Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

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: Clinton Wayne

Heard: May 15-16-17, 2017, August 16, 2017 and April 30, 2018 in Toronto, Ontario
Reasons for Decision: June 13, 2018

REASONS FOR DECISION (MISCONDUCT)

Hearing Panel of the Central Regional Council:

Frederick H. Webber	Chair
Brigitte J. Geisler	Industry Representative
Guenther W.K. Kleberg	Industry Representative

Appearances:

Maria Abate Shelly Feld	))	Counsel for the Mutual Fund Dealers Association of Canada
Thomas Mathews	)	Counsel for the Respondent
Clinton Wayne	)	Respondent

A. Case History

1. This case was commenced by a Notice of Hearing dated May 20, 2015 ("NOH"). Clinton Wayne ("Respondent") provided an undated written Response in June 2015 ("Response"). There were various adjournments of the hearing and a hearing of a procedural motion by the Respondent which was dismissed by this Hearing Panel by Order dated January 13, 2017. The matter was heard on May15, 16 and 17, 2017 and written submissions on misconduct were provided to the panel by the MFDA and the Respondent. An oral hearing on misconduct took place on August 16, 2017. At that hearing, a number of issues were raised by the Hearing Panel for MFDA counsel which required further submissions. The hearing was adjourned (*sine die*) on consent to give MFDA counsel an opportunity to address the issues raised. A date of April 30, 2018 was set to deal with the additional issues. By emails dated April 19 and April 29, 2018, the Respondent advised the MFDA that he was no longer represented by Mr. Thomas Mathews and would not attend the hearing on April 30, 2018. The hearing proceeded on April 30, 2018. The panel delivered its decision orally, finding Allegations 1, 3 and 4 in the NOH had been proven by the MFDA, but Allegation 2 had not been proven.

B. Allegations

2. The following are the allegations against the Respondent:

Allegation #1: Between November 2011 and April 2014, the Respondent had and continued in another gainful occupation that was not disclosed to or approved by the Member by:

a) acting as an officer and director of a real estate investment development corporation
b) soliciting and arranging for clients and other individuals to invest in, or loan monies to, the real estate development corporation;
c) personally borrowing monies from clients which the Respondent used to invest in the real estate development corporation; and

d) receiving referral fees and other payments in respect of the monies invested in, or loaned to, the real estate development corporation by the clients and other individuals,

contrary to MFDA Rules 1.2.1(c) (formerly, MFDA Rule 1.2.1(d)), 2.1.4, 2.4.2, 2.1.1, and sections 13.7 and 13.8 of National Instrument 31-103.

Allegation #2: Between November 2011 and April 2014, the Respondent engaged in personal financial dealings with clients by personally borrowing monies from clients and failing to repay the clients, thereby giving rise to a conflict or potential conflict of interest between the Respondent and the clients, which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation #3: Between June 2012 and April 2014, the Respondent issued advertisements or sales communications, which had not been reviewed and approved by the Member, contrary to MFDA Rule 2.7.3.

Allegation #4: Commencing March 4, 2013, the Respondent failed to comply with his reporting obligations to the Member by failing to report that he had been named a defendant in a civil claim related to the real estate investment development corporation, contrary to MFDA Rule 1.2.2(b), and subsections 4.1(b)(i) and (iv) of MFDA Policy No. 6.

C. Allegation #1

3. The panel raised a number of issues with MFDA's submissions regarding this allegation. The MFDA addressed these issues in their Supplementary Submissions dated March 28, 2018 and orally at the hearing on April 30, 2018.

Rules alleged to be contravened

4. The MFDA alleged that the conduct described in Allegation 1 contravened Rules 1.2.1(c), 2.1.4, 2.4.2, 2.1.1 and sections 13.7 and 13.8 of National Instrument 31-103. In its written submissions, the MFDA characterized the panel's position as requiring the contravention of all of the Rules alleged to have been contravened. That was inaccurate. The panel's position was that misconduct by the Respondent could only be found under whichever one or more of those Rules that the MFDA could prove misconduct, but the MFDA did not have to prove misconduct under all the rules named. The panel questioned whether the conduct described in Allegation 1 could contravene every one of these Rules. In the panel's view, Allegation 1 dealt only with the Respondent having an undisclosed outside gainful occupation; Rule 1.2.1(c) dealt specifically with outside gainful employment and Rule 2.1.1 dealt more generally with fair dealing and conduct unbecoming or detrimental to the public interest. Therefore Rules 1.2.1(c) and 2.1.1 could apply. However, Rule 2.1.4 dealt with conflicts of interest and Rule 2.4.2 and NI 31-103 dealt with referral fees and could not apply to the allegation.

5. MFDA counsel took the position that subparagraphs (b) and (c) dealt with the Respondent borrowing from clients and/or having them invest in his real estate company and that this was also referred to in detail in the particulars of the NOH; therefore the Respondent had adequate notice that this would be an issue, the NOH complied with the requirements of procedural fairness and therefore Rule 2.1.4 refers back to the conduct described in subparagraphs (b) and (c), which, if proven, would contravene that Rule.

