that he wanted his open investments all sold to pay off his loans. He then stated: "I expect you to reimburse all the DSC fees."

29. On July 25, 2011, the Respondent informed KS, in an e-mail, that he would not be reimbursing his DSC fees.

30. In a responding e-mail, later in the day of July 25, 2011, KS made a number of serious allegations against the Respondent, including:

(a) that he was getting rid of his open investments because of the Respondent's "unethical ways";
(b) that the Respondent had "pushed" him into the Smith Manoeuvre;
(c) that the Respondent had indicated on the loan application that KS's wife was making an income when she was not;
(d) that the Respondent had misrepresented the fact that the interest rate KS had agreed to accept on his second investment loan could be converted to a lower interest rate in the future.
(e) that the Respondent had refused to stop his PAC's in accordance with his instructions;
(f) that the Respondent's wife had signed the Respondent's name to certain documents.

31. The Respondent did not forward this e-mail to Ken Armstrong, the President of A & Q. He, likewise, did not forward it to Linda Anderson, A & Q's Chief Compliance Officer, or anyone else in the compliance department of A & Q.

32. The Respondent testified, however, that he telephoned Ken Armstrong and told him about the e-mail. He characterized the matter of KS and his issues as that of a disgruntled employee. He made no notes of that conversation with Armstrong.

33. Mr. Armstrong referred to a conversation he had with the Respondent in early August of 2011, just before he went on vacation. He did not refer to, nor was he cross-examined on, an alleged telephone conversation with the Respondent shortly after receipt by the Respondent of the July 25, 2011 e-mail from KS. Mr. Armstrong stated: "I didn't know about this e-mail on

July the 25th." He testified that he did not recall reading either this e-mail or any similar e-mail about the nature of KS's alleged grievances before his vacation in August of 2011.

34. Regardless of the motivation of KS in forwarding the July 25, 2011 e-mail to the Respondent and regardless of the sustainability of any or all of the complaints listed therein, the e-mail clearly, in our view, constituted a client "complaint", as that term was defined in the A & Q Policies and Procedures Manual, namely "any written statement of a client . . . alleging a grievance involving the conduct, business or affairs of the Member or any registered salesperson, partner, director or officer of the Member."

35. The A & Q Policies and Procedures Manual had very specific procedures to be followed in the case of a "client complaint".

36. It is very clear from the evidence provided to us by Mr. Armstrong that, up until at least the end of August 2011, he was under the impression that the issue between KS and the Respondent related solely to a disgruntled ex-employee. However, the allegations made by KS in the July 25, 2011 e-mail went far beyond what was communicated to Mr. Armstrong by the Respondent.

37. In a written communication to the MFDA Staff, Armstrong stated: "There were no other concerns communicated to me re [KS] other than he was an ex-employee and that he had a leverage account with [the Respondent], the investment had been sold with DSC option and [KS] wanted to be reimbursed the DSC fees as he was no longer working and needed the money."

iv) Events between July 28 and August 30, 2011

38. On July 28, 2011, the Respondent telephoned KS. He was not available. Additional e-mails were exchanged. KS repeated his comment about the alleged "dishonest actions" of the Respondent and indicated that if the DSC fees were not reimbursed he would have to "escalate this issue one step further".

39. On or about August 2, 2011, the Respondent telephoned Mr. Armstrong to discuss, *inter alia,* the reimbursement to KS of the DSC fees. At this point, Mr. Armstrong had neither seen the July 25, 2011 e-mail nor spoken to KS about the basis for his claim of reimbursement.

40. Based upon what he had been told by the Respondent, Mr. Armstrong interpreted the situation as an employer/employee matter involving a "disgruntled employee". Consequently, Mr. Armstrong told the Respondent: "he's your employee, you should be able to figure that out." He said that he expected that it would have been settled as an employer/employee matter.

41. On August 2, 2011, the Respondent sent an e-mail to KS informing him that he had discussed the matter with, *inter alia*, Ken Armstrong, "who is anticipating that you may call."

42. The Respondent indicated, in the e-mail, that he could not make payments directly to a client but that "settlements have to be paid by [A & Q]." It is interesting to note that the Respondent is referring to KS as a "client" and not an ex-employee, with respect to whom he had, apparently, just been told by Mr. Armstrong he could make whatever settlement he thought was appropriate as an employer.

43. The Respondent acknowledged that KS could lodge a complaint directly to A & Q but cautioned that if he did so "they will consider our full relationship, including your employment and the reasons for your dismissal, in investigating your complaints."

44. Alternatively, the Respondent proposed that "we are willing through verbal discussions to come to a reasonable agreement with you . . . If you decide to escalate this issue, then any offer from us would be off the table."

45. On August 3, 2011, KS agreed to have a verbal discussion with the Respondent. A discussion ensued, during which the Respondent offered a partial reimbursement of the DSC fees. This offer was not acceptable to KS.

v) The August 31, 2011 Written Complaint from KS to A & Q

46. On August 31, 2011, KS forwarded an e-mail to Mr. Armstrong, with a copy to Linda Anderson. The e-mail stated, *inter alia*, that "I would like to have all my investments with Ed Rempel & Associates liquidated and have my DSC fees rebated by Ed Rempel & Associates. The reason being because of Ed's unethical ways." The e-mail then provided detailed allegations against the Respondent, as set out in paragraph 30 above.

47. In his testimony before us, Mr. Armstrong made it clear that this e-mail had client complaint elements in it and that, consequently, the Respondent was no longer authorized to make a settlement offer to KS.

48. Ms. Anderson testified that when she reviewed the e-mail, it was clear to her that this was a client complaint, as it raised issues of potential falsification, misrepresentation and, perhaps, suitability on the part of the Respondent.

49. On September 9, 2011, Mr. Armstrong sent an e-mail to KS stating, *inter alia*: "I have been on vacation since Aug. 30 and have just reviewed your e-mail. I will be sending a response to you on Monday, Sept. 12, 2011."

50. Mr. Armstrong then forwarded to the Respondent a copy of the August 31, 2011 e-mail from KS and stated:

> "Attached is a copy of a letter I received from [KS] along with my response. This can probably be resolved with reimbursing DSC fees.
> The accusations he has made are quite negative – Linda is reviewing to see if it is mandatory that we report this to the MFDA. Hopefully not.
> Meanwhile:
> 1. Would you respond to Linda the issues raised in his e-mail. (sic)

2. Call to discuss the reimbursement of commission as I don't think it is in yours or our best interest to have MFDA involvement with the disgruntled employee matter."

