



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: Rafal Mark Rosicki

Heard: February 1, 2019 in Toronto, Ontario
Decision: February 1, 2019
Reasons for Decision: June 25, 2019

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Joan Smart
Kenneth P. Mann
Joseph Yassi

Chair
Industry Representative
Industry Representative

Appearances:

Shelly Feld)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
Alan Melamud)	
)	
Rafal Rosicki)	Respondent, by teleconference
)	
)	

I. INTRODUCTION

1. Proceedings were commenced by the Mutual Fund Dealers Association of Canada (the “MFDA”) against Rafal Mark Rosicki (the “Respondent”) by Notice of Hearing, dated March 21, 2018, and served on the Respondent on April 14, 2018.

2. The Notice of Hearing contained the following allegations:

Allegation # 1: Commencing on August 15, 2016, the Respondent obtained a loan in the amount of \$40,000 from client RS for his personal use which he did not repay or otherwise account for, thereby engaging in personal financial dealings with a client that gave rise to a conflict of interest that the Respondent failed to address through the exercise of responsible business judgement influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1 and the policies and procedures of the Member.

Allegation # 2: Commencing on September 13, 2016, the Respondent made false or misleading statements about his conduct in response to questioning from staff of the Member, staff of the Ontario Securities Commission, and staff of the MFDA (“Staff”), contrary to MFDA Rule 2.1.1.

3. The Notice of Hearing stated, among other things, that the Respondent must serve and file a Reply within 20 days from the date of service of the Notice of Hearing.

4. A first appearance was held by teleconference on May 16, 2018, at which time an order was made which extended the time for the Respondent to serve and file a Reply to June 15, 2018, provided a time frame for the exchange of documentary disclosure and information regarding witnesses and set the date for the hearing on the merits for October 11, 2018.

5. A second appearance was held by teleconference on October 5, 2018, in response to a request from the Respondent for an adjournment of the hearing on the merits due to health issues he indicated had resulted from a car accident in the summer. At that time an order was made giving the Respondent further time extensions to provide his Reply, documentary disclosure and information relating to witnesses, all to be done within the month of November 2018, and setting the date for the hearing on the merits for February 1, 2019.

6. A third appearance was held by teleconference on December 7, 2018, when the Respondent requested additional time extensions. At that time an order was made giving the Respondent until January 18, 2019, to provide his Reply, documentary disclosure and information relating to witnesses and confirming the date for the hearing on the merits for February 1, 2019.

7. The hearing on the merits in this matter was convened on February 1, 2019. As of that date the Respondent had not served and filed a Reply or made documentary disclosure or provided information on his witnesses, as he had previously agreed to do.

8. The Respondent did not appear in person at the hearing, but rather called into the hearing. Also, notwithstanding that he had indicated in previous appearances an intention to retain counsel, he had not done so and was self-represented.

9. According to Rule 8.4 of the MFDA Rules of Procedure, where a Respondent fails to serve and file a Reply, the Hearing Panel may, among other things:

- a) proceed with the hearing without further notice to and in the absence of the Respondent;
- b) accept the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1; and
- c) prohibit, restrict or place terms on the right of the Respondent to call witnesses or present evidence at the hearing.

10. Notwithstanding Rule 8.4, the Hearing Panel was prepared to allow the Respondent to participate in the hearing and give his evidence and cross-examine Staff witnesses over the phone, particularly given that he was self-represented. However, we informed the Respondent that the concerns Staff raised about the Respondent giving evidence in this manner, such as the Hearing Panel not being able to observe his demeanor and the difficulty in cross-examining him, may go to the weight we give to his evidence.

11. At the beginning of the hearing, the Hearing Panel made an order under Rule 13.6 of the MFDA Rules of Procedure excluding witnesses from the hearing until after they had given their evidence, with the exception of Mike Ford, the MFDA Investigator.