6. MFDA counsel also took the position that outside gainful employment gives rise to potential (emphasis added) conflicts of interest, and therefore Rule 2.1.4 applies. That may be true, but Rule 1.2.1(c) does not say that outside gainful employment necessarily gives rise to a conflict of interest. In fact it allows outside gainful employment if certain conditions are met. Furthermore the conflict of interest under Rule 2.1.4 must be a conflict with the Approved Person's clients. Having an outside gainful employment does not, by itself, create a conflict of interest with the clients.

7. MFDA's Staff Notice (MSN-0040), referred to in the MFDA supplementary submissions states that:

> "an outside business activity may also (emphasis added):
>
> a) give rise to conflicts of interest… to be addressed in compliance with Rule 2.1.4;
>
> b) result in referral fees which must comply with Rule 2.4.2…."

This confirms the panel's conclusion that conflicts of interest and referral fees may result from an outside business activity ("outside gainful employment" in the words of the Rule) but must be dealt with by separate allegations of non-compliance with Rules 2.1.4 and 2.4.2, and not under Rule 1.2.1(c) or 2.1.1.

8. It is clear that MFDA's position was that it was the loans to, or investments in, the Respondent's real estate company alone that gave rise to the conflict, not the establishment and operation of a real estate company.

For example, paragraph 25 of MFDA's Supplementary Submissions, states

> "… the potential for conflicts of interest arise when an Approved Person engages in an outside business activity….In the present case, the Respondent's solicitation of client money…to loans to his unapproved outside business gives rise to a conflict of interest…."

Paragraph 26 of MFDA's Supplementary Submissions state that:

> "When there is evidence that an Approved Person engaged in an outside activity…Staff typically alleges that the Approved Person contravened Rule 1.3, formerly Rule 1.2.1…"

There is no mention of Rule 2.1.4.

Paragraph 34 of the MFDA Supplementary Submissions outlines the Respondent's conduct in relation to the redemption of client mutual funds, the redemption fees incurred and the investment

of those funds in the Respondent's company as giving rise to a conflict of interest which was not in compliance with Rule 2.1.4.

9. Similarly, MFDA counsel took the position that subparagraph (d) dealt with referral fees received by the Respondent in connection with his real estate company, that these are also described in the particulars, the NOH satisfies procedural fairness requirements and therefore Rule 2.4.2 and NI 31-103 refer back to the conduct described in subparagraph (d), which, if proven, would contravene that Rule and NI 31-103.

10. The panel was not persuaded by MFDA counsel's arguments and its decision is that, because of the manner in which Allegation 1 is worded, the only misconduct alleged is "undisclosed outside gainful occupation". The conduct described in paragraphs (a), (b), (c) and (d) are simply factual particulars regarding the Respondent's carrying on his outside gainful employment and are not separate allegations. The wording structure of Allegation 1 is:

> "…the Respondent had…another gainful occupation…by
> (a), (b), (c) and (d)…" (emphasis added)

By using the word "by" it is clear to the panel that paragraphs (a), (b), (c) and (d) were factual particulars of the outside gainful employment which is the only misconduct alleged in Allegation 1. That conduct is not within the ambit of Rule 2.1.4 or Rule 2.4.2 (and NI 31-103) as described in Allegation 1.

11. The panel's issue is the wording of Allegation 1. The panel is not saying that the conduct described in subparagraphs (b) and (c) does not contravene Rule 2.1.4, but simply that it should have been the subject of a separate allegation. In fact, Allegation 2 describes the same conduct, for which the Respondent could be found liable, if proven. We deal with Allegation 2 in paragraphs 48 to 56 below.

12. Similarly the panel is not saying that the receipt of referral fees described in subparagraph (d) does not contravene Rule 2.4.2, only that the wording of Allegation 1 does not capture the

receipt of referral fees; that must be the subject of a separate allegation. However, in this case, there is no separate allegation regarding the receipt by the Respondent of referral fees and therefore there is no contravention of Rule 2.4.2. If there had been a separate allegation, the Respondent would likely have been found in contravention of Rule 2.4.2, because it was clear in the evidence that he did receive the referral fees.

13. The panel is also of the opinion that the undisclosed outside gainful employment activity in Allegation 1 could be misconduct under Rule 2.1.1, if proven.

14. MFDA counsel cited several cases in support of its position that reading the NOH as a whole, Allegation 1 is sufficiently worded to cover the Respondent's conduct under all four rules cited. The panel does not dispute the general proposition that the MFDA is not confined to the precise wording of the allegation, but may rely on the wording of the NOH as a whole. But that proposition is relevant only to determine whether the Respondent has been given reasonable notice of the case he must meet, i.e. whether the requirements of procedural fairness have been met. The MFDA must still prove the allegations which it makes. It is the panel's decision that, because of the way Allegation 1 is worded, it only makes one allegation, viz. undisclosed outside gainful employment which can be judged only by Rule 1.2.1(c), and Rule 2.1.1.