51. There was considerable discussion at the Hearing on the Merits as to whether this constituted an authorization from Mr. Armstrong to offer KS a reimbursement of the DSC fees.

52. The position of Mr. Armstrong was that he was requesting the Respondent to call him "to discuss reimbursement of commissions." Once it was determined that the situation involving KS was a client complaint and not a disgruntled ex-employee, there was no authorization from Mr. Armstrong or in the Rules and Policies of the MFDA for the Respondent to pay KS anything by way of compensation.

53. Mr. Armstrong testified that he did not have a clear recollection of a conversation with the Respondent after forwarding the September 9, 2011 e-mail. He was emphatic, however, that "there wasn't any authorization for [the Respondent] to make any offer of reimbursement…" to KS.

54. The position of the Respondent, at the Hearing on the Merits, is that he regarded Mr. Armstrong's September 9, 2011 e-mail as an instruction for him to call Mr. Armstrong to discuss the situation and not an authorization or a direction to contact KS to discuss the reimbursement of his DSC fees.

55. The Respondent testified that he did call Mr. Armstrong after the September 9, 2011 e-mail. He said that the conversation was short and "he (i.e. Mr. Armstrong) basically…he encouraged me to agree to pay the DSC fees. He basically kind of said, you know, deal with the issue. And he also explained to me that he was handing over the complaint issue to Linda [Anderson], so I should be dealing with her on it."

56. It is not possible to reconcile the evidence of the Respondent and Mr. Armstrong on this issue. It is clear that when he thought it was a disgruntled ex-employee matter, Mr. Armstrong

would have had no objection to the Respondent resolving the issue via a reimbursement of DSC fees.

57. At some point subsequent to the receipt of the August 31, 2011 e-mail from KS, Mr. Armstrong concluded that this was a client complaint situation. From that point on we do not believe that he would have authorized or did, in fact, authorize the Respondent to make any offer of reimbursement to KS.

58. If any telephone conversation did occur between the Respondent and Mr. Armstrong, it would have been after the Respondent forwarded his lengthy e-mail of September 12, 2011 to Mr. Armstrong and Ms. Anderson responding to the allegations in the August 31, 2011 e-mail from KS.

59. This is confirmed by the fact that the first sentence of the e-mail states: "This is the disgruntled employee that I called you about a few weeks ago" and ends with a request for a conversation with Ms. Anderson.

60. It is unlikely that Mr. Armstrong, after handing the matter over to his compliance officer to ascertain whether it was mandatory to report the matter to the MFDA, would encourage the Respondent to act in a manner which was contrary to the firm's complaint handling policy.

61. We believe Mr. Armstrong when he testified that, subsequent to September 9, 2011, the Respondent had no authorization from A & Q to make any offer of reimbursement to KS.

62. On September 13, 2011, KS forwarded an e-mail to both Mr. Armstrong and Ms. Anderson, expressing his disappointment at the lack of response from A & Q. Mr. Armstrong responded to KS indicating that Ms. Anderson would be responding that afternoon.

63. Shortly thereafter, Ms. Anderson sent an e-mail to KS which stated, in part, as follows:

". . . your allegations would suggest potential falsification/misrepresentation and perhaps suitability issues on the part of [the Respondent]. . . . if in fact these are true statements, and you are filing a grievance of this nature would require me as CCO to report to the MFDA via METS (Mets (sic) Event Tracking System).

In terms of your request, we can proceed with liquidating your investments but cannot comment on the reimbursement of DSC Fees. (**emphasis added**) until a full review has been conducted.

Please advise and confirm my understanding of the facts as you've presented above."

64. On September 14, 2011, KS sent an e-mail to Ms. Anderson, which stated, in part: "The information I provided is accurate as far as I'm concerned and you can go ahead and conduct your review. I assume you will be contacting (the Respondent) also. You can let him know that it was never my intention to cause problems for him, or his company. All I wanted was for him to pay back the DSC fees and pay back the loan and we both go our separate ways. My offer still stands, if he wants to resolve this without going further. When I requested for this to be done, there was around $15K profit at that time and I would be looking for compensation now. . . .

If you require any further proof to substantiate my "allegations", please do not hesitate to contact me."

65. This e-mail was forwarded by Ms. Anderson, without comment, to both Mr. Armstrong and the Respondent on September 19, 2011 at noon.

66. Linda Anderson testified that she was aware of MFDA Policy No. 6, which requires a Member to report to the MFDA via the Member Event Tracking System (METS) within 5 business days whenever a Member is aware, through a written or verbal complaint or otherwise, that the Member or any current or former Approved Person has or may have contravened any law or regulatory requirement.

67. Ms. Anderson testified that the August 31, 2011 e-mail from KS was turned over to her on September 9, 2011 by Mr. Armstrong. She testified that at least by September 14, 2011, when she received the confirmatory e-mail from KS, she knew that this was a client complaint which had to be reported on METS within 5 business days.

68. She testified that, although she only forwarded the KS e-mail to the Respondent on the 19th, she had telephoned him on either September 14, 15 or 16 to tell him that the e-mail was coming and that the matter was "reportable".

69. Ms. Anderson could not explain why she would make a phone call to the Respondent to advise him of the e-mail but not send it to him until 5 days after its receipt.

70. The matter was finally reported on METS on September 23, 2011.

vi) <u>September 19, 2011 – Telephone conversation between the Respondent and Linda Anderson</u>

71. The Respondent and Linda Anderson both testified about a conversation they had with each other during the afternoon of September 19, 2011.

72. Ms. Anderson testified that she believed the conversation took place between 3:00 p.m. and 4:00 p.m. and lasted approximately 15 minutes. She thought that she made a handwritten note of the conversation but was unable to produce it. The Respondent did not have any notes of the conversation.

73. Ms. Anderson recalled being rushed as she was on her way to a conference in Niagara Falls and someone was waiting for her in her office to travel to the conference.

74. Ms. Anderson testified that the Respondent knew that the KS Complaint was going to be filed on METS and that the filing clock was ticking.

75. Ms. Anderson was under the impression that the Respondent was going to telephone KS to inform him that the MFDA would not award compensation as part of its complaints process. The Respondent, surprisingly, was unaware that the MFDA does not award compensation to clients and he thought that KS would be similarly unaware.

