Now New Self-Regulatory Organization of Canada, a consolidation of IIROC and the MFDA

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: TeamMax Investment Corporation

Heard (Misconduct): June 24, 2022 in person, and June 27, 29, 30, 2022 by electronic hearing in Toronto, Ontario
Decision (Misconduct): June 30, 2022
Heard (Penalty): July 22, 2022 by electronic hearing in Toronto, Ontario
Decision (Penalty): July 22, 2022
Reasons for Decision: February 7, 2023

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, K.C.	Chair
Brigitte J. Geisler	Industry Representative
Kenneth P. Mann	Industry Representative

Appearances:

Alan Melamud	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Jason Wong	)	Counsel for the Respondent

I. INTRODUCTION

1. By Notice of Hearing, dated November 11, 2021, the Mutual Fund Dealers Association of Canada ("MFDA") made the following Allegations against TeamMax Investment Corp. ("Respondent"):

> Allegation #1: Between February 2016 and April 2017, the Respondent failed to adequately supervise an Approved Person with respect to concerns the Approved Person was not accurately recording Know-Your-Client information, contrary to MFDA Rules 2.5.1., 2.2.1., 2.1.2 and MFDA Policy No. 3.
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> Allegation #2: Commencing on or about October 30, 2016, the Respondent failed to ensure its compliance with the terms of an Order of a MFDA Hearing Panel, dated July 8, 2014, in MFDA File No. 201406, contrary to MFDA Rules 2.1.1 and 2.1.2.
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> Allegation #3: Between March 2017 and October 2019, the Respondent failed to implement a Branch Review Program compliant with the requirements set out in MFDA Policy No. 5, MFDA Rule 2.5.1, and the Respondent's policies and procedures.
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> Allegation #4: From in or about January 2018 to October 2020, the Respondent failed to adequately detect and query uniformity in the Know-Your-Client information recorded by its Approved Persons, contrary to MFDA Rule 2.2.1 and MFDA Policy No. 2.

2. The Notice of Hearing was served on the Respondent on November 29, 2021, as shown by the Affidavit of Terri Ash, sworn on December 2, 2021 and the exhibits attached thereto.

3. On January 11, 2022, the first appearance was held via teleconference before one public representative of a Regional Council, acting on behalf of the Central Regional Council of the MFDA ("Chair of the Hearing Panel"), pursuant to section 19.13 of MFDA By-law No. 1.

4. After hearing and considering the submissions of counsel for Staff of the MFDA ("Staff") and the Ultimate Designated Person ("UDP") of the Respondent, and on the consent of the parties, it was ordered that, in accordance with Rule 2.2(1)(a) of the MFDA Rules of Procedure, the Respondent's time to deliver a Reply was extended to February 1, 2022. It was further ordered that the next appearance would take place by videoconference on February 24, 2022 at 10:00 a.m. (Eastern).

5. On February 24, 2022, a second appearance was held by videoconference before the Chair of the Hearing Panel. After hearing and considering the submissions of Staff and the UDP of the Respondent, the Chair of the Hearing Panel set a schedule for steps in this proceeding, including setting the dates for the Hearing on the Merits, which was scheduled to take place on June 13-17,

2022, at the offices of the MFDA in Toronto, Ontario, commencing each day at 10:00 a.m. (Eastern).

6. On March 25, 2022, the Respondent served and filed a Reply.

7. At the request of the parties, on March 31, 2022, a third appearance was held by videoconference before the Chair of the Hearing Panel. After hearing and considering the submissions of Staff and counsel for the Respondent, the Chair of the Hearing Panel made an Order to extend the Respondent's time to deliver a Reply to March 25, 2022. The Order further set a schedule for steps in the proceedings and altered the date for the Hearing on the Merits, such that it was scheduled to take place at the same location on June 24, 27, 28, 29 and 30, commencing each day at 10:00 a.m. (Eastern).

8. On June 2, 2022, Staff brought a Motion, returnable on June 15, 2022, before the Chair of the Hearing Panel, seeking to obtain an order to permit a witness to be called, by Staff, at the Hearing on the Merits, to testify by videoconference.

9. Counsel for Staff and counsel for the Respondent attended the hearing of the Motion by videoconference on June 15, 2022. After reading the Motion Record, filed by Staff, and upon being advised by the parties that the Respondent consented to Staff's request in the Notice of Motion, an Order was made permitting Melody Potter to testify by videoconference at the Hearing on the Merits.

10. On June 23, 2022, the day before the scheduled commencement of the Hearing on the Merits, counsel for the Respondent, wrote to counsel for Staff advising that his instructing client had advised him that "he began feeling COVID-like symptoms starting last night and persisting today." He indicated that his client would have to quarantine for at least 10 days. He sought an adjournment of the proceedings and requested that Staff consent to same. Staff declined to consent.