15. MFDA counsel cited the case of *Re Abate*, 2015 LNCMFDA 101 [*Abate*]. As stated in the MFDA supplementary submissions, *Abate* rejected the respondent's argument that the panel in that case was confined to the "narrow wording" of the allegations alone as expressed in the allegations section of the NOH, and adopted the wording from *Re Blackmont Capital Inc. et al* 2011 LNBCSC 411 [*Blackmont*] "that it is the notice of hearing as a whole, not the 'count' or the charging paragraphs viewed in isolation, which identifies the alleged misconduct that the respondent has to meet…." As stated in paragraph 14 above, this panel agrees with that principle. However, the MFDA must then prove that the allegations plus the particulars related thereto, read as a whole, constitute misconduct which is within the wording of the rule cited as capturing the misconduct.

16. MFDA counsel also stated that in *Abate* "the Panel made findings of misconduct…even though it concluded that both allegations as articulated in the 'allegations section' of the NOH were 'unproved'". In fact the panel in *Abate* stated that the two allegations "considered alone" were unproved, but that paragraphs 24 and 28 of the NOH brought forward the facts which filled in the details missing from the narrow wording of the allegations. It found that the conduct described in the NOH as a whole was capable of violating the rules cited, and in fact did so.

17. The panel in *Abate* also stated:

> "…this does not mean that this panel has jurisdiction to impose a penalty for…a contravention of any…MFDA by-law, rule, or policy based on an alleged fact that has been proved, if the particular provision and Staff's conclusion (i.e. accusation or allegation) of contravention of it is not set out in the NOH." (paragraph 71)
>
> "…panels have held that the actual wording of the allegations define the meaning of the allegations made and define the nature of the case that a respondent must meet. *Myatovic, Re* 2012 IIROC 47 at para 47; *Castonguay, Re,* 2012 IIROC 76 at para 36; *Blackmont Capital Inc. et al*, Re, 2011 BCSCCOM 490 at para 24." (paragraph 72) and
>
> "We consider that the words 'and the conclusions drawn by the Corporation based on the alleged facts' in section 20.1.1 of MFDA By-law No. 1, require a conclusion of a contravention of a provision of a rule, policy or standard of conduct cited in the conclusion, for the panel to have jurisdiction to impose a penalty." (paragraph 85)

18. In the *Blackmont* case, the panel found, in paragraphs 22, 24 and 25:

> "22. There is an obvious discrepancy between the language in Count 1… and the language in Rule 29.6. The allegation… is that the respondents' failure to disclose to the banks the details and existence of the commission-sharing arrangement… was a contravention of Rules 29.6 and 29.1. Yet, as far as Rule 29.6 is concerned, that rule says nothing about disclosure. It requires nothing other than the obtaining of consent."
>
> "24. A notice of hearing is the foundation of hearings before IIROC panels and this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the notice of hearing…"

> "25. It follows that the IIROC hearing panel did not have jurisdiction to make a finding that the respondents contravened Rule 29.6 because the notice of hearing did not allege misconduct that would constitute a contravention of that Rule…"

19. This panel acknowledges the MFDA's position that, unlike *Blackmont*, Allegation 1 does mention conduct which is described in Rules 2.1.4 and 2.4.2. However, as stated above, it is this panel's decision that the conduct so described are only a factual particulars of Allegation 1 and Allegation 1 only deals with undisclosed outside gainful employment. Therefore as stated in *Blackmont*, Allegation 1 did not allege misconduct which would constitute a contravention of Rules 2.1.4 or 2.4.2.

20. *Blackmont* was also cited in *Re Russell Chang*, 2015 MFDA No. 201431 [*Chang*] for its conclusion that "the MFDA could not seek a finding that the Respondent had breached the policies of Investia as he was not so charged."

21. These cases support the decision of this panel that Allegation 1 as worded and read in the context of the whole NOH, only deals with undisclosed outside gainful employment to be judged under Rule 1.2.1(c) and 2.1.1 The facts stated in paragraphs (b) and (c) of Allegation 1 can only be dealt with under Allegation 2, and the facts stated in paragraph (d) are not the subject of any allegation.

Facts which MFDA must prove under Allegation #1

22. Paragraphs (a), (b), (c) and (d) are connected by the word "and", giving rise to the question whether MFDA must prove all of the facts listed in those paragraphs or may they still succeed if only some of those facts are proven. Should "and" be read conjunctively or disjunctively?

23. MFDA's position is that, reading the NOH as a whole, if the panel is satisfied that <u>any</u> facts or conclusions stated in the NOH constitute misconduct under the rules as alleged, it has jurisdiction to impose penalties under s. 24 of MFDA By-law No.1. MFDA does not have to prove <u>all</u> of the facts or conclusion stated in the NOH for the panel to find misconduct. Therefore "Staff

is not required to prove each of the particulars described in subparagraphs (a) to (d) in Allegation 1 in order for the Panel to make a finding of misconduct."