76. She recommended against making the call. She said that it was not in the Respondent's best interests to either call KS or to offer him any kind of compensation and that he should wait until the investigation was complete so that it would not appear that KS was being paid solely in light of the allegations.

77. Ms. Anderson testified that she asked the Respondent if he had made any mistakes, were the investments unsuitable and were the DSC fees properly disclosed. When the Respondent answered "no" to all three questions, she said that he should not even consider compensating KS now in light of the allegations.

78. Ms. Anderson was clear that she did not authorize the Respondent to offer payment of DSC fees to KS.

vii) <u>September 19, 2011 – Telephone conversation between the Respondent and KS</u>

79. A considerable portion of the Hearing before us related to a telephone conversation which took place on September 19, 2011, between the Respondent and KS.

80. Virtually the only thing that was agreed upon was that, on September 19, 2011, the Respondent telephoned KS and a conversation ensued.

81. The time of the call, the length of the call, the contents of the call, as well as the authenticity and admissibility of a recording which KS allegedly made of the call, were all hotly disputed. Staff also took issue with the qualifications of a witness which the Respondent sought to call to provide an expert opinion with respect to the authenticity of the audio recording produced by KS.

82. After carefully and fully reviewing the evidence and submissions of the parties, and considering the authorities relied upon, we permitted the Respondent's witness to testify. We subsequently admitted the audio file of the telephone call as well as a transcript of same into evidence.

viii) Reasons for Admission of Audio File and Transcript of Same into Evidence

83. KS testified that, on September 19, 2011, he had a software program on his cellular telephone called "Call Recorder".

84. KS had the program set so that every outgoing or incoming call would be recorded. At the end of the call, he could choose to either delete the call or save it on his telephone. If he chose to save the call, it would be saved on a location on the phone.

85. KS testified that it was his practice to save the recordings to a micro SD memory card on his cell phone and from the cell phone the recording was manually downloaded onto his home computer.

86. When the call was saved, it would usually be saved with a telephone number, followed by a generic numbering created by the software, as well as a date. The file name could be changed and renamed to whatever KS wanted.

87. KS testified that when he moved the recording in question over to his computer he added, at the beginning, "Ed-September 19, 2011". He made no change to the actual recording.

88. The default file name contained the word "[Null]". KS testified that this was because the call came from an unknown number.

89. The program also automatically inserted "19/09/2011" as that was the date of the call. It also inserted the numbers "16:07:47" – for the time of the call. The Respondent did not seek to challenge this portion of the testimony of KS on cross-examination.

90. The audio recording, containing the above identification features, was forwarded to the MFDA by KS on November 14, 2011, as part of his formal complaint against the Respondent. This complaint was marked as an Exhibit at the Hearing.

91. A transcript of the audio recording, that was sent by KS to the MFDA on November 14, 2011, was prepared by a Transcripts Officer at the MFDA.

92. The Hearing Panel heard the audio file with a copy of the transcript before them and were satisfied that the transcript was an accurate reflection of the audio file. This transcript was eventually marked as Exhibit 24 at the Hearing.

93. KS testified that he received the call from the Respondent just after four p.m. on September 19, 2011. He was home with his two boys, the older of whom had just started kindergarten. He testified that his son went to school for a half day, came home for lunch and then took a nap. Four o'clock was the time that he would generally give his children a snack.

94. KS also produced his FIDO cell phone invoice for the month of September 2011. He identified a call at 16:07 as being the call from the Respondent.

95. The call was indicated as being 4 minutes and 28 seconds long. The audio recording is, approximately, 4 minutes and 19 seconds long.

96. Staff produced evidence from a document entitled "Get to know Fido". Under the section of "how wireless services are charged" the guide stated that for incoming calls "Airtime charges . . . apply to every call you answer on your wireless phone until you press END. Charges will start the moment the calling party initiates the call by pressing SEND and include the ring time." (emphasis added)

97. It was the position of Staff that the call connection time and ring time prior to the commencement of the conversation between the Respondent and KS, accounts for the 9 second discrepancy between the length of the recording (4 min. 19 sec.) and the length of the call according to the FIDO invoice (4 min. 28 sec.).

ix) The Position of the Respondent

98. In his written submissions, the Respondent took the position that, while he accepted the Hearing Panel's decision to admit the audio file into evidence, the file is not "authentic" and should be assigned little weight.

99. This position is taken for, *inter alia*, the following reasons:

(a) KS had both the opportunity and the skills to edit the audio file;
(b) The Respondent and his wife testified that the audio file was different from their recollections of the telephone call;
(c) KS had a database of recordings from which he could manipulate the audio file;
(d) An expert testified that a piece of the Respondent's "voice was clipped off leaving a very small subtle 7 frame (approximately 0.25 second) audio fragment of his voice" which sounded like on edit in the audio file;
(e) Staff was unable to authenticate the audio file and failed to ask for the appropriate records to do so;
(f) Ms. Anderson had doubts as to the authenticity of the audio file;
(g) The Respondent believed that the call took place later in the day on September 19, 2011, and was of a longer duration.

x) Analysis

100. The Respondent does not deny that it was his voice on the audio file. Further, the Respondent does not deny that, during the telephone conversation with KS on September 19, 2011, he said the words which were recorded on the audio file.

101. On March 5, 2012, after listening to the audio file, the Respondent forwarded a 4 page e-mail to Linda Anderson providing his observations on the audio file. In that e-mail, he did not question the integrity of the recording. He did not assert that anything had been deleted or altered. He did state that his wife "has written to you separately about her recollections of the call." The Respondent did not state that he subscribed to those recollections.

102. The Respondent did not record the conversation with KS on September 19, 2011, or make any notes during or immediately after the conversation.

103. At his interview with the MFDA, on July 10, 2012, the Respondent agreed that the transcript was "basically accurate". He did state that his wife thought that the conversation was longer and that he thought that there were things that were said in the conversation that were not on the tape.

104. In an e-mail to Linda Anderson, on March 5, 2012, the Respondent's wife indicated that, after listening to the tape and thinking about the matter, she felt that certain things were missing. She mentioned the following items:

(a) Describing the role of Linda Anderson at A & Q more extensively;
(b) Mentioning the name of a former A & Q Chief Compliance Officer;
(c) At the beginning of the conversation, the Respondent making a statement like "we both know you had an IT business."