11. Arrangements were made for an immediate videoconference before the Chair of the Hearing Panel. At the videoconference, counsel for the Respondent sought an adjournment until September or October of 2022.

12. He repeated that his instructing client was still feeling COVID-like symptoms. He was unable to produce a positive COVID test. He admitted that no such tests had been done. He was

unable to produce any medical report. His argument, essentially, was that, as his instructing client had COVID-like symptoms, he had to quarantine and, therefore, could not attend the Hearing on the Merits in person.

13. Counsel for Staff argued that the instructing client could attend upon the Hearing on the Merits virtually. Staff relied, in part, on the decision of the Ontario Securities Commission ("Commission") in First Global Data Ltd. (Re) (2020), 43 OSCB 7349.

14. In First Global, the respondents objected to the Commission's intention to conduct the merits hearing by videoconference. They argued that to do so would be slower and more expensive and that it would not permit an adequate assessment of credibility.

15. The Commission rejected those arguments. It stated that "proceeding by videoconference under the current circumstances is consistent with the important goal of conducting Commission proceedings in a just, expeditious and cost-effective manner."

16. The Commission relied, in part, on the decision in Miller v. FSD Pharma Inc. 2020 ONSC 3291, where the Superior Court of Justice held that "there is nothing about a remote procedure, whether large, complex and potentially final, or small, straightforward, and interim, that is inherently unfair to either side. This is particularly so now that the legal community has had time to digest the use of virtual hearing technology."

17. It was also pointed out that the Respondent had consented to an Order whereby one of the Staff's witnesses would testify virtually.

18. After carefully considering the submissions of counsel and the relevant authorities, the Chair of the Hearing Panel dismissed the request for an adjournment and ordered that the Hearing on the Merits proceed, as scheduled the following day, June 24, 2022.

19. At the commencement of the proceedings before the full Hearing Panel on June 24, 2022, counsel for the Respondent made a further request for an adjournment. Staff opposed same.

20. The Respondent produced a hand-written note from a Dr. David Birbrager, dated June 23, 2022, which stated: "Due to illness will miss 7-8 days of work." Counsel for the Respondent conceded that this was a telephone consultation, that no COVID testing had been done and that there was no indication of an inability to join the Hearing on the Merits virtually. Counsel for the

Respondent also conceded that he was obtaining instructions to bring the adjournment request from this same individual.

21. Staff argued that this was the second adjournment request within 24 hours and that nothing had changed. Arrangements were still in place for joining the Hearing on the Merits virtually. Staff's witnesses were present and available to testify.

22. The Hearing Panel retired and considered both the new documentary evidence, as well as the submissions of the parties. After a due consideration of the matter, the Hearing Panel determined that it would proceed with the Hearing on the Merits.

23. When the Hearing Panel announced its decision, counsel for the Respondent requested a brief adjournment so that he could obtain instructions as to whether he should withdraw from the Hearing on the Merits.

24. Counsel for the Respondent subsequently advised that he had received instructions to withdraw. It was made clear that the Hearing on the Merits would be proceeding and that by withdrawing he might be forfeiting the Respondent's right of cross-examination of Staff's witnesses. Counsel withdrew.

25. Staff then made its Opening Statement and called evidence from 3 witnesses.

26. At the conclusion of the day on June 24, 2022, a discussion was held as to the mode of proceeding for the remainder of the Hearing on the Merits.

27. An Order had been made, on consent, by the Chair of the Hearing Panel on June 15, 2022, that Staff's next witness would be testifying virtually. The Hearing Panel, after consideration, made an Order that the remainder of the Hearing on the Merits would be done virtually. On June 24, 2022, the MFDA issued a News Release advising the public of same. Arrangements were made for counsel for the Respondent to be so informed.

28. On Monday, June 27, 2022, the Hearing on the Merits reconvened at 10:00 a.m. (Eastern). Counsel for the Respondent did not appear. Staff counsel advised the Hearing Panel that he had not heard from counsel for the Respondent since he chose to leave the Hearing on the Merits on June 24, 2022.

29. Staff commenced the Examination in Chief of its final witness, Melody Potter.

30. After approximately 45 minutes of testimony, Staff counsel indicated to the Hearing Panel that counsel for the Respondent was seeking to join the Hearing on the Merits virtually. The Examination in Chief of Ms. Potter was, temporarily, halted.

31. Counsel for the Respondent advised that he had a new letter from Dr. Birbrager and that he wanted to bring another Motion for an adjournment. Staff counsel objected and stated that he wished to complete his Examination in Chief of Ms. Potter.

