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: Mark Allen Smith

Heard: June 28, 2021 by electronic hearing in Toronto, Ontario
Decision (Penalty) and Reasons: September 24, 2021

DECISION (PENALTY) AND REASONS

Hearing Panel of the Central Regional Council:

Emily Cole	Chair
Cheryl Hamilton	Industry Representative
Robert White	Industry Representative

Appearances:

Francis Roy	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Mark Allen Smith	)	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 sanctions, and costs, if any, to be imposed upon Mark Allen Smith (the "Respondent").

2. An Agreed Statement of Facts signed by Staff and the Respondent on March 22, 2021 (the "ASF") was filed for our consideration. In the ASF, the Respondent admitted to engaging in the following misconduct:

> **Contravention #1:** Between May 27, 2012, and November 12, 2018, he accepted and acted upon a power of attorney from a related client without notifying the Member and transferring the accounts to another Approved Person in accordance with the Member's requirements, contrary to the Member's policies and procedures and MFDA Rules 2.3.1, 1.1.2, 2.5.1, and 2.1.1.
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> **Contravention #2:** Between September 2012 and November 12, 2018, he engaged in personal financial dealings with a related client when he acted upon a power of attorney to borrow or otherwise obtain monies from the client's accounts, thereby giving rise to a conflict or potential conflict of interest which he failed to disclose to the Member, or otherwise address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the Member's policies and procedures, and MFDA Rules 2.1.4, 2.3.1, 2.5.1, and 2.1.1.
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> **Contravention #3:** Between 2013 and November 12, 2018, he provided false or misleading responses to the Member on annual compliance questionnaires relating to accepting a power of attorney or borrowing monies from a related client, contrary to MFDA Rule 2.1.1.
>
> **Contravention #4:** In or about March 2016, he failed to notify the Member within two business days that he had made an arrangement with his creditors, contrary to the Member's policies and procedures, section 4.1(g) of MFDA Policy No. 6, and MFDA Rules 1.2.2(b) [now Rule 1.4], 2.1.1, 2.5.1, and 1.1.2.

3. The Respondent was self-represented. After hearing submissions from Staff and the Respondent, the Hearing Panel found the Respondent breached the Member's policies and procedures, MFDA Policy No. 6, and the MFDA Rules set out in the contraventions based on the facts in the ASF and the Respondent's admissions above.

4. We then heard further submissions from Staff and the Respondent regarding the appropriate sanctions. The Respondent did not oppose the imposition of a permanent prohibition of the Respondent's authority to conduct securities related business as a mutual fund salesperson (now known as a dealing representative). Staff and the Respondent disagreed on the amount of fine and costs, if any.

5. We reserved our decision.

6. The Hearing Panel carefully reviewed Staff's written submissions and considered the submissions made by the parties at the hearing. We decided the appropriate sanctions are:

i) A permanent prohibition of the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with a Member of the MFDA, pursuant to section 24.1.1(e) MFDA By-law No. 1;

ii) A fine in the amount of $140,000 pursuant to section 24.1.1(b) of MFDA By-law No. 1, payable on or before December 31, 2022. The fine shall be reduced by any and all amounts the Respondent repays to his Client CS/his mother or her estate if appropriate up to a maximum of $122,000 before December 31, 2022; and

iii) Costs in the amount of $5,000, pursuant to section 24.2 of MFDA By-law No. 1.

7. These are the reasons for our decision.

II. AGREED FACTS

8. The facts are set out in the ASF attached as Schedule "1"to these reasons.

III. ANALYSIS

The Hearing Panel's Jurisdiction on a Sanctions Hearing is Limited

9. Settlements including ASFs play an important and necessary role in facilitating the MFDA's principal goal of protecting the investing public. An administrative tribunal cannot adjudicate every matter that comes before it. Settlements provide an efficient and effective way for the MFDA to proscribe conduct that is harmful to the public, while providing a flexible remedy that can be tailored to address the interests of Staff and respondents:

> But the power to settle, I find, is necessary if the Commission is going to carry out its purpose under s. 4(2) and its enforcement mandate under ss. 161 and 162 in an effective and efficient manner. Administrative tribunals do not and cannot adjudicate on every matter that commences before them.
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> Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to

settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing.