24. The MFDA supplementary submission cites the *Abate* case for the proposition that Allegation 1 gives clear notice to the Respondent of the matters stated in subparagraphs (a) to (d) and that the Respondent:

> "failed to comply with his regulatory obligations. Whether or not the Panel finds that Staff proved alleged violations exactly on the grounds and to the extent that the allegations were pleaded, what is certain is that the Respondent knew the case he had to meet and was able to fully and adequately prepare to respond to the NOH."

25. The panel does not agree with the MFDA's position regarding *Abate*. *Abate* only dealt with whether the form and content of the NOH complied with s. 24 of MFDA By-law No.1 and the requirements of natural justice. It concluded that the MFDA was not confined to the narrow wording of the allegations; rather the allegations and the particulars in the NOH must be read as a whole to determine if the NOH complied with the MFDA By-law and the requirements of natural justice. As noted in paragraph 17 above, *Abate* required that the allegations contained in the NOH must be proven by the facts stated in the NOH. It did not deal with whether proof of some or all of those stated facts was sufficient to prove the allegations.

26. Of greater help in answering the question of which facts need be proven is *Re Ironside*, 2006 ABASC 1930 [*Ironside*]. It was stated "…However, the Commission's public interest jurisdiction does not require that particulars… in [disciplinary hearings] be treated like counts in a criminal indictment. Therefore Staff need not prove each and every particular cited in order to prove the allegation." To the same effect is *Re YBM Magnex Inc*., 2000 LNONOSC 830.

27. This case and others cited to the panel also confirm that factual particulars need not be specifically contained in the allegations or the statement of particulars. Facts which arise in testimony, may be used to prove an allegation if they are sufficiently connected to the allegations so as to satisfy the principle of adequate disclose of the case the respondent must meet. See *Re*

Trend Capital Services Inc. et al, 1992 LNONOSC 77; *Bartel v. Manitoba (Securities Commission),* [2003] M.J. No. 53; *Taylor v. Ontario (Securities Commission),* [2013] O.J. 4988.

28. This panel agrees with the statement quoted in paragraph 26 from *Ironside*, but notes that it only concludes that not all the particulars must be proven; it does not state which of all those particulars must be proven, in order to prove the allegation.

29. The cases of *Law Society of British Columbia v. Lawyer 11*, [2009] L.S.D.D. No. 96 [*Lawyer 11*] and *Scaplen v. New Brunswick Real Estate Association*, 2007 NBQB 45 [*Scaplen*], both cited to the panel by the MFDA in support of its position, are instructive.

30. In *Lawyer 11*, the allegation in issue was the respondent's conduct:

> "in participating in a scheme or design to misrepresent the expenses or liabilities of the P and/or K Hotel businesses by:
>
> (a) Providing false or misleading information to the [court] on the Rowbotham application…, and for the purpose of misrepresenting the value of his assets, by claiming the existence of previously undisclosed liabilities…." (emphasis added)

The question on which counsel were asked to make submissions was:

> "In respect of allegation numbered 2(a), must the Law Society prove that the Respondent participated in a scheme or design to misrepresent the PE and/or K Ltd expenses by both:
>
> 1. providing false or misleading information; and
> 2. claiming previously undisclosed liabilities?"

Counsel for the Respondent argued that Allegation 2(a) has distinct interrelated elements, all of which go toward the allegation claimed, which cannot be read in a disjunctive manner. Counsel for the Law Society's position was that " a finding that the Respondent was involved in a scheme or design to misrepresent the assets and expenses of PE and/or K Ltd can be made out either by establishing that the Respondent provided false or misleading information or by his claiming of previously undisclosed assets, or both."

Referring to the Law Society's position, the panel stated that the issue was whether such an interpretation can be supported with due regard to the drafting principles and interpretive framework that govern [allegations]. The panel referred to *Brendzan v. Law Society of Alberta*, [1997] AJ No. 680 and *R. Sault St. Marie (1975),* 3 CR (3d) 30, and concluded that the allegation plus the particulars thereof need only give respondent sufficient notice of the case which he will be required to meet, viz., meet the rules of *audi alteram partem*. The panel applied those principles to Allegation 2(a) and agreed with the Law Society's position that the particulars could be read disjunctively.