105. At the Hearing on the Merits, the Respondent's wife testified that this e-mail contained her "best recollection of what occurred on the September 19, 2011, telephone call with KS.

106. When questioned as to whether she specifically remembered what was said by the Respondent during the call, she answered "Not specifically, no."

107. Thus, the position of the Respondent is that the tape and transcript of the telephone conversation with KS are basically accurate with a recollection that there might have been slightly more to the conversation than was recorded on the tape.

108. Strikingly, there was no suggestion by the Respondent or his wife that anything, which could be considered to be of an exculpatory nature, was said in the conversation, but was not recorded.

xi) Timing of September 19, 2014, phone call

109. Both the Respondent and his wife testified that they believed that the telephone conversation with KS occurred later in the day on September 19, 2011, suggesting that a slightly longer call, which appeared on the Fido account at 5:15 p.m., was probably the call in question.

110. The evidence of the Respondent and his wife with respect to the timing of the telephone call was supported by his recollection of a lengthy telephone conversation with a client other than KS and what, he testified, was a contemporaneous note to file with respect to same.

111. Even though it was the Respondent who initiated the call from his telephone, he did not produce any evidence from his service provider with respect to the timing and length of the call. KS produced such evidence.

112. In our view, the Respondent is mistaken as to the timing and/or length of the call with his other client on September 19, 2011.

xii) Evidence of the Respondent's Expert

113. To buttress his position, the Respondent sought to call Dan Kuntz as an expert witness. Staff objected to the expertise of Mr. Kuntz.

114. Mr. Kuntz was retained by the Respondent "to explain the process of digital audio editing and to determine if this taped conversation between Ed and [KS] (i.e. the September 19, 2011 telephone conversation) could (emphasis added) have been edited."

115. Mr. Kuntz is a recording engineer. He is a dialog editor, a sound effects designer, an audio mixer as well as an audio post-supervisor. He has more than 30 years' experience as a freelance sound designer. He completed his grade 13 in Kitchener, Ontario and moved to Toronto where he acquired on the job experience in sound recording and editing.

116. In Chief and in Cross-Examination, it was established that Mr. Kuntz:

(a) has no formal certifications in the field of sound editing;
(b) he has had no previous experience with forensic analysis of digital editing;
(c) he has never previously been qualified as an expert and has no experience testifying in a legal proceeding;
(d) he had never previously provided an analysis of whether something has been edited or whether it is the original recording;
(e) it has never been part of his job description to evaluate or determine whether a recording is original or has been altered in some way;
(f) he has never taken a course to assess whether a recording has been manipulated;
(g) he has no published articles about the editing process.

117. What Mr. Kuntz possessed was over 30 years of practical experience. With the limitations cited above, we chose to hear his testimony on the process of digital audio editing and whether the conversation in question could have been edited.

118. Mr. Kuntz produced a short summary of his analysis, which was marked as an Exhibit.

119. His report stated, in part: "Any digital audio file is mechanically easy to edit. All digital editing programs allow the user to delete sections of a recording or insert parts of the same recording. In the case of deleting audio in the middle of a recording, the user may butt the two

remaining sections together manually or allow the program to "snap" them together automatically. In the case of inserting audio, the user would copy and paste the audio at a selected insertion point. The key to creating a seamless edit is to find in and out edit points of the section you want to modify, that once removed, would not be missed or once inserted, would not be noticed." The difficult element was not the editing of the words on the tape, but to ensure that there was a smooth flow of the ambient noise around the words when the edit was made.

120. In order to prepare his analysis, Mr. Kuntz stated that he "listened to the tape in a number of environments, on a number of speakers, and put on some headphones to critically listen to what was going on in the recording so that I could hear, critically what was happening in the background and foreground and as well as blow up the waveform and have a critical look at the graphical waveform to see if there were any anomalies in it."

121. When he did this, Mr. Kuntz testified that he did not find any evidence of an edit by means of graphical analysis of the recording.

122. He found that the tape was 4 minutes, 18 seconds and 24 frames long. He testified that he did not find any evidence of an edit by sonic analysis during the first 4 minutes, 5 seconds and 14 frames of the recording. At that point he found what he thought was "a possible edit".

123. He testified that up to that point, in his professional opinion, there were no integrity issues with respect to the recording.

124. The possible edit came right at the end of the conversation where the Respondent asked KS whether he had had any luck finding work. KS replied "No, not as yet." The Respondent said "No?" This is the only place in the entire recording that Mr. Kuntz believes there could be a possible edit.

125. The only deletions in the audio recording suggested by the Respondent or his wife allegedly or logically occurred in the beginning portion of the conversation, not in the last few seconds.

126. We believe that the Respondent and his wife were mistaken when they testified that certain other things were said in the conversation. We believe that Exhibit 23 is an accurate audio file of the conversation and that Exhibit 24 is an accurate transcript of the audio file.

127. We further believe that the actual call was 4 minutes, 18 seconds and 24 frames, as verified by Mr. Kuntz, that the call started at 4:07 p.m. on September 19, 2011, as testified to by KS and as verified by the Fido statement of KS and not at a later time in the day, as suggested by both the Respondent and his wife.

128. We accept that the difference in time between the 4 minutes, 18 seconds and 24 frames of the actual recording and the 4 minutes and 28 seconds for which KS was billed, is accounted for by the Fido policy of starting charges at the moment the calling party initiates the call by pressing SEND, and includes the ring time until the call is answered.

xiii) Transcript of September 19, 2011 telephone conversation between the Respondent and KS

129. The telephone conversation between the Respondent and KS was as follows:

"KS: Hello?

Mr. Rempel: Hello, KS?

KS: Speaking.

Mr. Rempel: It's Ed calling, how are you doing?

KS: I'm good.

Mr. Rempel: Okay, there's something I need to talk to you about, have you got a couple of minutes?

KS: Okay, yes.

Mr. Rempel: Yes, okay. Okay. So I was talking to this Linda Anderson, she's the new compliance person at A & Q that's been there --- been around for 20 years.

KS: Okay.