> *British Columbia (Securities Commission) v. Seifert*, 2006 BCSC 174 (BCSC) at paras. 48-49, aff'd, 2007 BCCA 484 at para. 31.

10. Where the parties agree on the facts and sign an ASF but cannot agree on penalty, our role is to determine the correct penalty having regard only to the facts and contraventions contained in the ASF. As the Ontario Securities Commission stated in *Vickers (Re)*, 2015 ONSEC 13 at para. 58:

> In my view, the case law is clear. As stated by the Ontario Superior Court of Justice in McGarrigle, when parties to a disciplinary proceeding have entered into an agreed statement of facts, those are the only facts regarding the alleged improper conduct of the respondent that the panel is allowed to consider. This is entirely appropriate as respondents must know the case they have to meet. Hearing panels, including the Panel, are bound by, and limited to the facts set out in agreed statements of facts which are intended to substantially simplify proceedings by obviating the need for additional evidence.

11. In determining the appropriate sanctions 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. In exercising our discretion, we also considered the protection of the governing bodies membership and the protection of the integrity of the governing body's enforcement processes.

> *Re Parkinson,* [2005] MFDA Case No. 200501

Factors to be Considered to Determine the Appropriate Sanctions

12. We then considered the following factors listed in the MFDA Sanction Guidelines together with the circumstances of this case to determine the appropriate sanctions to be imposed against the Respondent:

a) General and specific deterrence

13. The principles of general and specific deterrence are the foundation of sanctions which are reasonable and proportionate to the misconduct in issue and all the circumstances. General and specific deterrence is of heightened importance in this case because the victim is a vulnerable investor.

14. The MFDA and other securities regulators have declared that protection of vulnerable investors is a key regulatory priority. This includes proactive steps to protect vulnerable investors and risk-based enforcement.

> Over the last several years, the MFDA has implemented several initiatives relating to the protection of seniors and vulnerable clients. These have included i) participating in policy development with the Canadian Securities Administrators on the use of a Trusted Contact Person and Temporary Holds to protect vulnerable clients; ii) organizing educational events providing guidance on protecting and servicing senior clients and iii) implementing a risk-based focus in both Compliance and Enforcement activities on seniors and other vulnerable clients. MFDA will continue its regulatory focus and intends on providing further guidance to Members and Approved Persons to assist them in servicing vulnerable clients.
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> MFDA Bulletin 0855-M, February 24, 2021

15. Client CS, the Respondent's mother was 88 years old, suffering from health problems and grieving the recent loss of her husband when she appointed her son, the Respondent as her power of attorney (POA).

16. The Respondent began financially exploiting Client CS/his mother within four months of his appointment and continued undetected for more than four years. During that time the Respondent borrowed or otherwise obtained money from Client CS/his mother by withdrawing funds from lines of credit that she held with two separate banks and transferring funds from her bank accounts to the Respondent's personal bank account. $21,224 of the funds he withdrew from Client CS/his mother's bank accounts were the proceeds of redemptions of mutual funds that the Respondent facilitated from her investment accounts at the Member.

17. As admitted by the Respondent in the ASF he used the money to support his gambling activities, pay his personal expenses and to otherwise fund his lifestyle. The Respondent submitted some evidence at the hearing that he suffered from mental health issues including depression and a gambling addiction. While mental illness might explain a failure to cooperate with a regulator, it cannot be a defence to borrowing or obtaining money from a client, particularly predatory behaviour targeting a vulnerable client as in this case.

18. The Respondent concealed his actions by failing to comply with the Member's policies and advise the Member that he had been appointed his mother's POA. By failing to do so, the Respondent removed the Member's ability to properly supervise him, implement measures to protect Client CS and address the conflict of interest such as transferring her investment accounts to another representative.

19. The securities industry is taking steps to ensure that vulnerable clients are protected including sanctions that promote general and specific deterrence from engaging in misconduct which causes harm to vulnerable investors.

20. Aging clients can be vulnerable due to declining health, issues of capacity and social isolation. An elderly widow can be particularly vulnerable if she relied on her husband to take care of financial issues and investing.