31. In *Scaplen*, the allegation was that Scaplen…

> "failed to comply with article 23 of [the Code], in particular, failing to respect the contractual relationship of the Complainants and in failing to negotiate a purchase of the property…" [emphasis added]

Counsel for Scaplen argued that the "and" was conjunctive and the Association had to prove both elements for a finding of misconduct. The disciplinary panel disagreed, concluding that a finding of misconduct could occur if either of these two elements were proved. The decision was upheld on appeal where, in dealing with the use of "and" as a conjunctive, the court stated:

> "…While the respondent, in providing particulars to Mr. Scaplen, used the conjunctive 'and' rather than a disjunctive term … Mr. Scaplen was not denied a fair hearing as a result."

and

> "Furthermore, what is important about the particulars…is not how they are worded but that they identify the standard that the member is alleged to have breached…"

32. While "and" would normally be read conjunctively, these cases make it clear that reading "and" disjunctively depends on the wording of the particulars, given the requirements of *audi alteram partem*, but that "and" may be read disjunctively so long as those requirements are satisfied.

33. In addition, those cases dealt only with the particulars and did not deal with the use of "and" in the base allegation. Those cases still required that the base allegation must be proven, and must be proven so as to come within the wording of the particular rule alleged to have been breached. This is further clarified at paragraph 63 of the *Lawyer 11* case where the Law Society's submission is quoted as follows

> "The question posed by the Panel…posits two alternative interpretations of Count 2(a)….However, both alternatives incorporate the express essential element of the count that the member 'participated in a scheme or design to misrepresent the PE and/or K Ltd expenses or liabilities.' The Law Society, of course, accepts that this must be found by the Panel to have taken place in order for Count 2(a) to be made out."

This panel will return to these issues in part D below.

34. These cases support the conclusion of this panel that the particulars as they are worded in subparagraphs (a), (b), (c) and (d) can be, and should be, read disjunctively as stated by MFDA counsel. They are further detailed in the particulars portion of the NOH. If any one of these subparagraphs were not proven, the others would remain; also sufficient additional particulars of the alleged misconduct are contained in the NOH. For example there is ample reference to the incorporation of the Respondent's real estate company and its pursuit of property investments.

35. This leaves the question of what the MFDA must prove in relation to Allegation 1 to give the panel jurisdiction to impose sanctions. The principles of natural justice or *audi alteram partem* require that the NOH, read as a whole, give the Respondent notice of the case he will be required to meet. That case is set out in the allegations and even though all the particulars need not be proven, the essential elements of the base allegation itself must be proven and they must be proven so as to be captured by the rule alleged to have been breached; and even if some misconduct may be proven, it must be the misconduct which is stated in the allegation. These conclusions are based on the cases cited to this panel by the MFDA and referred to above, *Abate, Blackmon, Chang, Bartel, Ironside, Lawyer 11* and *Scaplen.*

36. A number of the cases cited to this panel by MFDA counsel state that the allegation of professional misconduct need not have the precision required in a criminal prosecution. This panel agrees with that statement. But the cases also state that, even though the precision of a criminal proceeding is not required, the allegation must allege conduct, which if proved could amount to professional misconduct. For example, in *Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 O.R. (2d) 73, the court stated:

> "In cases of this type, no one would suggest that an allegation of professional misconduct need have that degree of precision that is required in a criminal prosecution. But the charge must allege conduct which if proved could amount to professional misconduct and must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself." (emphasis added)

The case of *Re Hennig*, 2008 LNABASC 289 quotes *Ironside* with approval as follows:

> "… the principles of natural justice require that the respondents be provided with sufficient particulars to inform them of the allegations made against them, and to know the case they have to meet. The particulars themselves should not be confused with the case and the allegations…" (emphasis added).

37. Examining Allegation 1, the following are the essential elements which must be proven by the MFDA:

1. The time frame, "Between November 2011 and April 2014;
2. another gainful employment; and
3. non-disclosure to or approval by the Member of that outside gainful employment, and
4. that those elements of the allegation are contrary to MFDA Rules 1.2.1(c) or 2.1.1.

38. Dealing first with the requirements of Rule 1.2.1 (c). It provides that an Approved Person may have, and continue in, another gainful employment, provided, inter alia, the Approved Person's Member is aware of and approves of that outside gainful employment.

39. Regarding the time frame, as one would expect, it is not mentioned in the Rule but is included in the allegation. Does that mean that it should require the same precision of proof as the other two elements of the allegation which are essential parts of the Rule? It is this panel's decision that such precision is not required. All that is required is that the alleged conduct fall somewhere in that time frame. The panel raised the question with MFDA counsel whether "between" the dates mentioned means the conduct must occur during the whole time frame or merely sometime during the period. Both interpretations of "between" are possible. Since the time frame is not an essential part of the Rule and is more like a factual particular, the more liberal interpretation should apply in this case. Therefore this panel agrees with MFDA counsel that the MFDA need only prove that the conduct occurred sometime during the time frame. There was ample evidence that the conduct alleged occurred within the dates mentioned and this was not disputed by the Respondent.