II. BURDEN OF PROOF

12. As noted in the case of *F.H. McDougall*, [2008] 3 S.C.R. 41 at paras. 40 and 49, “there is only one civil standard of proof at common law and that is proof on the balance of probabilities”. It was incumbent on Staff to present clear, cogent and convincing evidence to prove the allegations against the Respondent on the balance of probabilities. That is the standard applicable in proceedings such as this and that the Hearing Panel applied in this case.

III. FACTS

Our Approach to the Evidence

13. At the hearing Staff called two witnesses. The first was MT who, at the relevant time in 2016, was the branch manager of the branch of TD Canada Trust (the “Bank”) where the Respondent worked and was his supervisor. The second was Mike Ford, a Manager of Investigations at the MFDA, who had assumed the case from the original investigator who retired in 2018. Mr. Ford indicated at the hearing that he had familiarized himself with the investigation by reviewing documents.

14. As noted above, we permitted the Respondent to give evidence and cross-examine Staff’s witnesses at the hearing. He did not present any other witnesses or any documentary evidence.

15. We note that Rule 1.6(1) of the MFDA Rules of Procedure provides that, “a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.” We received certain evidence that was hearsay and permitted the Respondent to participate by telephone. The nature of the evidence was considered as we determined its reliability and weighed the evidence.

16. In this decision we refer to some but not all of the evidence. However, we considered all the evidence, including oral testimony and exhibits. We also considered the oral submissions of both parties and the written submissions and cases provided by Staff.

17. In our Reasons we have referred to the affected client as Client RS in order to provide a measure of privacy protection to the client.

18. Based on the evidence provided to us at the hearing, the relevant facts as we have found them are set out below.

Respondent's Registration History

19. From August 12, 2015 to September 16, 2016, the Respondent was registered in Ontario as a mutual fund salesperson with TD Investment Services Inc. ("TDISI"), a Member of the MFDA (the "Member").

20. On July 31, 2015, the Respondent signed a MFDA Agreement of Approved Person, in which he agreed "to be bound by, observe and comply with MFDA Rules" and "that I am conversant with the MFDA Rules, and to keep myself fully informed about the MFDA Rules as they are amended or supplemented from time to time."

21. On September 16, 2016, TDISI terminated the Respondent's registration and he is no longer registered in the securities industry.

Allegation #1 - Respondent's Financial Dealings With Client

22. Client RS was a client of TDISI.

23. In August 2016, the Respondent borrowed \$40,000 from Client RS. The loan was documented in an Investment Agreement that indicated that: the loan was being given so the Respondent could leverage trade using his TD Waterhouse Discount Brokerage account; the principal of \$40,000 would be returned to Client RS but all interest would be kept by the Respondent; and there was no set date when the principal would be returned, with that being left to be worked out between the parties.

24. The meaning of the Investment Agreement provision that all interest would be kept by the Respondent was not entirely clear to us, such as whether it was limited to meaning that the Respondent would retain the interest that would otherwise be payable on the loan. The agreement did not specify who would receive the capital gains or dividends, if any, from investments made with the loaned funds.

25. On August 12, 2016, in order to fund the loan, Client RS redeemed mutual funds from his account at TDISI that was being serviced by the Respondent. The redemption represented almost 40% of the market value of the account at the time. The proceeds of the redemption were deposited into Client RS's Bank account.

26. On August 15, 2016, the Respondent arranged to have the subject \$40,000 transferred to his personal Bank account. The following day he transferred the funds to his Tax Free Savings Account ("TFSA") at TD Direct Investing.

27. The Respondent initially invested the \$40,000 in stocks of cannabis companies.

28. There was one significant issue of credibility that the Hearing Panel had to decide upon, and that related to whether or not the branch manager had been aware, and approved, of the Respondent obtaining a loan from Client RS to invest in marijuana stocks in his TFSA.

29. At the hearing, the Respondent indicated that the branch manager and others in the branch knew what he was doing. He made the same point on several other prior occasions, although he did not indicate that when first interviewed by the Bank on September 13, 2016. The Respondent did not provide any corroborating evidence from any others in the Bank branch.