21. As the Canadian population ages, the number of vulnerable investors is increasing. A 2020 MFDA Client Research Report revealed that 22% of MFDA clients were 65 years of age or older.

> Older clients and clients with limited financial resources can be more likely to display characteristics of vulnerability than other clients. As noted in the 2020 MFDA Client Research Report, 22% of MFDA Member clients were 65 years of age or older. Further, 18% of clients 65 years of age or older had less than $100,000 in financial wealth.
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> 2020 MFDA Client Research Report

22. Although vulnerable investors were once thought to be synonymous with the elderly, securities regulators have recognized various factors can create vulnerability and have adopted a broad and inclusive definition.

23. The Financial Conduct Authority adopted a broad definition of a vulnerable client in their 2021 guidance for firms on the fair treatment of vulnerable customers: "A vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care." See Financial Conduct Authority, 2021, 'Guidance for firms on the fair treatment of vulnerable customers.'

24. On July 31, 2021, the Canadian Securities Administrators (CSA) published final amendments to National Instrument 31-103 (NI 31-103) and its Companion Policy (CP 31-103) to enhance protection of older and vulnerable clients, including enhanced Know Your Client requirements and the introduction of a trusted contact person (TCP). These amendments are to take effect on December 31, 2021. The MFDA and Investment Industry Regulatory Organization of Canada (IIROC) worked with the CSA on these amendments. NI 31-103 defines a vulnerable client as a client "who may have an illness, impairment, disability or aging process limitation that places the client at risk of financial exploitation.

National Instrument 31-103 and Companion Policy 31-103

25. The MFDA has developed a more diverse and inclusive approach to determine whether an investor is vulnerable by identifying factors that may increase client vulnerability including health, life events, resilience, and capability.

> There are some groups of clients who are more likely to display characteristics of vulnerability than others, such as seniors, new immigrants and the unemployed. However, rather than simply looking at demographic groups, a broader look at the factors or drivers that increase the risk of vulnerability may provide a better understanding of vulnerability and the different needs of these investors

26. We determined that in this case because the investor is vulnerable it is essential that the sanctions address general and specific deterrence. To achieve general deterrence and send a clear message to the industry that financially exploiting vulnerable investors will not be tolerated, the fine must disgorge all benefits the Respondent received. To achieve specific deterrence and ensure that the Respondent cannot repeat his behavior, a permanent prohibition is necessary to remove him from the industry.

b) Public confidence

27. The securities industry is based upon public confidence in the trustworthiness and honesty of the individuals and dealers who handle people's savings and are responsible for their financial investments. It goes without saying that abusing a POA to misappropriate a vulnerable client's assets is an investor's worst nightmare. It is essential that the financial services industry maintain public trust and confidence, particularly of the greying population, the vulnerable and their families.

> The penalty must re-affirm public confidence in the system, and to do this it must be seen to act as a general deterrent. Every member acts for highly susceptible investors, and the penalty must be sufficiently severe as to dissuade other members from any temptation to follow the predatory practices engaged in by [the respondent]. Moreover, the public is entitled to be protected from any further predatory activities by him.
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> *Re Brown-John*, 2005 CanLii 77709 at p. 5

c) The seriousness of the allegations proved against the Respondent

28. The allegations against the Respondent are very serious. Simply put – he took money from his client/mother. His misconduct is egregious because she is a vulnerable client. He failed to disclose to the Member that he had accepted an appointment as a POA for his client/mother thereby shrouding his misconduct.

29. The Respondent breached his Approved Person, son/mother, POA, trust relationships. He financially exploited his client/mother by redeeming some of her investments without her written authorization and withdrawing funds from her bank accounts and lines of credit without her permission.

30. Borrowing or obtaining monies from clients was prohibited by the Member's Policies and Procedures. Such conduct violates the fundamental principles which underpin the Approved Person/Client Relationship and is a significant and direct conflict of interest.

31. The Respondent abused his unique position as her advisor/son/POA and the insights he gained because of those trust relationships: awareness of her vulnerability, complete knowledge of her investments and full access to her accounts.