Mr. Rempel: So I'm not sure --- she just sent me that she sent you. And I'm not quite sure if you're understanding exactly what she's saying in there. What she's saying is the one specific allegation that you made about falsifying income, if that is in there, whether it's true or not, that one allegation means that it had to go directly to the MFDA, okay? Which actually creates a problem, I think, for what you're trying to do. Because if it does that, we actually --- I actually cannot pay you anything, okay? And the reason for it is because any payment would be seen as being, you know, paying you off in order to cancel something. Okay, in order to cancel an MFDA investigation. I mean, plus, from our point of view, if we're going to go through a whole big, long, MFDA investigation, then there's no point in paying you as well. Okay. So here's what we're willing to do. We're willing to cover your DSC fees, but it has to be done in a specific way, and only the DSC fees. After that, you can determine the timing of selling so that you don't sell at a loss, you can sell whenever you want, but we would just cover the DSC fees on the open, okay? But to do that, what you need to do is you actually need to write an e-mail back to us, basically saying that you're retracting that one allegation about falsifying income, that that's not true, okay? And once you do that, we have to --- like, we probably can't do it right away, a few days --- just to wait, like, a couple of weeks or whatever. And then any time after that you can redeem and we'll rebate the DSC fees. How does that sound to you?

KS: E-mail me this and I'll respond back to you.

Mr. Rempel: I can't e-mail it to you. In fact, we have to be careful what we do. If either one of us sends an e-mail that mentions this phone call, then we have to report it to the MFDA and all discussions of money are gone.

KS: M'hmm.

Mr. Rempel: So none of this can be in writing whatsoever.

KS: Okay.

Mr. Rempel: So here's the process. I need you to write a retraction e-mail, we'll have to take about the exact wording of it, saying that that part wasn't true about falsifying income, okay? So you send the e-mail. Then we just got to wait a couple of weeks or something, and then any time after that, you choose the time, we redeem so that we make sure that --- a particular time where you're not out money, and then I'll rebate your DSC fees.

KS: All right, let me think about it. I'll get back to you.

Mr. Rempel Okay. As of tonight, in the next couple of days, I'm actually going to be out of the office, I'm at a conference for a couple of days.

KS: M'hmm.

Mr. Rempel So you'll be able to reach me on my cell phone, but not anywhere else.

KS: Okay.

Mr. Rempel: Okay?

KS: All right.

Mr. Rempel: All right? How are you doing otherwise?

KS: I'm doing good.

Mr. Rempel: Yes? Any luck finding work?

KS: No, not as yet.

Mr. Rempel: No?

KS: All right, I'll get back to you.

Mr. Rempel: I wait to hear from you, then.

KS: Yes.

Mr. Rempel: Make sure, don't send anything to me by e-mail, okay?

KS: Yes.

Mr. Rempel: Okay. Thank you KS."

xiv) Meeting between the Respondent and Linda Anderson on September 20, 2011

130. On September 20, 2011, the Respondent met with Linda Anderson at a conference in Niagara Falls, at which time he told her that he had spoken with KS the day before.

131. The Respondent called Linda Anderson as a witness at the Hearing on the Merits. She testified about this September 20, 2011 conversation with the Respondent, in part, as follows: "He completely shared with me the content of that conversation, which was he wanted to find

out, you know, was this really all about the DSC fees? And he really was so hurt about the lies that he wanted [KS] to take back the lies. He wanted him to admit in writing that he lied. And that was, you know, a big part of the call, was he wanted him to admit it, and that this was all just about getting his money back, his DSC fees."

132. In Cross-Examination, Ms. Anderson expanded this to say that the Respondent also said "I wanted to tell him [KS] that . . . the MFDA didn't and wouldn't be rendering compensation."

133. If Ms. Anderson was correct in her recollection of what the Respondent told her on September 20, 2011, the Respondent was lying to her, as the tape of the September 19, 2011 conversation clearly demonstrates, as there was no mention of the inability of the MFDA to award compensation which the Respondent had said was the reason for making the call.

xv) KS's Complaint to the MFDA

134. By e-mail, dated November 14, 2011, KS submitted a detailed complaint to the MFDA with respect to the conduct of the Respondent. This included a reference to the fact that the Respondent had offered to pay him back his DSC fees if he [KS] would retract the allegation that he had made to A & Q in his August 31, 2011 e-mail that the Respondent had falsified KS's income on a loan application.

135. KS attached a copy of the audio file of the September 19, 2011 telephone conversation in the supporting material, which he forwarded to the MFDA with his complaint.

xvi) MFDA Request for Information from the Respondent

136. By e-mail, dated November 24, 2011, David Forestieri, a Case Assessment Officer in the Enforcement Department of the MFDA, wrote to Linda Anderson, in part, as follows:

"Good morning Linda,

. . . .the MFDA have been made aware of an allegation that the AP advised [KS] to rescind his complaint and/or some of his allegations and, should he comply, the AP would reimburse all DSC fees associated with his leveraged holdings.

We understand that, in an e-mail dated October 4, 2011 to you from [KS], the Member was made aware of this allegation and the AP's offer.

By **December 1, 2011**, please address the following items:

1) Provide a written statement from the AP directly advising whether:

a) He advised the Complainant at any time to rescind any or all of the allegations raised in his letter of complaint;
b) He advised the Complainant that he would directly reimburse him with any DSC fees associated with his leveraged holdings if complied by rescinding one or all allegations raised in his letter of complaint; and
c) He has ever entered into –or- attempted to enter into any private settlements with any clients and/or handled any client complaints directly. Where applicable, please ensure that the AP advise the name(s) of the client(s) involved and the nature of the complaint(s) and settlement offer(s)."

The MFDA did not advise that they had a tape of the telephone conversation of September 19, 2011.

xvii) <u>The Response from the Respondent</u>

137. By e-mail, dated November 28, 2011, the Respondent provided the requested written statement to Linda Anderson, as follows:

"Hi Linda,

The reason I called [KS] was that I had found out from you that his allegations, although invented, required that the MFDA be notified and that the MFDA does not order compensation or restitution to clients. I know [KS] well and know that he tends to dwell on things for long periods of time. He is fully aware that he had had an IT business for years, but I believe that [KS] saw a discrepancy in the records (tax returns vs. loan applications) and saw this as an opportunity to raise this as an allegation in an attempt to gain compensation.

I have always had his best interest at heart. I thought that it would save him many weeks of anguish fretting over this situation if he knew up front that this would not result in money for him.