30. In an e-mail to the Ontario Securities Commission ("OSC") on October 4, 2016, when referring to the \$40,000 that was transferred to him, the Respondent stated, "Furthermore all these transactions were done under my branch manager's knowledge and nothing was said to me about breaking any codes or laws that TD had for their employees."

31. In an e-mail to the MFDA Investigator on March 27, 2017, the Respondent stated, "I had also let my branch manager know everything I was doing just so I didn't break any rules and she gave me full clearance to have a teller transfer the money to my bank account so I could invest in a certain stock (branch manager also invested in this stock)."

32. Similarly, when the Respondent was interviewed by MFDA Staff on April 21, 2017, he stated, "all of this was done under branch manager supervision. Like, she was told about this and she actually invested into this stock herself as well....because before doing any of this I told the branch manager everything that I was doing. She knew that I was borrowing money, she knew I

was investing in the stock...” In response to a question during that interview about whether the branch manager was aware that the person from whom he was borrowing money was a client at the time, the Respondent stated, “Yes, she knew he was a client...And everything was made clear to her what I was doing, that I was signing a contract with him, every little thing, right? Nothing was said that I was doing anything wrong.” Later in the same interview the Respondent stated, “We did have a full out conversation, we talked about it, we talked about the stock, we talked about who I was borrowing, how much I was borrowing, how much I was putting into these stocks.”

33. According to the evidence of MT, the branch manager, she first started to become aware of the loan from Client RS when, during a meeting with the Respondent in her office, she saw a document in a third party mortgage file that referenced the amount of \$40,000 and the names of the Respondent and Client RS. She testified that the Respondent took the document away and refused to give it back, saying it was personal and had nothing to do with work. The Respondent did not agree with MT that the subject loan document could have been in a mortgage file.

34. MT testified that she subsequently looked up Client RS’s account and saw that \$40,000 had been withdrawn from mutual funds, moved to Client RS’s Bank account and then moved to the Respondent’s Bank account. She then informed Human Resources of what she had found.

35. While MT acknowledged she had engaged in discussions with the Respondent about investing in marijuana stocks, she testified that she had not previously known about the subject loan and never authorized the Respondent to borrow money from Client RS to invest in stocks in his TFSA.

36. We found the evidence of MT to be more credible than that of the Respondent on this issue. We believe her version of events and that, prior to the Respondent entering into the subject loan transaction with Client RS, she had not been aware, or approved, of the Respondent borrowing money from the client to invest in stocks in his TFSA.

37. After being informed by MT, the Bank conducted an investigation and thereafter, as evidenced by a letter, dated September 15, 2016, terminated the Respondent’s employment for cause for certain reasons, including the subject loan.

38. The Member's Compliance Manual contained a Code of Ethics and Standards. It provided that "Approved Persons shall not engage in unethical business practices", and listed as an example of an unethical behaviour, "borrowing money from a customer."

39. In addition, the Bank had a Code of Conduct and Ethics which, among other things, addressed "Conflicts of Interest" and included a provision relating to borrowing funds from a Bank customer.

40. On a quarterly basis, the Respondent had been required to sign a form disclosing any instances of, among other things, personal financial dealings. The form referenced MFDA Rule 2.1.4. In each case the Respondent indicated "No".

41. At the hearing, the Respondent indicated he did not look at the MFDA rules, that they were not reviewed with employees and he was just asked to "initial here". On the other hand, MT advised that she spoke with branch staff about the policies of TDISI concerning borrowing money from clients as part of the quarterly meetings they had about MFDA regulations and newsletters that were circulated quarterly through the branches, and also that she gave the Respondent the Code of Conduct and Ethics.

42. No evidence was presented at the hearing as to the final benefit that accrued to the Respondent from investing the \$40,000 loaned to him by Client RS. However, the statements for the Respondent's subject TFSA for the period August 1, 2016 to February 28, 2017 were submitted in evidence. They showed: \$40,000 being deposited in August 2016; \$21,218.72 being withdrawn in October 2016; \$5,000 being withdrawn in February, 2017; and the market value of the account at the end of February 2017 being \$40,501. Client RS did not receive any of the funds generated by the investment of his \$40,000.