32. He failed to maintain a record of the monies he had taken or any arrangements with his mother, including evidence that any arrangement was authorized by her. He also misled the member about his personal dealings with his client/mother.

33. The Respondent's misconduct is very serious and is a blight on the reputation of the mutual fund industry.

d) Whether the Respondent recognizes the seriousness of the misconduct.

34. The Respondent accepted responsibility for his actions. He admitted his misconduct and entered into the ASF saving the MFDA the time and expense of a hearing on the merits. Significantly he also agreed to a permanent prohibition.

e) The benefits received by the Respondent as a result of the misconduct

35. The Respondent financially benefitted by approximately $122,000. He withdrew a total of $149,358 from his client/mother's accounts but repaid $54,358. His client/mother also accrued interest on her lines of credit, which as of January 2020 totaled approximately $27,000.

f) The harm suffered by investors because of the Respondent's misconduct.

36. The Respondent's client/mother suffered a corresponding loss of $149,358. She also lost the opportunity to invest that money and earn a return on it. She was repaid $54,358. In addition, to the losses from her investment funds, she also accrued $27,000 interest on her lines of credit as discussed above.

g) The Respondent's past conduct, including prior sanctions.

37. The Respondent had approximately 20 years' experience at the time of his misconduct. He was aware that he must not borrow money from clients. The Respondent has not been the subject of client complaints or any prior disciplinary actions. In some cases, a prior disciplinary history can be an aggravating factor or the absence of one a mitigating factor. In this case, it is a neutral

factor. The Respondent was experienced and knew better. The egregious nature of his misconduct outweighs the fact that he has not been the subject of any prior disciplinary action.

h) Previous decisions made in similar circumstances.

38. Staff provided several MFDA decisions which addressed similar misconduct. None of these cases was precisely on point, however the *Ryan Re* case had several similarities. *Ryan Re* is a ten-year-old decision. It also concerned an elderly client (now defined as a vulnerable client) and the abuse of a POA. Mr. Ryan obtained a smaller benefit of $72,000 compared to Mr. Smith's larger benefit of $122,000. Unlike Mr. Smith, however, Mr. Ryan did not cooperate with Staff or enter into an ASF. He did not even appear at his hearing. Mr. Ryan received a permanent prohibition, a fine of $100,000 and costs of $7,500. Based on a review of these cases and taking into consideration the factors discussed above, we are satisfied the sanctions that we have determined fall within a reasonable range of appropriateness.

i) For multiple violations, the total or cumulative sanction should appropriately reflect the totality of the misconduct.

39. The Respondent admitted to four contraventions. The Hearing Panel is satisfied that the total sanctions appropriately reflect the totality of the misconduct.

j) Ability to pay is a consideration when imposing an appropriate monetary sanction.

40. At the Hearing, the Respondent submitted evidence of his inability to pay. He also submitted that his future earning potential is curtailed because he is 67 years old, has heart issues, lost his job and with the permanent prohibition that will be imposed upon him, his ability to get another job in his field. The Hearing Panel was persuaded that the Respondent has a *bona fide* inability to pay.

41. However, for the reasons discussed above including the principles of general and specific deterrence the Respondent cannot retain the financial benefit from his egregious misconduct.

k) **Whether the Respondent made voluntary acts of compensation, restitution, or disgorgement to remedy the misconduct**

42. The Respondent has repaid approximately $54,358 of the total amount of $149,358 that he withdrew from his mother's accounts while acting as her POA. He has not paid to or otherwise reimbursed his mother the interest accrued on her lines of credit, which as of January 2020 totaled approximately $27,000.

l) The Respondent's proactive and exceptional assistance to the MFDA

43. As discussed above, the Respondent cooperated with the MFDA. He admitted his misconduct and the allegations against him and entered into an ASF. His cooperation after his misconduct was discovered cannot negate the need for substantial sanctions which reflect the gravity of his misconduct.

MFDA Sanction Guidelines

Costs

44. The costs award is appropriate and consistent with previous MFDA decisions involving cases that proceeded by way of an ASF.