To answer the specific questions:

a) I did not advise him to rescind his allegations. I called [KS] on September 19. I told him that I had previously hoped to be able to help him out of his situation by rebating a portion of his DSC fees through the A & Q process as a gesture of goodwill. I know that he has no job, his wife is not working yet, he has 2 small children to support and we had been friends for a few years. However I had just found out that with these allegations, it is no longer possible, even if he admitted that he made them up. I told him I thought he should be aware of this.

b) Ken Armstrong was aware of discussions that I had with [KS] back in August about possibly have A & Q rebate a portion of his DSC fees through their process. If there would ever have been any rebates paid, they would all have been paid by A & Q through their rebate process.

c) No, I have never discussed a private settlement with any client. I am fully aware of the policy that any payments to clients would have to be made by A & Q. I would never want to do anything that might jeopardize the financial planning practice that I have put so much effort into building.

Ed"

138. By e-mail, dated December 1, 2011, Linda Anderson forwarded the written statement of the Respondent to the MFDA.

D. THE LAW

I) The Standard of Proof

139. The parties agreed that the MFDA bears the burden of demonstrating, on a balance of probabilities, that each of the Allegations against the Respondent has been proven.

140. The evidence must be "clear, convincing and cogent to satisfy the balance of probabilities test". The Hearing Panel "must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred".

Re: F.H. McDougall [2008] 3 S.C.R. 41 (Supreme Court of Canada) at paras. 46 and 49.

141. "The Respondent need not prove anything. There is no onus placed on him. His evidence must be considered along with the other evidence in determining whether the allegations have been proven."

Re: Popovich (Re) Decision of MFDA Central Regional Council, January 14, 2015, para.8.

II) Admissibility of Evidence

142. Rule 1.6 of the MFDA Rules of Procedure provides, in part, that a Hearing 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 technical or legal rules of evidence."

E. FINDING ON ALLEGATION #1

143. Allegation #1 alleges that the Respondent, by engaging in the conduct outlined therein, acted contrary to MFDA Rules 2.1.1 and 2.1.4, MFDA Policy No. 3 and the Policies and Procedures of the Member.

144. Rule 2.1.1 provides 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.

145. Rule 2.1.4 provides 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).

146. MFDA Policy No. 3 is titled "Complaint Handling, Supervisory Investigations and Internal Discipline".

147. The Policy defines a "complaint" to "include any written or verbal statement of grievance, including electronic communications from a client."

148. Section 9(1) provides that: "All client complaints and supervisory obligations must be handled by qualified sales supervisors/compliance staff. An individual who is the subject of a complaint must not handle the complaint (emphasis added) unless the Member has no other supervisory staff who are qualified to handle such complaints."

149. Section 10 states, in part, that: "No Approved Person shall, without the prior written consent of the Member, enter into any settlement agreement with, pay any compensation to or make any restitution to a client. No Member or Approved Person of such Member may impose confidentiality restrictions on clients or a requirement to withdraw a complaint with respect to the MFDA . . . as part of a resolution of a dispute or otherwise."

150. A portion of the A & Q Policies and Procedures Manual was marked as an Exhibit at the Hearing on the Merits. It sought to provide guidance to, *inter alia*, Approved Persons as to how Policy No. 3 was to be implemented.

151. Included in its provisions were the following:

(a) "Client complaints involving the sales practices of an A & Q representative will be handled by the Branch Manager and/or Head Office Compliance depending on the nature of the complaint"
(b) "All severe misconduct and <u>any</u> legal actions must be reported to the Branch Manager <u>and</u> Head Office immediately" (emphasis in original);
(c) "Whenever there is a complaint that potentially breaches MFDA By-laws, Rules and Policies, they are to be reported to the Branch Manager and/or Head Office immediately with all pertinent information";
(d) "Compensation is never to be paid directly to a client by a representative. All such monetary resolutions are to be referred to and handled by the A & Q Head Office. The client is not to be restricted from reporting any complaint to the MFDA as part of the settlement."

152. In our view, the Respondent, by his conduct on September 19, 2011, breached each and every one of the provisions of Rule 2.1.1(a) through (d).

153. The tape of the conversation speaks for itself. It records deplorable conduct on the part of the Respondent.

154. On the tape of the call, after brief introductory comments, the Respondent refers to (according to the sworn testimony of the Respondent) the e-mail from Linda Anderson to KS, dated September 13, 2011, in which Ms. Anderson basically asks KS to confirm his allegations.[1]

[1] Ms. Anderson's e-mail states, in part: "Your correspondence, more specifically your allegations (attached below) would suggest potential falsification/misrepresentation and perhaps suitability issues on the part of Mr. Rempel."

155. Ms. Anderson then stated that if these allegations were true, she would be required to report this matter to the MFDA. She requested KS to confirm the accuracy of the factual allegations, which he did early the following morning.

156. The Respondent then states to KS that reporting to the MFDA "creates a problem" as then the Respondent could not pay KS anything as such a payment would be seen as "paying you off in order to cancel something".

157. The Respondent says that "in order to cancel an MFDA investigation". He does not finish that sentence but says if the Respondent has to go through "a whole, big, long MFDA investigation, then there's no point in paying you as well."

158. The Respondent then formulates his offer to KS as follows:

> "So here's what we're willing to do. We're willing to cover your DSC fees, but it has to be done in a specific way (emphasis added) and only the DSC fees."

159. The Respondent then tells KS that he could determine the time of selling his investments "so that you don't sell at a loss".

160. In order to get his DSC fees paid, the Respondent stated that KS had to send an e-mail "retracting that one allegation about falsifying income". The Respondent stated that they would

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Ms. Anderson then attached the following excerpt from the August 31, 2011, e-mail from KS to Ken Armstrong:

> "As is evident from the loan approval and application forms, it is pretty glaring of his unethical nature. For example, in the first loan application Ed stated that I have another income of $12,000 from an IT business, which is false. Since Ed files my taxes, and there is no claim of other income, it would prove that the IT business is false. Ed went on to say that my wife is self employed with a meal plan service, which is also false. This information was not on the application when my wife and I signed it. I only became aware of this when Ed brought out my file with my applications when he was trying to convince me to get the third loan. Perhaps that is the reason I was not provided with copies of the loan application.
> My wife brought to my attention that on the last loan approval form she noticed that my gross monthly income was stated as $4500. She wanted to know if I got a raise in pay of which she was not aware, since my actual gross income is $40,000 and not $54,000. Your office can verify this information since you would have a copy for your perusal."

have to wait "a couple of weeks or whatever" and then KS can redeem the investments and the DSC fees will be rebated.

