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: Omar Enrique Rojas Diaz (also known as Omar Rojas)

Heard: December 14, 2020 by electronic hearing in Toronto, Ontario
Decision (Misconduct): December 14, 2020
Decision (Penalty) and Reasons: January 29, 2021

DECISION (PENALTY) AND REASONS

Hearing Panel of the Central Regional Council:

Emily Cole	Chair
Linda J. Anderson	Industry Representative
Matthew Prew	Industry Representative

Appearances:

Lyla Simon	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Omar Enrique Rojas Diaz	)	Respondent

I. INTRODUCTION

1. This was a hearing pursuant to sections 20 and 24 of By-Law No.1 of the Mutual Fund Dealers Association of Canada (the "MFDA") to determine liability, the appropriate penalty, and costs, if any, to be imposed upon Omar Enrique Rojas Diaz (the "Respondent").

2. An Agreed Statement of Facts signed by Staff and the Respondent on December 8, 2020 (the "ASF") was filed for our consideration. In the ASF, the Respondent admitted to engaging in the following misconduct:

> Between on or about September 8, 2017 and June 29, 2018 the Respondent misappropriated approximately $39,270 from one client contrary to MFDA Rule 2.1.1.

3. The Respondent was self-represented. He confirmed that he was aware of his right to counsel but wished to proceed without counsel. After hearing submissions from Staff and confirming that the Respondent understood the proceedings and agreed freely with the ASF, the Hearing Panel found the Respondent breached MFDA Rule 2.1.1 based on the facts set out in the ASF and his admission above.

4. We then heard further submissions from Staff and the Respondent regarding the appropriate penalty. We reserved our decision.

5. On December 18, 2020, we asked Staff to provide us with authorities that address the issue of whether a loss associated with a bank product, such as a line of credit constitutes an investor loss.

6. On January 14, 2021, Staff provided supplemental written submissions and authorities. We then gave the Respondent an opportunity to reply which he declined.

7. We have carefully reviewed all the material provided by Staff and the submissions made by the parties at the hearing and have reached a decision regarding penalty.

8. In the unique circumstances of this case, we decided the appropriate penalty is:

i) A permanent prohibition of the Respondent's authority to conduct securities related business while in the employ of or affiliated with a Member of the MFDA, pursuant to section 24.1(e) MFDA By-law No 1.

9. These are the reasons for our decision:

II. B. AGREED FACTS

10. The Agreed facts are as follows:

Registration History

11. From December 9, 2013 to July 17, 2018, the Respondent was registered as a dealing representative in Ontario with Royal Mutual Funds Inc. (the "Member"), a Member of the MFDA.

12. At all material times, the Respondent conducted business at a branch of the Member (the "Branch") in Toronto, Ontario. The Respondent was also an employee of Royal Bank of Canada (the "Bank") which is affiliated with the Member and which operated a bank branch at the same premises as the Branch.

13. On July 17, 2018, the Member terminated the Respondent as a result of the conduct described herein. The Respondent is not currently registered in the securities industry in any capacity.

Allegation #1 – Misappropriation of Monies

14. In or about 2013, client MC became acquainted with the Respondent as they both attended the same church.

15. On or about February 24, 2014, client MC became a client of the Member, and the Respondent started servicing her mutual fund accounts. At the same time, the Respondent facilitated the opening of a chequing account with the Bank for client MC.

16. In early 2017, the Respondent advised client MC that she had been pre-approved for a line of credit with the Bank in the amount of $10,000. Client MC was not interested in opening a line of credit; however, the Respondent continued encouraging client MC to do so, and on or about February 23, 2017, client MC opened a line of credit with the Bank.

17. On or about September 6, 2017, two days before he started misappropriating monies from client MC, the Respondent changed the contact details (address, telephone number, and email) on client MC's client profile to fictitious details without client MC's knowledge or authorization. The

changes enabled the Respondent to conceal subsequent activity in client MC's account from client MC, as described in more detail below.

18. On or about October 3, 2017, the Respondent opened a new account at the Bank in the name of client MC, without client MC's knowledge or authorization. The Respondent changed the repayment account linked to client MC's line of credit to the new account, so that he could pay the minimum interest on client MC's line of credit from the new account. The Respondent did all of this by submitting a letter of direction to the Bank, on which he falsified client MC's signature without her knowledge or authorization.

19. Between on or about September 8, 2017 and June 29, 2018, the Respondent processed unauthorized transactions in client MC's line of credit account at the Bank and misappropriated a total of $39,270. The unauthorized transactions included approximately:

- 30 increases to the credit limit on client MC's line of credit account;
- 30 withdrawals of monies (ranging from $200 to $5,100) from client MC's line of credit account for the Respondent's personal use and benefit; and
- 15 deposits into client MC's line of credit account to pay the monthly interest charges such that the line of credit did not go into default, thereby avoiding detection of his activities.