IV. CONCLUSION

45. We are of the view that the sanctions, including a permanent prohibition of the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with a Member of the MFDA, the $140,000 fine and $5,000 in costs will serve as a specific deterrence to the Respondent, Mr. Smith, and as general deterrence to others in the industry who may contemplate financially exploiting vulnerable clients in the future.

DATED this 24th day of September, 2021.

"Emily Cole"
Emily Cole
Chair

"Cheryl Hamilton"
Cheryl Hamilton
Industry Representative

"Robert White"
Robert White
Industry Representative

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: Mark Allen Smith

AGREED STATEMENT OF FACTS

I. INTRODUCTION

1. By Notice of Hearing issued January 7, 2021, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced a disciplinary proceeding against Mark Allen Smith (the "Respondent") pursuant to sections 20 and 24 of MFDA By-law No. 1, alleging:

> **Allegation #1**: Between May 27, 2012 and November 12, 2018, the Respondent accepted and acted upon a power of attorney from a related client without notifying the Member and transferring the accounts to another Approved Person in accordance with the Member's requirements, contrary to the Member's policies and procedures and MFDA Rules 2.3.1[1], 1.1.2, 2.5.1, and 2.1.1.
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> **Allegation #2**: Between September 2012 and November 12, 2018, the Respondent engaged in personal financial dealings with a related client when he acted upon a power of attorney to borrow or otherwise obtain monies from the client's accounts, thereby giving rise to a conflict or potential conflict of interest which the Respondent failed to disclose to the Member, or otherwise address by the exercise of responsible business judgment influenced

[1] MFDA Rule 2.3.1 was amended effective July 19, 2017. The Respondent's conduct contravened the Rule as it existed both prior to and after the amendment.

only by the best interests of the client, contrary to the Member's policies and procedures, and MFDA Rules 2.1.4, 2.3.1[2], 2.5.1, and 2.1.1.

Allegation #3: Between 2013 and November 12, 2018, the Respondent provided false or misleading responses to the Member on annual compliance questionnaires relating to accepting a power of attorney or borrowing monies from a related client, contrary to MFDA Rule 2.1.1.

Allegation #4: In or about March 2016, the Respondent failed to notify the Member within two business days that he had made an arrangement with his creditors, contrary to the Member's policies and procedures, section 4.1(g) of MFDA Policy No. 6, and MFDA Rules 1.2.2(b) [3] [now Rule 1.4], 2.1.1, 2.5.1, and 1.1.2.

II. IN PUBLIC / IN CAMERA

2. The Respondent and Staff of the MFDA ("**Staff**") agree that this matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

3. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to section 24.1 of MFDA By-law No. 1.

4. Subject to the determination of the Hearing Panel, Staff submits, and the Respondent does not oppose, that the appropriate penalty to impose on the Respondent include a permanent prohibition on the Respondent's authority to act and be registered as a mutual fund salesperson (now known as a dealing representative), pursuant to section 24.1(e) of By-law No. 1.

5. Staff and the Respondent however disagree on the quantum of financial penalties, including fines and costs, to be imposed on the Respondent pursuant to sections 24.1.1(b) and 24.2 of MFDA By-law No. 1. Staff seeks an order imposing fine and costs on the Respondent. The Respondent opposes the imposition of any fine and costs to be requested by Staff.

[2] See Note 1.
[3] On March 17, 2016, MFDA Rule 1.2.2(b) was renumbered to MFDA Rule 1.4(b). The content of the Rule did not change.

6. Staff and the Respondent therefore request that the Hearing Panel determine the appropriate of quantum of fines and costs to be ordered against the Respondent, if any

IV. AGREED FACTS

7. Staff and the Respondent agree that submissions made with respect to the appropriate penalty should be based only on the agreed facts in Part IV, and no other information or documents, subject to the content of this paragraph and paragraph 8 below.