32. The Hearing Panel retired to consider the matter. It was decided to hear further from counsel for the Respondent.

33. Counsel for the Respondent then introduced a further letter from Dr. Birbrager, which stated as follows:

> "June 27, 2022
>
> RE: Aziz Khamisa
>
> Mr. Khamisa has been a patient of mine since September 2003.
>
> Further to my written note dated June 23, 2022, I am of the opinion Mr. Khamisa is unfit to work or participate in any work-related activity. This includes participating in a legal proceeding in person or via videoconference.
>
> Mr. Khamisa's condition is such that he does not have the physical or mental capacity to do the same. He suffers from COVID-19-flu-like symptoms and he is in a high risk category. Mr. Khamisa should be on bedrest for at least 7 days.
>
> Sincerely,
>
> "Dr. Birbrager"
>
> D. Birbrager MD
>
> Dictated but not read"

34. Counsel for the Respondent submitted that, in light of the note and the surrounding circumstances, the proceedings had to be adjourned until September or October of 2022.

35. It was conceded by counsel for the Respondent that he was still receiving instructions from his instructing client, Aziz Khamisa, that Dr. Birbrager had only done a telephone consultation and that no COVID testing had been done to date.

36. Staff counsel requested a brief adjournment so that he could obtain instructions. The Hearing on the Merits was adjourned for 30 minutes.

37. Staff counsel returned and indicated that Staff needed more time to consider its position. Counsel for the Respondent objected and indicated that the Hearing Panel should decide immediately on the adjournment request of the Respondent. The Hearing Panel indicated that it was granting the brief adjournment request of Staff.

38. When it became clear that Ms. Potter was not easily available on Tuesday, June 28, 2022, the Hearing on the Merits was adjourned to Wednesday, June 29, 2022, at 10:00 a.m. (Eastern).

39. On June 29, 2022, Staff counsel indicated that Staff was opposing the requested adjournment on the ground, *inter alia*, that the question of an adjournment on the basis of the instructing client having COVID-like symptoms was *res judicata* and that the adjournment should be denied on the basis of issue estoppel.

40. It was submitted that this was the third time a request for an adjournment had been made on, essentially, the same basis. Staff argued that this also raised the doctrine of abuse of process, which, Staff submitted, is a distinct doctrine, but related to issue estoppel.

41. Staff relied upon the following cases:

a) *Spadacini-Kelava v. Kelava*, 2020 ONSC 7907

b) *Earley-Kendall v. Sirard*, 2007 ONCA 468

c) *Powers v. Tufman*, 2017 ONSC 7210

d) *Simcoe Muskoka Child, Youth and Family Services v. C.C.*, 2019 ONSC 4541

e) *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63.

42. Staff quoted from paragraph 103 of the decision of Justice Kurz in Spadacini-Kelava v. Kelava that "issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding." He argued that the issue of the adjournment was "decided by Friday morning at the latest, if not already on Thursday when this first adjournment request was made."

43. Still quoting from paragraph 103 of Spadacini-Kelava v. Kelava, Staff argued that the doctrine of *res judicata* "prevents an encore and reflects the law's refusal to tolerate needless litigation."

44. At paragraph 105, the Court sets out the three-part test for the application of issue estoppel which was adopted by the majority of the Supreme Court of Canada in Angie v. Minister of National Revenue, [1975] 2 SCR 248 at p. 254.

a) the same question has been decided;
b) the judicial decision which is said to create the estoppel is final; and
c) the parties to the judicial decision were the same persons as the parties to the proceedings, in which the estoppel was raised.

45. Staff counsel then cited a number of cases where the principle of issue estoppel and *res judicata* were applied.

46. One of the cases referred to was Powers v. Tufman, *supra*, a decision of the Ontario Superior Court. Here the respondent to a Summary Judgment Motion requested an adjournment of the Motion on the basis that the respondent (plaintiff) was ill and was, consequently, not in a position to provide an affidavit.

47. This request was made at the outset of the Summary Judgment Motion. However, the same request had been made by the respondent to a civil justice practice court judge earlier, supported by a note from a physician that "due to medical reasons" the respondent was unable to attend the court appearance. The justice had rejected the request for an adjournment. The request was then renewed at the Motion itself. The request was opposed on the basis of issue estoppel. The court agreed, quoting from the decision of the Ontario Court of Appeal in Earley-Kendall v. Sirard, *supra*, as follows, at paragraph 45:

> "Although a trial judge enjoys an overarching discretion to consider a motion for an adjournment of a trial, that discretion must be exercised judiciously and in accordance with the law. It is not open to a trial judge to grant an adjournment on the basis of the same facts put to another judge of concurrent jurisdiction earlier in the proceedings in the absence of a change of circumstance, where the first judge refused the adjournment request. To do otherwise would fly in the face of the well-settled law of issue estoppel."

48. Here, likewise, there was no change in circumstances. The instructing client, Mr. Khamisa, on both Thursday and Monday had COVID-like symptoms, had not had any PCR testing done, was able to give instructions to seek an adjournment and could not explain why he was unable to join the Hearing on the Merits virtually. The only change was an, arguably, more robust note from his doctor, who, still had not seen his patient.