40. Did the Respondent carry on "another gainful employment" during that time frame? That he did so is not disputed by the Respondent. In his Response and in his testimony, he admitted that he and an associate established a company which sought to profit from investments in real property in Toronto, that he acted as a director and officer of the company, that he arranged for his parents and in-laws to invest in or loan money to that company and that he earned referral fees related to their investments. The Respondent's evidence is that he did not solicit money from "other individuals" as stated in subparagraph (b); this is not relevant as the MFDA need not prove all the details contained in the particulars as we have noted above. Though the venture did not succeed due to what the Respondent and another investor allege was fraud by the Respondent's business colleague, it is not necessary that the venture actually be profitable for it to be a "gainful employment", only that the venture was seeking to make profits. This real estate venture occurred during the time frame mentioned in Allegation 1. As this panel concluded in paragraph 39 above, it is not necessary that the venture continue throughout the time frame, therefore its failure at some point therein is not relevant. This part of Allegation 1 has been proven by the MFDA.

41. The last requirement under Allegation 1 is that the real estate venture was not disclosed by the Respondent to, or approval received from the Members for which he worked. This issue was the subject of conflicting, and less than conclusive evidence from both parties.

42. The MFDA's evidence on this issue came solely from its investigator. It included, inter alia, Members' compliance questionnaires regarding outside business activities. Although the Respondent disclosed his activities as an assistant football coach on an early Investors Group (IG) questionnaire, he never disclosed his real estate venture which is the subject of Allegation 1 to IG or to his subsequent Members. In addition, the MFDA's documentary evidence included an Event Report Form from the Respondent's then Member, Olympian Financial (Olympian), reporting a civil law suit against the Respondent which included allegations of the Respondent's participation in undisclosed and unapproved outside business activity. The MFDA's evidence also included correspondence from Olympian during the MFDA's investigation that they were unaware of and had not approved the Respondent's real estate investment venture.

43. Because this documentary evidence was presented by the MFDA investigator, it is hearsay, although never challenged on that ground by the Respondent's counsel. Early in the hearing, the panel asked MFDA counsel whether executives from the Respondent's Members would be called to testify. We were informed that no one from the Members would testify. This panel believes that such testimony would have enhanced the quality of the MFDA evidence, especially on the issue of awareness and approval of the Respondent's outside gainful employment.

44. In his Response, the Respondent specifically denies that the venture was not disclosed to or approved by the Member. He repeated this position during the hearing. In fact he stated that the manager that recruited him to IG, told the Respondent that he didn't have to report his real estate activity because it was not of sufficient significance. Even if the IG executive made the statement alleged, it almost certainly referred only to the Respondent's personal real estate investment made prior to joining IG, and not to the real estate investment activity which is the subject of Allegation 1.

45. He also stated that executives at Olympian were aware of his real estate activities because they had visited him at his outside office. However, based on cases such as *Re Jose Luis Bautista*, [2012], MFDA File No. 201143, and *Re Meiz Mohammed Majdoub*, [2010], MFDA File No. 201010 [*Majdoub*], cited to the panel by MFDA counsel, the Member must be specifically aware of the nature of the Respondent's outside gainful employment, not simply knowledge of another

business office. Also, the Respondent seemed to be saying that simply being aware of the outside activity, without objecting thereto, gave the Member's implied approval for the activity. The panel disagrees with that position; the Member must explicitly approve that outside activity. Also of significance, the Respondent provided no corroborating evidence either documentary or oral evidence from persons within the Member that they were aware of or approved the Respondent's real estate investment venture.

46. Despite the somewhat less than satisfactory evidence, it is this panel's decision that the Respondent's Members were not aware of and did not approve his outside gainful employment as required under Rule 1.2.1(c). It is therefore this panel's decision that MFDA has proven that Allegation 1 contravenes Rule 1.2.1(c).

47. This panel also agrees that the conduct described in Allegation 1, proven as outlined above, is a contravention of MFDA Rule 2.1.1. We agree with MFDA's position that this Rule articulates the standard of conduct to be followed by all registrants. By engaging in his real estate investment venture while employed by MFDA Members, the Respondent gave less than his full attention to his obligations to his Members and their mutual fund clients, and created a situation of potential conflict of interest. He therefore failed to live up to the standards set in Rule 2.1.1, fair dealing, honesty, good faith, high standards of ethics and conduct, and conduct unbecoming or detrimental to the public interest.

D. Allegation #2

48. Allegation # 2 is that:

> Between November 2011 and April 2014, the Respondent engaged in personal financial dealings with clients by personally borrowing monies from clients and failing to repay the clients, thereby giving rise to a conflict or potential conflict of interest between the Respondent and the clients, which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.4 and 2.1.1. (emphasis added)

49. It is the panel's decision that the MFDA has not proven this allegation. Our decision is based on the manner in which this allegation is worded. In this case the word "and", highlighted above, must be read conjunctively. In Allegation 1, the four factual elements in subparagraphs (a), (b), (c) and (d) are independent of each other, i.e. if any one of them had not been included or were not proven, Allegation 1 is still grammatically correct, and if proven, would constitute misconduct. In Allegation 2, the two essential elements alleged, the borrowing and the failure to repay are connected; the failure to repay cannot be independent of the borrowing. We also note that "thereby" is placed after and refers back to those two elements. In Allegation 2 the claim is that the borrowing and failure to repay, "thereby" gave rise to the alleged misconduct.