8. In the event that the Hearing Panel advises one or both of Staff and the Respondent of any additional facts that it considers necessary in order to determine the issues before it, Staff and the Respondent agree that such additional facts may be provided to the Hearing Panel, either: (a) with the consent of both Staff and the Respondent if the additional facts are agreed upon; (b) if the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel; or (c) if the parties are both present at the hearing and are not in agreement about the additional facts requested by the Hearing Panel, the parties will be given a reasonable opportunity to lead evidence concerning the additional facts. In circumstances where a party leads evidence concerning additional facts requested by the Hearing Panel, the opposing party may cross-examine any witness tendered to lead such evidence and shall be given a reasonable opportunity to lead responding evidence if they wish to do so.

9. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

10. Commencing in April 1993, the Respondent was registered in the securities industry.

11. Between April 1, 1993 and November 12, 2018, the Respondent was registered in Ontario as a dealing representative with Investors Group Financial Services Inc. (the "Member")[4], a Member of the MFDA.

12. On November 12, 2018, the Member terminated the Respondent as a result of the matters described herein.

[4] Since February 8, 2002, Investors Group has been a Member of the MFDA.

13. At all material times, the Respondent conducted business from a branch office of the Member located in Toronto, Ontario.

Contravention #1 – The Respondent Failed to Notify the Member that he Accepted a Power of Attorney for a Related Client and Continued to Service the Client's Accounts

14. At all material times, the Member's policies and procedures permitted its Approved Persons to accept appointments as Power of Attorney ("POA") for their immediate family members, including parents, subject to the following conditions:

a) the Approved Persons was required to give written notification to the Member's compliance department of such appointment; and
b) all accounts held with the Member by such family members had to be transferred to and serviced by a different Approved Person of the Member.

15. Client CS is the mother of the Respondent. At all material times, client CS was a client of the Member whose accounts were serviced by the Respondent.

16. On May 27, 2012, shortly after client CS's husband passed away, the Respondent was appointed by client CS as her continuing POA for property.

17. At this time, the Respondent's mother was 88 years of age and suffered from health problems. Client CS was a vulnerable client.

18. The Respondent failed to notify the Member that he had been appointed as POA for client CS in accordance with the Member's requirements.

19. The Respondent also continued to service client CS's accounts at the Member while appointed as her POA. The investment accounts of client CS were not transferred to a different Approved Person in accordance with the Member's requirements.

20. As described below, the Respondent acted on the POA to borrow or otherwise obtain monies from client CS's account for his personal use.

Contravention #2 – The Respondent Engaged in Personal Financial Dealings with a Client

21. At all material times, the Member's policies and procedures prohibited its Approved Persons from borrowing monies from a client under any circumstances.

22. From September 2012 until December 2016, the Respondent acted on the POA from client CS to borrow or otherwise obtain for his personal use at least $149,358 from accounts of client CS. In particular:

a) between September 2012 and December 2016, the Respondent withdrew at least $95,000 from lines of credit that client CS held with two separate banks; and

b) between January 2015 and December 2016, the Respondent withdrew at least $52,481 by processing 22 separate transactions from bank accounts of client CS and transferred the proceeds to the Respondent's personal bank account.

23. As at January 2020 interest of approximately $27,000 had accrued on the $95,000 that the Respondent withdrew from lines of credit of client CS.

24. Approximately $21,224 of the $52,481 that the Respondent withdrew from bank accounts of client CS described above, were the proceeds of redemptions of mutual funds that the Respondent facilitated from client CS's investment accounts at the Member.

25. The Respondent used the monies taken from client CS to support his gambling activities, pay his personal expenses and to otherwise fund his lifestyle.

26. To date, the Respondent has repaid only approximately $54,358 of the total amount of $149,358 that he withdrew from accounts of client CS while acting as her POA. He has not paid to or otherwise reimbursed client CS the interest accrued on her lines of credit.

27. The Respondent failed to maintain a record of any borrowing or other arrangements with client CS, including evidence that any arrangement was authorized by client CS.

28. The Respondent failed to disclose to the Member that he borrowed or otherwise obtained any monies from client CS as described above. This conduct gave rise to a conflict or potential conflict of interest that the Respondent was required to disclose to the Member and, together with the Member, to address by the exercise of responsible judgment influenced only by the best interests of the client.

Contravention #3 – The Respondent Misled the Member on Annual Compliance Questionnaires

29. Between 2013 and 2018, each year the Respondent submitted responses to annual compliance questionnaires from the Member.