161. The call from the Respondent to KS was unsolicited. Consequently, KS was hearing this "offer" for the first time. KS then states: "E-mail me this and I'll respond back to you."

162. The Respondent then makes the startling statement:

> "I can't e-mail it to you. In fact, we have to be careful what we do. If either one of us sends an e-mail that mentions this phone call, then we have to report it to the MFDA and all discussions of money are gone." (emphasis added)

163. KS hesitates and the Respondent then emphasized "So none of this can be in writing whatsoever."

164. The Respondent then states "So here's the process." He says that they would have to discuss the exact wording of the retraction, wait a couple of weeks after the e-mail is sent, KS would choose when he wanted to redeem "and then I'll rebate your DSC fees." (emphasis added)

165. There is then small-talk about how KS is doing and whether he has had luck finding work. KS says that "I'll get back to you." The Respondent again warns him "Make sure, don't send anything to me by e-mail, okay?"

166. Incredibly, in sworn testimony before this Hearing Panel, the Respondent stated that, even if KS had sent the e-mail retracting the allegation of falsifying income, the Respondent did not feel that he would have been bound to pay his DSC fees. The Hearing Panel is extremely troubled by this testimony.

167. The Respondent testified: "I would have said we're willing to pay the fees. I didn't say we would or could" – in spite of the clear statement in the transcript that if KS sent the retraction e-mail "I'll rebate your DSC fees."

168. As stated above, the Respondent's conduct was a clear violation of Rule 2.1.1.

169. Counsel for the Respondent argued before us "that there has never been a case that found a violation of MFDA Rule 2.1.1 without the basis of another clear infraction of MFDA rules or practices." We do not agree with this submission.

170. As stated in the *Kenneth Roy Breckenridge* Decision:

> "MFDA Rule 2.1.1 sets out the standard of conduct expected of Approved Persons. The Rule is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct. The Rule articulates the most fundamental obligations of all registrants in the securities industry."
>
> *In the Matter of Kenneth Roy Breckenridge*, (2007) MFDA File No. 200718 (Ontario Regional Council), Decision and Reasons dated November 14, 2007, at p 20.

171. Rule 2.1.1 stands by itself. While it is true that a breach of Rule 2.1.1 often involves conduct which breaches another specific MFDA Rule or Policy, it is not necessary that it do so.

172. For example, in *Breckenridge (Re),* Allegation No. 2, which was found by the Hearing Panel to be established, solely alleged a breach of Rule 2.1.1.

173. Staff, in its submissions, also referred to certain other authorities where the Hearing Panel found a breach of Rule 2.1.1 without necessarily finding a breach of any other MFDA Rule or Policy. These cases included:

(a) *Wellings (Re),* 2011 LNCMFDA 73;
(b) *Parkinson (Re),* 2005 LNCMFDA 1; and
(c) *Van Der Velden (Re),* 2005 LNCMFDA 14.

174. Thus, irrespective of whether we find that the conduct of the Respondent breached any other MFDA Rule or Policy, we find that the Respondent breached the provisions of Rule 2.1.1.

175. In addition, we accept Staff's argument that if a different Rule or Policy had to be applicable for Rule 2.1.1 to apply, there would be no reason to have Rule 2.1.1 because the "other" Rule would be sufficient to sanction and censure the conduct.

i) Breach of Rule 2.1.4

176. The Respondent submitted that "the purpose of this Rule is to ensure advisors do not engage in personal financial dealings with their clients. A violation of this section requires a financial transaction, that is a payment off the books of the Dealer."

177. In support of the argument, two cases are cited in which Hearing Panels found a breach of Rule 2.1.4 where there were financial transactions which occurred off the books of the Dealer. In our view, that in no way narrows the scope of Rule 2.1.4 which is titled "Conflicts of Interest". In addition, the wording of the Rule refers neither to "financial transactions" nor "off book" payments.

178. In this case, the Respondent was in a clear conflict of interest. Without the knowledge or consent of the Member, he was seeking to enter into a clandestine arrangement with his client, pursuant to which the client would withdraw a personal serious allegation against the Respondent in return for a promise of funds. Unknown to the client, the Respondent apparently did not believe he had to carry out his side of the bargain, even if the client withdrew his allegation.

179. The Respondent was seeking to achieve a benefit for himself that was not in the best interests of the client.

180. Part I, section 9(1) of Policy No. 3 clearly prohibits this kind of dealing by stating that "an individual who is the subject of a complaint must not handle the complaint." The Respondent was subject to this provision and clearly breached it. He was acting to achieve his own ends, the wishes, desires and rights of KS were either secondary or non-existent. In so acting, he was in a conflict of interest.

181. It is irrelevant whether any or all of the allegations of KS had substance. There was a process for dealing with those allegations. The Respondent chose to interfere in that process.

182. In our view, the Respondent breached Rule 2.1.4.

ii) Breach of Policy No. 3

183. We have already concluded that the Respondent breached Section 9 of Policy No. 3 by acting in the manner which he did in the telephone call of September 19, 2011.

184. The Respondent, in his written and oral submissions, spent a considerable amount of time on Section 10 of Policy No. 3, which is entitled "Settlement Agreements". (see paragraph 149)

185. The main argument put forward is that the section refers to a "settlement agreement" and, here, there was not a completed agreement and no money was paid by the Respondent to KS.

186. With respect to the second paragraph of Section 10, the Respondent argues that the confidentiality restrictions, as well as the requirement to withdraw a complaint, must be part of a dispute resolution. As there was no resolution, the argument is that the second paragraph could not have been breached by the Respondent.

187. The Respondent argues that an actionable offence under paragraph 10 of Policy No. 3 requires that:

(a) the Dealer must not know about any settlement arrangements being made; and
(b) a settlement is such that a secret off-book payment must be made.

188. The Respondent submits that Staff did not prove that the Respondent did not have prior authority to enter into negotiations with KS and failed to prove that a payment was made.

189. We do not find substance in any of these arguments.

190. Mr. Armstrong testified that after the August 31, 2011 e-mail from KS, there was no authority from A & Q for the Respondent to pay DSC fees. In any event, there could be no suggestion that Mr. Armstrong or anyone in authority at A & Q, directly or by implication, authorized the Respondent to make the *clandestine* settlement offer to KS, which he made on September 19, 2011.