50. The panel acknowledges that the second element, the failure to repay, could have been omitted from the allegation, leaving the borrowing as the alleged misconduct. If that had been the case, the panel would have had no issue with the wording of Allegation 2. The failure to repay could have been included in the particulars as a factor relative to the penalty sought by the MFDA or it could have been omitted entirely. However it was included in the base allegation and therefore it was essential that it be proven along with the borrowing.

51. There is no doubt that the Respondent borrowed money from his parents and in-laws who were clients at the time of the borrowing. He acknowledges that in his Response and in his testimony and that of his witnesses. He attempted to justify that borrowing as merely a continuation of real estate investing with his parents and in-laws prior to them becoming mutual fund clients. That is irrelevant; they were in fact clients at the time of the borrowing and that alone gives rise to a conflict or potential conflict of interest. That conflict was acknowledged by the Respondent in his Response.

52. However, the Respondent testified that all the money borrowed from his parents and in-laws, $186,500 in total, was repaid to them. In their Supplementary Submissions this is acknowledged by the MFDA, but claim that the Respondent provided no documentary evidence to corroborate the repayment, despite MFDA requests for documentation such as cancelled cheques or bank records. On the other hand, the MFDA provided no evidence that the money

borrowed was not repaid, either their own evidence or in cross-examination of the Respondent or his witnesses. Therefore the only evidence on this point is the testimony of the Respondent, albeit uncorroborated. The allegation of failure to repay is that of the MFDA and therefore it is incumbent on them to prove it. Because the manner in which Allegation 2 is worded, the failure to repay must be proven by the MFDA. It is the panel's decision that they have not done so and therefore it is the panel's decision that Allegation 2 fails.

53. The MFDA also points to the fact that the parents and in-laws incurred deferred sales charges (DSCs) when redeeming mutual funds to provide the funds loaned to the Respondent or invested in his real estate venture. However they did not claim that the DSCs were part of the funds borrowed or failure to reimburse for the DSCs was part of the unpaid debt, but the DSCs were an aggravating aspect of the conflict of interest.

54. The MFDA cited the cases of *Re Stephan Headley*, [2006], MFDA File No. 200509 [*Headley*], *Re Blair Addison*, [2014], MFDA File No. 201338 [*Addison*] and *Re Lisa Hua Huang,* [2016], MFDA File No. 201538 [*Huang*] in support of its position that repayment is not a defense to the misconduct of borrowing from clients, but is a mitigating factor when considering sanctions. In *Headley*, the allegation was misappropriation of funds and failure to repay as in our case. However in *Headley*, the Respondent never appeared either in person or by counsel and the wording of the allegation was not put in issue. In our case, the wording of Allegation 2 was put in issue. It is the panel's decision that both the borrowing and the failure to repay were essential elements of the allegation and both had to be proven.

55. In the *Addison* case, failure to repay was not part of the allegation and was a settlement hearing. Similarly, in the *Huang* case failure to repay was not part of the allegation and Huang did not file a reply or participate in the hearing. In this panel's view these two cases do not support the MFDA position in our case.

56. The last part of this allegation is that the Respondent failed to address the conflict of interest "by the exercise of responsible business conduct influenced only by the best interests of the clients…." Because of our decision that this allegation fails based on the MFDA not proving the

failure to repay, the panel makes no finding regarding this last issue, but wishes to make some comments because this was raised by the panel. We feel that this issue was not adequately addressed at the hearing. There was no evidence that the borrowing to invest in the Respondent's real estate venture was not in the clients' best interests, even given the DSCs incurred and referral fees earned by the Respondent. The real estate investment might have been in the clients' best interests, but the MFDA presented no evidence on this issue as it should have done, given that it is an essential part of the allegation.

E. Allegation # 3

57. Allegation # 3 is as follows:

> Between June 2012 and April 2014, the Respondent issued advertisements or sales communications, which had not been reviewed and approved by the Member, contrary to MFDA Rule 2.7.3.

Respondent's Advertisements and sales communications

58. When the Respondent transferred from FundEX to Olympian, his Registration Transfer Form dated June 14, 2012 showed that the Respondent operated under the name "MetroLink". Soon thereafter he ceased using that name and it is not the subject of Allegation 3. However, he started using the trade name "The Finance Coach Co." In the course of operating under that name, the Respondent:

a) produced business cards describing "The Finance Coach Co." as a broker of financial services including insurance, mortgages and investments, located at 246 Harbord Street, Toronto, Ontario;
b) maintained a website, "www.TheFinanceCoachCo.com;
c) maintained a twitter account, "The Finance Coach Co." and
d) maintained a website "www.tactplan.com", which describes a program developed by the Respondent called "The Athletic Career Transition Program" or "TACT"

that is targeted at providing investment advice to current and former Canadian Football League players

The Respondent did not deny operating "The Finance Coach Co." as described above, leaving two issues, first whether such activities were within the scope of Rule 2.7.3. and second, whether Olympian gave its prior approval.