30. Among other things, the compliance questionnaires required the Respondent to advise:

a) whether he held a POA for clients, including his spouse, parent or child; and

b) whether he had borrowed money from a client.

31. Between 2013 and 2018, the Respondent denied on each annual compliance questionnaire:

a) that he held a POA in favour of a client; and

b) that he had borrowed money from a client.

32. The responses of the Respondent described in paragraph 31 above were false or misleading.

33. The Respondent's false and misleading answers to the Member's annual compliance questionnaires interfered with the Member's ability to supervise his conduct.

Contravention #4 – The Respondent Failed to Report to the Member that he had Arrangements with his Creditors

34. At all material times, the Member's policies and procedures required its Approved Persons to notify the Member within two business days if an Approved Person becomes bankrupt or suspends payment of debts generally or makes an arrangement with creditors or makes an assignment or is deemed insolvent.

35. On March 15, 2016, the Respondent filed a Consumer Proposal pursuant to the *Bankruptcy and Insolvency Act* (Canada) which proposed an arrangement with his creditors for the payment of his personal debts (the "Consumer Proposal").

36. The Respondent failed to disclose to the Member that he made the Consumer Proposal within two business days, as required.

37. In October 2018, the Respondent disclosed to the Member his Consumer Proposal from 2016 in response to a request by the Member after it commenced an investigation into the conduct described above with respect to Allegations #1 and #2.

Misconduct Admitted

38. By engaging in the conduct described above, the Respondent admits that:

a) between May 27, 2012 and November 12, 2018, he accepted and acted upon a power of attorney from a related client (his mother) without notifying the Member and transferring the accounts to another Approved Person in accordance with the Member's requirements, contrary to the Member's policies and procedures and MFDA Rules 2.3.1[5], 1.1.2, 2.5.1, and 2.1.1;

b) between September 2012 and November 12, 2018, he engaged in personal financial dealings with a related client (his mother) when he acted upon a power of attorney to borrow or otherwise obtain monies from the client's accounts, thereby giving rise to a conflict or potential conflict of interest which the Respondent failed to disclose to the Member, or otherwise address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the Member's policies and procedures, and MFDA Rules 2.1.4, 2.3.1[6], 2.5.1, and 2.1.1;

c) between 2013 and November 12, 2018, he provided false or misleading responses to the Member on annual compliance questionnaires relating to accepting a power of attorney or borrowing monies from a related client, contrary to MFDA Rule 2.1.1; and

d) in or about March 2016, he failed to notify the Member within two business days that he had made an arrangement with his creditors, contrary to the Member's policies and procedures, section 4.1(g) of MFDA Policy No. 6, and MFDA Rules 1.2.2(b) [7] [now Rule 1.4], 2.1.1, 2.5.1, and 1.1.2.

Additional Factors

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

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

41. The Respondent claims to be impecunious. As described above, in March 2016 the Respondent entered into the Consumer Proposal, which his creditors accepted. He also has an

[5] See Note 1.
[6] See Note 1.
[7] On March 17, 2016, MFDA Rule 1.2.2(b) was renumbered to MFDA Rule 1.4(b). The content of the Rule did not change.

agreement with the Canada Revenue Agency to pay unpaid taxes. The Respondent therefore states that he is unable to pay any amount towards either a fine or costs.

42. Pursuant to the Consumer Proposal, the Respondent is required to make monthly payments of $800 to the administrator of the Proposal, to a required total of $48,000 after 60 months.

43. As of the date of this Agreed Statement of Facts, the Respondent owes unpaid taxes in the amount of $41,454.86 to the Canada Revenue Agency. This tax liability is not part of the Consumer Proposal.

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

Execution of Agreed Statement of Facts

45. This Agreed Statement of Facts may be signed in one or more counterparts, which together, shall constitute a binding agreement.

46. A facsimile copy of any signature shall be effective as an original signature.

DATED this 22nd day of March, 2021.

"Mark Allen Smith"
Mark Allen Smith

"Charles Toth"
Staff of the MFDA
Per: Charles Toth
Vice-President, Enforcement

DM 840543