43. Toward the end of the hearing there was discussion regarding the Respondent obtaining a portfolio summary of his TFSA to show the full history of the account, as it would have been helpful to the Hearing Panel in determining the total benefit the Respondent received from investing the \$40,000. The Respondent indicated he would not be able to do so, stating, "I was at the Bank the other day, and I had an issue with this because that account was closed due to fraud. I can't even access that account." His response did not appear reasonable and suggested to us that

he was unwilling to provide the information. Subsequent to the hearing, MFDA Staff followed up with the Respondent in an attempt to obtain a transaction summary of the Respondent's TFSA statements, but the Respondent did not provide any further information.

44. At the hearing, Staff introduced a transcript, and played the tape, of a telephone call that had been held on April 4, 2018 between MFDA Staff and Client RS. In response to the question from MFDA Staff, "So you expected to get your \$40,000 back with any increase?", Client RS stated, "Yes, with some profit as well, right. I hope." However, as English is not Client RS's first language, we do not believe that statement is definitive about Client RS's understanding of the arrangement.

45. There was no evidence that Client RS ever complained about the loan transaction.

46. At the hearing, the Respondent advised for the first time that he had repaid Client RS \$40,000 about a week prior to the hearing, using a bank draft. Subsequent to the hearing, he provided evidence of the repayment which showed it had been made on the day before the hearing.

Allegation #2 - False or Misleading Statements

47. The Respondent changed his story to some extent about the loan when confronted about it by different parties looking into the matter.

48. The Member interviewed the Respondent on September 13, 2016. According to the interview notes, the Respondent indicated that: he had met Client RS a couple of times and worked for him a couple of times; Client RS gave him the funds because Client RS wanted to invest in a certain stock tax free but did not have a TFSA as he did not have a SIN, so wanted to make use of the Respondent's TFSA; and the Respondent was to invest the money, Client RS was to get his money back, but the Respondent was to keep any interest on funds earned.

49. In response to questioning from the OSC, in an e-mail on October 4, 2016, the Respondent stated, "A friend owed me money from work I did for him for a while ago and because it was a large sum of money (\$40,000) that was transferred to me (again none of these transactions were done under my login ID) TD had a hard time believing the legitimacy of these funds."

50. In an e-mail to the MFDA investigator on March 27, 2017, the Respondent stated, “I worked with Client RS a few times in August and July, 2016 but the exact dates I cannot remember. The \$40,000 was not payment but rather we came under an understanding that I could use the funds for leverage trading and then would give the principal of that amount back to him while keeping the interest.”

51. When interviewed by MFDA Staff on April 21, 2017, the Respondent stated when referring to the loan arrangement, “So I asked a friend, he has like a decent amount of money, he’s—I handled his finances before. He owed me favours from before from working for him. He always said, oh, you need anything, you need anything I’ll help you out...type of thing. And I said sure. So I was like, I’ll ask him, you know, for money in order to put into this, and I told him what it was for. And he’s like, yes, okay, I don’t have a problem with it, it’s just that my wife gets nervous about these things... He’s like I trust you, but just put it on paper. And he wrote this like little contract, right, between me and him and I was just like, all right, I’ll give you—like there’s no problem, the \$40,000, I’ll give it back to you. I was just like, I’m just like trying to make money off of the interest.” The Respondent went on later to state, “ the whole reason is because he’s Polish also, basically, I’m Polish, I’m young and he’s just like, he always wants to see another young, like, Polish kid do well.”

52. At the hearing, the Respondent suggested that the reason for him giving the conflicting evidence was that the interviews would have been done months apart, he had no legal advice and he was using drugs at the time.

IV. ANALYSIS

Allegation # 1 – Respondent’s Financial Dealings With Client

53. The MFDA alleged that the Respondent breached MFDA Rules 2.1.4 and 2.1.1 and the policies and procedures of his Member firm.

54. MFDA Rule 2.1.1 provides that:

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...