Scope of Rule 2.7.3

59. Rule 2.7.3 provides:

> No advertisement or sales communication shall be issued unless first approved by [named officers] designated by the Member as being responsible for advertisements and sales communications.

60. Advertisements and sales communications are defined in Rule 2.7.1 as follows:

a) Advertisement" includes…internet websites, newspapers and magazine advertisements or commentaries and <u>any published material promoting the business of the Member</u> and any other sales literature disseminated through the communications media, and

b) "sales communications" includes records, video tapes and similar material, market letters, research reports, and all other published material… designed for use in presentation to client or a prospective client…" (emphasis added)

61. At the hearing on August 16, 2017 and in their Submissions on Misconduct, the MFDA made no attempt to establish that the Respondent's activities related to The Financial Coach were within the scope of Rule 2.7.3, but merely focused on whether they had been disclosed to and approved by Olympian. However the panel raised the issue of the scope of Rule 2.7.3, noting that it is very general and questioned whether it included advertisements and sales literature published by an Approved Person that was not a direct promotion of the Member's mutual fund business.

The panel noted that Exhibit 50, provided by the MFDA, Olympian's Manual on Client Communications, states that:

> "Client communications includes any marketing materials…used when conducting Olympian Financial business…must be approved by Olympian Financial Compliance Department prior to publication."

No cases were cited to the panel which were instructive on the type of promotional material which is within the scope of Rule 2.7.3.

62. In her oral submissions, MFDA counsel addressed this issue, pointing out that the Respondent's activities regarding The Financial Coach all related to financial services and investments; therefore even if The Financial Coach activities did not directly mention Olympian's business, it was within the scope of Rule 2.7.3. The panel agrees with MFDA counsel on this point. Despite the vagueness of the language of Rule 2.7.3., it logically must encompass all promotional material published by Members and Approved Persons (i.e. those regulated by the MFDA) if that material relates directly to the Member's business or more generally to financial services or investments which might, by inference, include the Member's business. This panel is not attempting to further define the scope of Rule 2.7.3. That must await, either a redraft of the rule or additional cases on whether particular promotional material is, or is not, within the scope of Rule 2.7.3.

Prior approval by Olympian

63. The only remaining issue under Allegation 3 is whether the Respondent's Financial Coach activities described above, were approved by Olympian prior to their use by the Respondent. In his Response the Respondent took the position that:

> "Olympian had always been aware of my activities and have even been to my office at 246 Harbord St. where signage is prominent and in full view. I am also connected to Olympian through my social media accounts, and have had many candid conversations regarding my 'gainful occupation' outside of mutual funds."

64. Even if Olympian were aware of the Respondent's Financial Coach activities, that is insufficient to comply with Rule 2.7.3. Approval prior to dissemination of the advertisements or sales communication is required. Visiting the Respondent's premises and seeing signage, and social media connections does not equate to awareness of the Respondent's advertisements and sales communications and certainly does not amount to prior approval. This conclusion is supported by the cases of *Re Majdoub* (supra) and *Re Bemelekot W. Tewahade,* [2016], MFDA File No. 201425.

65. The Respondent provided no evidence, documentary or testimony to corroborate his claim. On the other hand, the MFDA provided no direct evidence that the Respondent had not received prior approval from Olympian. In Exhibit 50, the Respondent states that he had not "formally requested approval of our website or twitter page…", but this appears to be related only to Metrolink Financial, not to Finance Coach activities. Testimony from Olympian executives might have provided clear evidence that Olympian did not give its prior approval for the Finance Coach advertisements and sales communications. Based on the evidence before the panel, it is the panel's conclusion that the Respondent did not obtain the prior approval from Olympian for the advertisements and sales communication used by him in his Finance Coach business

66. It is the panel's decision that Allegation 3 has been proven by the MFDA.

F. Allegation #4

67. This allegation is that:

> Commencing March 4, 2013, the Respondent failed to comply with his reporting obligations to the Member by failing to report that he had been named a defendant in a civil claim related to the real estate investment development corporation, contrary to MFDA Rule 1.2.2(b), and subsections 4.1(b)(i) and (iv) of MFDA Policy No. 6.

68. In his Response, the Respondent admitted his misconduct as alleged in Allegation 4, and this was never in issue. It is therefore the panel's decision that the MFDA has proven Allegation 4.

Decision

69. In conclusion, it is the panel's decision that Allegations 1, 3, and 4 have been proven by the MFDA, but that Allegation 2 has not been proven. Our decision to that effect was given orally on April 30, 2018.

DATED this 13th day of June, 2018.

"Frederick H. Webber"

Frederick H. Webber
Chair

"Brigitte J. Geisler"

Brigitte J. Geisler
Industry Representative

"Guenther W.K. Kleberg"

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Industry Representative

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