20. At all material times, client MC was unaware that her line of credit was being accessed or used, and had not authorized anyone, including the Respondent, to access or use her line of credit.

21. In or about July 2018, the Respondent's conduct was discovered by the Bank and subsequently reported to the MFDA.

Misconduct Admitted

22. By engaging in the conduct described above, the Respondent admits that between on or about September 8, 2017 and June 29, 2018, the Respondent misappropriated approximately $39,270 from one client, contrary to MFDA Rule 2.1.1.

Additional Factors

23. The client was compensated by the Bank for the amounts misappropriated by the Respondent.

24. The Member conducted an investigation and no evidence of additional misconduct affecting other clients of the Member or the bank was identified. There have been no other client complaints to the Member or to the MFDA.

25. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

26. In November 2018, the Respondent entered into a consumer proposal ("Proposal"), which his creditors, including the Bank, accepted.

27. Pursuant to the Proposal, the Respondent is required to make monthly payments of $350 to the administrator of the Proposal, to a required total of $21,000 after 60 months. The administrator then makes annual payments to the Respondent's creditors on a 13% recovery pro rata basis.

28. The Respondent had been making the required monthly payments; however, as of November 3, 2020, the Respondent was behind by two payments.

29. To date, the administrator has made two payments to the Bank, totaling $7,000. The next payment to creditors is scheduled for December 2020.

30. The Respondent is married and has two school age children. In 2019, the Respondent and his family moved to Calgary, Alberta in order to pursue employment opportunities. The Respondent states that after moving to Calgary, he was initially driving for Uber and working sporadically as a day laborer. For tax year 2019, the Respondent had total income of $9,235.

31. Since April 2020, the Respondent has been receiving the federal Canada Emergency Response Benefit. His wife was laid off and is receiving employment insurance benefits. The Respondent and his family live in a rented apartment.

32. The Respondent has cooperated with MFDA Staff throughout the investigation and the disciplinary proceedings herein.

III. ANALYSIS

33. In determining the appropriate penalty to impose upon the Respondent, we considered the primary purpose of securities regulation which is the protection of investors, including ensuring efficient capital markets and public confidence in the industry.

Pezim v. British Columbia and (Superintendent of Brokers), [1994] 2 S. C. R. 557
as cited in *Larson (Re)*, 2009 LNCMFDA, Reasons for Decision of the MFDA
Prairie Regional Council dated October 14, 2009 at para 72

34. In exercising our discretion to impose a penalty, we also considered:

a) the protection of the investing public;
b) the integrity of the securities market;
c) specific and general deterrence;
d) the protection of the governing body's membership; and
e) the protection of the integrity of the governing body's enforcement processes.

35. In determining the appropriate penalty, we considered the following additional factors:

i. the seriousness of the allegations proved against the respondent;
ii. the respondent's past conduct, including prior sanctions;
iii. the respondent's experience and level of activity in the capital markets;
iv. whether the respondent recognizes the seriousness of the improper activity;
v. the harm suffered by investors as a result of the respondent's activities;
vi. the benefits received by the respondent as a result of the improper activity;
vii. the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
viii. the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;
ix. 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;
x. the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
xi. previous decisions made in similar circumstances.

36. Our role in determining the appropriate penalty is to prevent future harm, not to punish.

> We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

Re Mithras Management Ltd. et al. (1990), 13 O.S.C.B. 1600 at 1610 cited by the MFDA in *Tonnies (Re), 2005 LNCMFDA 7, Reasons for Decision of the MFDA Prairie Regional Council dated June 27, 2005*

Seriousness of the misconduct

37. A closer examination of the nature of the misconduct is necessary to explain how we reached our decision.

38. The Respondent began his career as a dealing representative in late 2013 when he went to work for a Member which offered mutual funds. The Member was affiliated with a Bank which offered banking products and services. He was an employee of the affiliated Bank in addition to being registered with the Member. Around the same time, the Respondent became acquainted with the individual who in 2014 became his mutual fund client and his bank client. He began to service her mutual fund accounts and he facilitated her opening a chequing account with the Bank.

39. The Respondent serviced the client's mutual fund accounts for approximately three years without incident.

40. In early 2017, the client was pre-approved by the Bank for a line of credit. She was not interested in opening a line of credit and did so with the Respondent's encouragement. We do not know why the Respondent encouraged the client to open a line of credit. In the absence of an explanation, we cannot assume mal-intent and we accept this fact on its face.