55. MFDA Rule 2.1.4 provides that:

- a) Each...Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the...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 to the Member.
- b) In the event that such a conflict or potential conflict arises, the Member and the Approved Person shall ensure 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 Approved Person as the Member directs, prior to the...Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest..."

56. MFDA Staff Notice MSN-0047, dated October 3, 2005, on Personal Financial Dealings With Clients, notes that:

Borrowing from a client by...the Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA Rules, MFDA staff are unaware of any circumstances where...Approved Persons proposing to enter into any such arrangements would be able to demonstrate that the conflict has been properly dealt with.

57. Similarly MFDA Staff Notice MSN-0054 on Conflicts of Interest - MFDA Rule 2.1.4, contains a statement that:

MFDA staff would expect that transactions involving borrowing from clients would generally be prohibited.

58. As noted above, the Member's policies also provided that Approved Persons must not engage in unethical business practices, which included borrowing money from a customer.

59. In our opinion, the Respondent had a significant conflict of interest when he solicited Client RS to enter into the subject loan arrangement with him, pursuant to which the Respondent would invest the borrowed funds in his personal investment account and keep the interest on the funds loaned, the principal was to be paid back at an unspecified time and no security for the loan was provided.

60. The conflict of interest was exacerbated by the fact that the Respondent arranged for Client RS to sell mutual funds in Client RS's account at TDISI to fund the loan to benefit the Respondent. Clearly the nature of the relationship between an Approved Person and his client requires that all transactions performed in the client's account be for the benefit of the client and not the Approved Person.

61. We have also found that, prior to entering into the loan arrangement with Client RS, the Respondent did not disclose the conflict to the Member, as required by MFDA Rule 2.1.4 (a). Also, there was no evidence of any written disclosure of the conflict to Client RS, as required by MFDA Rule 2.1.4 (c).

62. In our view, the Respondent failed to ensure that the conflict of interest was addressed through the exercise of responsible business judgment influenced only by the best interests of the client, as required by MFDA Rule 2.1.4 (b). Indeed it would appear that the Respondent only had his own best interests in mind.

63. In addition, in entering into the subject loan transaction with Client RS, the Respondent did not deal fairly with the client or observe high standards of ethics, and engaged in business conduct or practice that was unbecoming or detrimental to the public interest, contrary to MFDA Rule 2.1.1.

64. The Respondent also breached his Member firm policies relating to borrowing money from a customer.

65. In a number of previous cases MFDA Hearing Panels have held that borrowing money from a client for the benefit of an Approved Person gives rise to a conflict of interest, for example in the case of *Tonnies (Re)*, 2005 LMCNFDA 7 at para. 31 and *Brauns (Re)*, 2013 LNCMFDA 68 at para. 58.

66. It was not entirely clear to us whether Client RS fully understood whether he was to receive any return, in addition to the repayment of principal of the loan. We do note that there was no evidence that he has complained. However, in our view that does not negate the fact that the Respondent had a conflict of interest in entering into the subject arrangement with Client RS.

67. The fact that the Respondent repaid the principal of the loan on the day prior to the hearing was a positive development but does not negate the breaches of the MFDA Rules and Member policies referenced above. It does, however, limit our finding on Allegation #1, in that we have not made a finding that he did not repay or otherwise account for the loan.

68. At the hearing, the Respondent indicated he did not look at the MFDA Rules. However, it is incumbent on Approved Persons to familiarize themselves with the MFDA Rules and Member policies that are applicable to their activities. We also note that the Respondent had signed the MFDA Agreement of Approved Person confirming that he was conversant with the MFDA Rules and would comply with them. The fact that the Respondent may not have read the MFDA Rules or his firm's policies does not exonerate him.

69. At the hearing, the Respondent indicated that he did not now deny that entering into the subject loan was a conflict of interest, but had thought that it was not because it was signed outside the Bank. However, whether or not the arrangement was made outside the Bank, the fact remains it was with a client. Further, the fact that the Respondent arranged for Client RS to sell mutual funds from his account at TDISI to fund the loan would indicate this was not done entirely outside of the Bank.