191. There is no question but that no payment was made to KS by the Respondent. Does the absence of a payment, as well as the lack of a completed settlement agreement, mean that the Respondent did not breach Section 10 of Policy No. 3?

192. The Respondent argues for a strict interpretation of Section 10. The forbidden activities are entering into a settlement agreement, paying compensation and making restitution. Attempts, it is submitted, are not prohibited. Likewise, in the second paragraph of Section 10, the prohibited act is imposing confidentiality restrictions as part of a resolution of a dispute. "Attempting to resolve a dispute or an attempted resolution of a dispute are not prohibited."

193. In response, Staff argues that this is an administrative proceeding aimed most fundamentally at the protection of investors. Consequently, Staff submits that it is necessary to apply a contextual and purposive approach to the interpretation of the applicable Rules and Policies.

194. Applying the contextual and purposive approach to the facts of the case before us, Staff submitted that: "in circumstances where an Approved Person takes active and intentional steps to:

(a) undermine the interests of his client;
(b) conceal his nefarious conduct from the Member;
(c) displays a flagrant disregard for applicable regulatory requirements and the applicable policies or procedures of the Member; and

(d) conducts himself in such a way that the logical anticipated result of his conduct would be a breach of regulatory requirements and/or Member policies,

but an intervening event beyond the Approved Person's control (such as the refusal of the client to accept his unethical proposal or the prevention of the prohibited result because of vigilant and effective supervisory action, intervention by a legal or regulatory authority or some fortuitous occurrence) prevents the intended and anticipated outcome from coming to fruition, it is offensive to the public interest and the objectives of the regulatory enforcement process if such a result should lead to the consequence that the perpetrator is exonerated and no violation is established.

195. Staff relied on two cases:

(a) *Wellings (Re), supra*, where the Hearing Panel was dealing, *inter alia*, with an attempted misappropriation of funds. The Respondent attempted to deposit a cheque of over $98,000.00, which he had obtained from his client in return for an "annuity", which he knew was not real. The bank refused to cash the cheque because the bank teller knew the client in question.

196. At paragraph 23 of its Decision, the Hearing Panel stated:

> "The second allegation regarding the attempt to sell a non-existent annuity for almost $100,000 is considered by the Panel to be more egregious conduct than the original borrowing. The fact that the client did not lose any money is considered irrelevant by this Panel since any loss was prevented only by the intervention of the client's bank."

(b) *Chen (Re),* 2011 LNCMFDA 8 (Reasons) and 2011 LNCMFDA 4 (Settlement Agreement). This case involved a Settlement Hearing where the Hearing Panel was considering an attempt by the Respondent to enter into a settlement agreement with a client to resolve a complaint relating to the Respondent's conduct. The client did not accept the proposed settlement. However, the parties and the Hearing Panel agreed that the attempt to enter into a settlement agreement without the prior consent of the Member was contrary to MFDA Policy No. 3 and MFDA Rule 2.1.1.

197. After considering the submissions of both the Respondent and Staff, we are of the view that the conduct of the Respondent, in the circumstances of this case, was in violation of the first paragraph of Section 10 of MFDA Policy No. 3.

198. We, likewise, reject the Respondent's argument with respect to the second paragraph of Section 10 of Policy No. 3. That section states that:

> "No Approved Person may impose confidentiality restrictions on clients or a requirement to withdraw a complaint with respect to the MFDA, as part of a resolution of a dispute or otherwise." (emphasis added)

199. It is clear to us that the attempt by the Respondent to have KS withdraw the MFDA complaint as well as his attempt to impose confidentiality restrictions, are violations of the second paragraph of Section 10 of MFDA Policy No. 3.

iii) Conclusion re: Allegation #1

200. The Hearing Panel finds that Allegation #1 has been established.

F. FINDING ON ALLEGATION #2

201. Allegation #2 alleges that on November 28, 2011, the Respondent sent a written statement to the MFDA in which he falsely denied that he had attempted to:

(a) persuade client KS to withdraw part or all of his complaint; and
(b) negotiate a settlement with client KS without the prior written consent of the Member,

contrary to MFDA Rule 2.1.1 and Section 22.1 of MFDA By-law No.1.

202. The written response of the Respondent was marked as an Exhibit at the Hearing on the Merits and is reproduced above (see paragraph 137).

203. Section 22.1(a) of MFDA By-law No. 1 requires, *inter alia*, an Approved Person, such as the Respondent, to "submit a report in writing" with regard to any matter involved in any investigation conducted by Staff.

204. The Respondent acknowledged, at the Hearing on the Merits, that he understood that it was expected that this report must be truthful.

205. In this case, we find that the report made by the Respondent to the MFDA on November 28, 2011, was not truthful.

206. The statements made are inconsistent with the words spoken by the Respondent in the September 19, 2011 telephone conversation with KS.

207. To seek to mislead a regulator, such as the MFDA, is a serious offence and a contravention of both Section 22.1 of MFDA By-law No. 1 and Rule 2.1.1.

208. We were referred to a number of authorities where previous Hearing Panels have come to this conclusion. These included the following:

(a) *Crackower (Re),* 2005 LNCMFDA 11;
(b) *Headley (Re),* 2006 LNCMFDA 3;
(c) *Jain (Re),* 2012 LNCMFDA 23 (Reasons for Decision) and 2012 LNCMFDA 19 (Settlement Agreement); and
(d) *McIntosh (Re),* 2013 LNCMFDA 58.

209. We find that Allegation #2 has been established.

G. PENALTY HEARING

210. At this time, we have received no evidence, nor heard any submissions with respect to what, if any, penalty should be imposed on the Respondent in light of the findings which we have made herein.

211. We request that the MFDA Hearings Manager confer with the parties in order to ascertain whether mutually agreeable arrangements can be made for a Penalty Hearing.

212. If such arrangements cannot be made, the MFDA Hearings Manager shall convene a telephone appearance, at a mutually convenient time, so that the Hearing Panel can make the appropriate procedural Order.

DATED this 3rd day of September, 2015.

"Thomas J. Lockwood"

Thomas J. Lockwood, Q.C.
Chair

"Brigitte J. Geisler"

Brigitte J. Geisler
Industry Representative

"Vlasios Kardaras"

Vlasios Kardaras
Industry Representative

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