41. An additional six months passed without incident.

42. In September of 2017, the Respondent changed the client's contact information with the Bank. He then embarked on a course of unauthorized increases to the client's credit limit on her line of credit held by the Bank and began making unauthorized withdrawals of monies. Between September 2018 and June 2019, he made 30 unauthorized withdrawals ranging from $200 to $5100. The Respondent paid the monthly interest charges, so the line of credit did not go into default.

43. The Bank discovered his actions and reported them to the MFDA in July 2018.

44. There was no evidence that the Respondent used the funds he obtained from the line of credit held by the Bank to support a lavish lifestyle. He told the panel that he and his wife had experienced financial difficulties and he needed money to pay his bills. The Respondent's explanation is consistent with the multiple small withdrawals.

45. The Member investigated and did not find any evidence of any misconduct affecting other clients of the Member.

46. The line between when the Respondent was acting as a dealing representative and when he was acting as an employee of the Bank was blurred. What is clear, however is that the Respondent breached the trust his client placed in him as her dealing representative and as her Bank representative. He accessed her line of credit with the Bank and engaged in deceitful conduct to avoid detection. In doing so, the Respondent breached his duty to deal fairly, honestly and in good faith with his client and MFDA Rule 2.1.1.

47. While the client's trust was breached, the financial loss was that of the Bank. A line of credit is an arrangement by which a bank loans money to its client. It is not an investment which belongs to a client.

48. We reject Staff's submission that "Approved Persons should not be penalized less significantly, including being made to disgorge less monies from a non-mutual fund source (for example, from a client's bank account or line of credit) versus for misappropriating monies from a client's mutual fund account." It misapprehends the issue.

49. The MFDA does not have jurisdiction over the Bank or its employees. As Staff submitted, the MFDA does not have jurisdiction over bank clients. The MFDA is the national self-regulatory organization for mutual fund dealers in Canada. It derives its authority from Recognition Orders issued by the respective provincial securities regulators.

50. Staff referred us to six decisions. None of these cases dealt with a bank employee who is also a dealing representative misappropriating money from a Bank using a line of credit or other bank products.

51. Staff also made submissions about the *Vanlandschoot (Re)* case decided December 16, 2020 but there are no reasons for decision. The MFDA News Release relied upon is not of assistance.

52. There is no evidence the Respondent engaged in the same type of misconduct with respect to his client's mutual fund account. He did not misappropriate funds from her mutual fund account or change her mutual fund account information.

53. Nonetheless, the Respondent's breach of trust is very serious and requires a penalty commensurate to the egregious nature of this misconduct.

General and specific deterrence

54. The penalty we impose must deter the Respondent from engaging in similar misconduct in the future (specific deterrence) and deter others who may contemplate engaging in similar misconduct in the future (general deterrence).

55. We are of the view that a permanent prohibition on the Respondent's authority to conduct securities related business while in the employ of or affiliated with a Member of the MFDA, will protect investors, deter the Respondent from engaging in this type of misconduct and send a strong message to the industry that abusing the client trust relationship will not be tolerated.

Mitigating factors

56. The Respondent was remorseful. He admitted his misconduct and took responsibility when his actions were discovered by the Bank in July 2018. At the hearing, the Respondent told the Hearing Panel that he had met with the client and apologized. He apologized to his employer. He also apologized to his wife and his family.

57. In November 2018, four months after his misconduct was discovered by the Bank, the Respondent signed a Proposal which his creditors, one of which is the Bank accepted. From November 2018 until approximately September 2020, the Respondent made the agreed upon monthly payments of $350 to the Administrator of the Proposal. As of November 3, 2020, he was behind by two payments.

58. The Hearing Panel takes judicial notice that a global pandemic began in late 2019 and in March 2020, Canada was locked down to ensure public safety. The economic landscape and job market took a severe and unexpected downturn.

59. At the hearing, the Respondent told the Hearing Panel that he did not think he deserved to work in the industry, work which he said he loved. The Respondent is no longer registered in the securities industry. He lost his job, and he does not have any references to assist him in securing future employment. However, the Respondent blamed only himself. He said what he did was wrong, and he was stupid. The Respondent accepts his loss of employment and registration as "the fruit of my actions."

60. Staff submitted that the Respondent took a very cooperative, proactive approach with Staff. He admitted his misconduct at the outset. He produced documents and submitted to an interview. He signed the ASF in which he admitted his misconduct saving the MFDA the time, money and resources required to conduct a contested hearing.