70. In summary, we have found in connection with Allegation #1, that the Respondent obtained a loan in the amount of \$40,000 from Client RS for his personal use, thereby engaging in personal

financial dealings with the client that gave rise to a conflict of interest that the Respondent failed to address through the exercise of responsible business judgement influenced only by the best interests of the client, contrary to MFDA Rules 2.1.1 and 2.1.4, as well as the Member's policies.

Allegation # 2 – False or Misleading Statements

71. As described above, the Respondent gave inconsistent answers to his Member firm, the OSC and the MFDA when questioned about why he obtained the \$40,000 from Client RS. Based on the evidence presented at the hearing, the explanation the Respondent ultimately gave to the MFDA appeared to be the most likely.

72. We were not able to give much credence to the reasons the Respondent gave for providing inconsistent explanations to the different parties. As to his statement that the interviews were given months apart, we note that the first two explanations were given within the space of three weeks. As to the Respondent not having counsel, while we appreciate that dealing with regulators can be an intimidating experience, that should not prevent an Approved Person from being truthful. As to him using drugs at the time, he provided no corroboration.

73. We were also concerned about his statements to the OSC and MFDA to the effect that he had entered into the arrangement with Client RS with full knowledge of his branch manager. As noted above, we did not find those statements to be credible.

74. It is critical to the integrity of the mutual fund industry that Approved Persons are truthful and forthcoming with their Member firms and regulators.

75. We found, in connection with Allegation #2, that the Respondent made false or misleading statements to the Member and regulators about his conduct. That was a serious breach of MFDA Rule 2.1.1, which requires that an Approved Person, among other things, not engage in business conduct that is unbecoming or detrimental to the public interest.

76. As a result of the misleading statements, the MFDA was required to expend additional resources in order to determine what had actually happened.

V. SANCTION

77. Having found that the Respondent breached MFDA Rules 2.1.1 and 2.1.4 and his Member firm's policies, we now address the issue of an appropriate sanction in the circumstances.

78. Staff proposed that the Respondent:

- a) be permanently prohibited from conducting securities related business in any capacity while in the employ of, or in association with, any MFDA Member;
- b) pay a fine in the amount of at least \$65,000, to be reduced by any amounts paid by the Respondent to Client RS within 30 days of the Order; and
- c) pay costs to the MFDA in the amount of \$7,000.

79. The Respondent repaid the principal of \$40,000 to Client RS on the day before the hearing. It is unclear when, or if, that payment might have been made had the hearing not been pending. In any event, we regard that repayment as a mitigating factor and a positive outcome of the regulatory process in this case.

80. The Supreme Court of Canada, in the case of *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 59, held that the primary goal of securities regulation is "the protection of the investor but other goals include...ensuring public confidence in the system".

81. In the case of *Tonnies (Re)*, 2005, LCNMFDA 7 at para. 45, the Hearing Panel, in discussing its role in sanctioning a respondent, stated:

"The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in *Re Mithras Management Ltd. et al.* (1990), 13 O.S.C.B. 1600. The Commission stated at 1600:

...[The] role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of the capital markets..."

82. We also concur with the comments in the case of *Tonnies (Re)*, *supra* at para. 46 that the following factors should be taken into consideration in determining an appropriate sanction:

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

83. Hearing Panels in a number of cases, including in *Tonnies (Re)*, *supra* at para. 48, have set out additional factors that should be considered in determining penalty. These include:

- a) the seriousness of the allegations proved against the respondent;
- b) the respondent's past conduct, including sanctions;
- c) the respondent's experience in the capital markets;
- d) the level of the respondent's activity in the capital markets;
- e) the harm suffered by investors as a result of the respondent's activities;
- f) the benefits received by the respondent as a result of the improper activity;
- g) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate there;
- h) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;
- i) the need to deter not only the respondent, but others who participate in the capital markets, from engaging in similar improper activity;
- j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k) previous decisions made in similar circumstances.

We have considered a number of those and other factors in determining an appropriate sanction in this case, and, in particular, those set out in the paragraphs below.

84. Seriousness of the allegations: As noted above, we believe that the Respondent's misconduct outlined above constituted serious breaches of MFDA Rules 2.1.1 and 2.1.4 and the

Member's policies. We do note that, in respect of the subject loan, it was not a case of misappropriation and the subject loan appears to have been an isolated incident.

85. The Respondent's experience: The Respondent was relatively young and inexperienced, having been registered for only a year when the misconduct occurred. However, all Approved Persons have the responsibility to make themselves aware of applicable regulations and their Member's policies.

86. The Respondent's past conduct: The Respondent has not previously been the subject of disciplinary proceedings. However, this was not a significant factor, given that the Respondent was only registered for a short period.

87. Benefits received by the Respondent as a result of the improper activity: The Respondent benefitted in that he received an interest-free loan from Client RS and thereby saved the interest he would have had to pay to a financial institution or another lender if he had otherwise been able to qualify for a loan. In addition, the evidence showed that the Respondent made a return on the investment of the \$40,000, which allowed him to withdraw at least \$26,218.72 from the TFSA.

No evidence was presented at the hearing as to the total benefit the Respondent received from investing the \$40,000 up to the date of repayment. The fact that the Respondent appeared unwilling to provide additional information on his TFSA up to the date of the repayment suggested to us that the Respondent likely received returns in excess of \$26,218.72 from the investments.

88. Harm suffered by the investor: The Respondent repaid to Client RS the principal of \$40,000, without interest. Client RS lost the return on the \$40,000 he could have received had the funds remained invested in mutual funds or otherwise been invested for his benefit from the time of the loan until the repayment. Client RS did not receive any benefit from the investments the Respondent made in his TFSA utilizing Client RS's funds. In addition, we are concerned that the Respondent may have potentially put Client RS at risk of losing the principal of the amount loaned. While the arrangement provided that the Respondent was to repay the principal to Client RS, in light of the Respondent's stated financial circumstances, we question whether he could have afforded to do that had the market value of the investments in the Respondent's TFSA declined

such that the \$40,000 in principal had been lost. We do note, however, that there was no evidence that Client RS has complained.

89. Whether the Respondent recognizes the seriousness of the improper activity: While at the hearing the Respondent acknowledged that he had a conflict when he obtained a loan from a client, he did not appear to appreciate why he was being blamed. Also, the fact that the Respondent neither filed a Reply after obtaining time extensions in order to do so nor appeared in person at the hearing, led us to believe he did not recognize the seriousness of the improper activity.

90. Actions taken by the Member: TDISI terminated the employment of the Respondent as a result of improper conduct. The Respondent indicated at the hearing that he has not been able to work in financial services since that time. That is a very significant penalty and will likely negatively impact the Respondent's future employment.

91. Respondent's ability to pay: According to the MFDA Sanction Guidelines, a respondent's ability to pay may be a consideration in determining an appropriate monetary sanction to be imposed, but notes that the burden is on a respondent to raise the issue and provide evidence of inability to pay. At the hearing the Respondent argued that the fine was not reasonable and spoke of matters which indicated an inability to pay. These included statements to the effect that: he had suffered significant injuries in a car accident in the summer of 2018 that required hospitalization and surgery; he continues to have medical and personal issues; he has domestic issues at home; and he has not been able to work in financial services since September 2017 and is now unemployed, other than "odd jobs". However, the Respondent failed to provide any evidence to Staff or at the hearing to corroborate his current financial condition or current medical and personal issues. While we are reluctant to do so in the absence of corroborating evidence, we are prepared to give some credence to the Respondent's claim of impecuniosity, particularly given that he is only 26 years old and was terminated from his employment in financial services. However, as previously noted, the Respondent has received returns from investing the subject borrowed funds in his TFSA, the total amount of which is unknown to us.

92. The need for deterrence: It is important to deter the Respondent from future contraventions and send a clear message to others in the mutual fund industry that borrowing by an Approved Person from a client for the benefit of the Approved Person is a serious conflict of interest and will

not be tolerated by the MFDA and, similarly, misleading Members and regulators will not be tolerated.