61. From the outset, the Respondent indicated his desire to take responsibility and put this matter behind him. At the hearing, Staff submitted that she is confident that the Respondent is sincere in saying he wants to step up to the plate and take responsibility.

62. The Respondent has not been the subject of any prior disciplinary proceedings.

63. There were no client complaints against the Respondent.

64. The Bank forgave the amounts withdrawn from the line of credit. The client was never out of pocket any money. The Bank was.

Inability to Pay

65. The Respondent's misconduct would ordinarily warrant a financial penalty; however, the Hearing Panel is satisfied that in these circumstances a financial penalty is neither fair nor appropriate.

66. MFDA Sanction Guidelines provide that a Respondent's ability to pay a fine may be taken into consideration in determining the appropriate monetary sanction to be imposed.

MFDA Sanction Guidelines, p.5 para. 11.

67. The Hearing Panel acknowledges Staff's submission that inability to pay is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA's disciplinary processes.

MFDA Sanction Guidelines Tab 3 para 11.

68. Staff invited us to consider four MFDA decisions in which the Hearing Panel undertook such a balancing exercise: *Brauns (Re)*, MFDA Case No. 201203, Reasons for Decision (Penalty) of the MFDA Central Regional Council dated February 4, 2014, *Secord (Re)*, 2020 LNCMFDA 36, Reasons for Decision of the MFDA Central Regional Council dated March 9, 2020, *Zamrykut (Re)*, MFDA Case No. 201933, Reasons for Decision of the MFDA Prairie Regional Council,

dated September 29, 2020 and *Elwood (Re)*, MFDA Case No. 201940, Reasons for Decision (Penalty) of the MFDA Central Regional Council dated September 30, 2020.

69. A careful review of these cases simply confirms the Hearing Panel's discretion to craft sanctions which reflect the circumstances. These cases are distinguished from the case at hand.

70. In the Brauns case, the Hearing Panel noted: "This was not a misappropriation case." The Respondent caused his clients to move $850,000 of their secure investments to his highly speculative unsecured hotel venture. The Hearing Panel ordered a permanent prohibition and disgorged the $850,000 from the Respondent.

71. In the Secord case, the Respondent borrowed money from a client. The Hearing Panel acknowledged that inability to pay is only one of many factors to be weighed. Staff failed to reproduce the entirety of paragraph 20 upon which she relied. The Hearing Panel went to say that it was of the view that the Respondent's impecuniosity should be given more weight as a factor than was submitted by Staff.

> The Hearing Panel acknowledged and agreed with Staff's Submission that even if the Respondent was impecunious, that this was only one of many factors to be weighed by the Hearing Panel in assessing penalty. **Having acknowledged the above, the Hearing Panel was of the view that the Respondent's impecuniosity should be given more weight as a factor than was submitted by Staff**.

72. In the Zamrykut case, the Respondent borrowed money from clients and failed to report a garnishment order against him. The Hearing Panel did not find the Respondent had a bona fide inability to pay. The Hearing Panel reviewed the financial evidence adduced and stated: "It was difficult to establish a clear picture of the Respondent's financial status." Staff was not recommending a permanent prohibition. Ultimately the Hearing Panel ordered a longer prohibition and a lower fine than Staff recommended.

73. In the Elwood case, the Respondent borrowed money from clients, misled the Member and failed to report a civil action against him related to borrowing money from a client. There was no evidence to support the Respondent's assertion that he was impecunious. The Respondent refused to take responsibility for his misconduct. He continued to refute the allegation this was a loan. The Respondent had failed to repay the client pursuant to the settlement agreement he had agreed to to

settle the civil action against him. He did not acknowledge his misconduct or apologize until the hearing.

74. Whereas in this case, Staff was satisfied that the Respondent has a bona fide inability to pay. The Respondent produced financial documents to Staff to prove he is unable to pay.

75. The Respondent's 2019 total income was $9,235. Since April 2020, the Respondent has been receiving the federal Canada Emergency Response Benefit. His wife was laid off and is receiving employment insurance benefits. The Respondent and his family live in a rented apartment.

76. In these circumstances, to impose a financial penalty on the Respondent in addition to a permanent prohibition on the Respondent's authority to conduct securities related business while in the employ of or affiliated with a Member of the MFDA, would be to punish past conduct which as Mithras states is not our role.

IV. COSTS

77. Staff provided a Bill of Costs in the amount of $5,900. Considering our decision, we have reduced the costs award to $2,500.

DATED this 29th day of January, 2021.

"Emily Cole"
Emily Cole
Chair

"Linda J. Anderson"
Linda J. Anderson
Industry Representative

"Matthew Prew"
Matthew Prew
Industry Representative

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