93. Previous cases of personal financial dealings: MFDA Staff referred us to a number of previous MFDA cases involving respondents borrowing from clients for the benefit of the respondents, each of which resulted in a permanent prohibition and a substantial fine. In most of those cases the respondents had either not repaid the loan or had only partially repaid the loan or loans. Staff also referred us to the case of *Headley, (Re)* 2006 LCNMFDA 3 in which the respondent had misappropriated a total of \$155,000 from two clients, which he only repaid when the clients complained, or threatened to complain, to the respondent's employer. The respondent had also fabricated a letter to one of the clients in an attempt to cover up the misappropriation. In addition, the respondent had failed to cooperate in the MFDA investigation. In that case the Hearing Panel imposed a permanent prohibition on the respondent to conduct securities related business in any capacity and, in respect of the misappropriation, a fine in the amount of \$100,000.

94. In respect of a respondent's inability to pay a fine, Staff referred us to the case of *Brauns (Re)*, 2014 LNCMFDA 9 at para. 16, where the Hearing Panel stated:

In our view, any inability to pay the fine (while relevant) is trumped by the need to articulate the seriousness of the Respondent's conduct, and to at least impose a fine that bears some relationship to the benefit obtained as a result of the misconduct and/or the loss to those affected. In our view a fine of \$850,000 is fit in the circumstances.

95. We also note that the MFDA Sanction Guidelines state that:

As a general principle, wrong-doers should not benefit from their wrong-doing. In cases where the Respondent benefitted financially from the misconduct, the sanction should, if possible, reflect the extent to which the Respondent obtained or attempted to achieve a financial or other benefit from the misconduct, directly or indirectly.

96. We are of the view that a permanent prohibition against the Respondent from participating in the mutual fund business is appropriate in this case, given the totality of the Respondent's misconduct involving a personal financial dealing with a client, which was then seriously exacerbated by him misleading his Member firm and regulators. The Respondent demonstrated

behavior throughout this matter that indicated he is ungovernable and suggested to us a lack of integrity and an inability to recognize the obligations of an Approved Person. The Respondent is, therefore, not an appropriate candidate to be in that position. We are inclined to believe there would be a risk to investors and the securities industry if he were allowed to be registered in the future.

97. In addition, we believe it is important to impose a fine in this case that is reflective of the benefit the Respondent received from his misconduct. We are of the view that an appropriate fine is \$25,000. We considered whether a higher fine would be appropriate in light of his misleading statements and our concern that the Respondent may well have received a higher benefit than what was disclosed in the evidence. However, we gave consideration to certain other factors, including that: the Respondent repaid the subject loan; Client RS has apparently not complained; the subject loan appears to have been an isolated incident; the Respondent was inexperienced; and the Respondent already had his employment with TDISI terminated as a result of this issue. We also considered the Respondent's likely financial circumstances, but gave only limited consideration to this due to lack of corroboration. In addition, we appreciate that a permanent prohibition is a very significant penalty.

98. We are of the view that the above sanctions will prevent future misconduct by the Respondent and deter others from engaging in similar misconduct, and thereby improve compliance by mutual fund market participants, enhance investor protection and foster public confidence the mutual fund industry.

99. In the circumstances it is reasonable to order costs in the amount of \$7,000. Staff provided a Bill of Costs showing the amount of time expended, resulting in costs of \$7,175. The Bill of Costs did not include all the time or disbursements expended. Costs are particularly appropriate in this case where: the Respondent was not entirely forthright with regulators at the outset; the Respondent requested time extensions to file a Reply which he then failed to do and which might have circumscribed the issues that Staff needed to address; and a one day hearing on the merits was required.

100. Accordingly, the following penalties will be imposed:

- a) a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of, or in association with, any MFDA Member;
- b) a fine in the amount of \$25,000; and
- c) costs in the amount of \$7,000.

DATED this 25th day of June, 2019.

“Joan Smart”

Joan Smart
Chair

“Kenneth P. Mann”

Kenneth P. Mann
Industry Representative

“Joseph Yassi”

Joseph Yassi
Industry Representative

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