49. The final case, which Staff put before the Hearing Panel, was the Supreme Court of Canada decision in Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79, *supra*, where the Supreme Court discusses the principle of "abuse of process", by quoting, with approval, the decision of Goudge J.A. in the case of Canam Enterprises Inc. v. Coles (2000) 51 O.R. (3d) 481 (C.A.) at paragraph 55, as follows:

> "The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel."

50. Staff argued that, in the circumstances, it had met all of the criteria of issue estoppel but, if not, the principle of abuse of process applied.

51. Counsel for the Respondent then made submissions as to why neither issue estoppel nor abuse of process applied in the particular circumstances of this case, although he did not take issue with the principles as enunciated by Staff counsel.

52. Counsel for the Respondent argued that, while the condition of his client had not changed from Thursday to Monday, his condition had not improved. He also confirmed that his instructing client was not a witness in the proceedings but just the person providing instructions to counsel.

53. After the completion of the submissions of counsel, the Hearing Panel retired to consider this third request for an adjournment. After carefully considering the facts and the law, the Hearing Panel was, unanimously, of the view that the request should be denied. We so advised the parties.

54. It is clear from the evidence before us that Staff provided full disclosure of its case to the Respondent in a timely fashion. The dates for the Hearing on the Merits were set, on consent, and known well in advance by the parties.

55. Thus, Respondent's counsel should have been in a position to cross-examine the witnesses called by Staff. Yet, he received instructions to withdraw from the proceedings after the adjournment request was denied on June 24, 2022. He received those instructions from the same person who was, apparently, too ill to join the Hearing on the Merits virtually.

56. Additionally, after the third request for an adjournment was denied on June 29, 2022, counsel again withdrew although he was invited by the Hearing Panel to remain and exercise his client's right of cross-examination.

57. There never was a cogent reason given to the Hearing Panel, medical or otherwise, as to how the instructing client could give instructions to counsel to seek repeated adjournments but couldn't give instructions on how to deal with the evidence presented by Staff, evidence known well in advance by the Respondent.

58. The Respondent forfeited its right to cross-examine Staff's witnesses or present evidence or witnesses of its own on the instructions of an individual who, allegedly, did not have the mental capacity to participate in the Hearing on the Merits either in person or by videoconference.

59. The third adjournment request was made on the same basis as the first two – namely that the instructing client had COVID-like flu symptoms, which had, apparently, not grown either worse or better from the first adjournment request on Thursday to the third adjournment request on the following Monday, had never submitted to any PCR tests and had never attended upon a doctor in person.

60. In our view, by the time of the third adjournment request, the principles of both issue estoppel and abuse of process, as outlined above, clearly and unambiguously applied.

61. After counsel for the Respondent left the Hearing on the Merits, Staff completed the Examination in Chief of its final witness.

62. The matter was put over to June 30, 2022, for argument. Counsel for the Respondent was notified. He did not attend on June 30, 2022.

63. Staff made both extensive written and oral submissions. The Hearing Panel reserved its decision and retired to ascertain whether it could reach a decision on misconduct.

64. After a careful consideration of all of the evidence, both oral and documentary, the Hearing Panel concluded that all the Allegations had been established.

65. The Hearing Panel then set July 8, 2022, at 10:00 a.m. (Eastern), via videoconference, for the Penalty Hearing.

66. On July 5, 2022, counsel for the Respondent requested that this matter be adjourned to July 22, 2022, as he anticipated providing submissions. Counsel also indicated that he had a conflict on July 8, 2022. Both Staff and the Hearing Panel consented to this request for an adjournment.

67. Staff filed extensive written Submissions on Penalty.

68. On July 22, 2022, after a brief further adjournment, Staff and the Respondent filed an Agreement on Joint Submission and made submissions with respect to same. Part of the agreement was that the proposed fine and costs would be paid over a period of time.

69. The Hearing Panel retired briefly to consider the matter. It then informed the parties that it would accept the Agreement on Joint Submission only on the basis that both the fine and costs were paid immediately. Otherwise, we would reserve our Decision as to Penalty.

70. Counsel for the Respondent requested an opportunity to get instructions. After a brief delay, counsel returned and indicated that the fine and costs would be paid immediately.

71. The Hearing was adjourned until the Agreement on Joint Submission had been amended and the monies received.

II. THE EVIDENCE

72. In the Notice of Hearing, Staff made 4 Allegations against the Respondent.

See paragraph 1, s*upra*.

73. At the Hearing on the Merits, which took place on June 24, 27, 29 and 30, Staff presented extensive documentary and testimonial evidence in an attempt to prove these Allegations. The Respondent chose not to either cross-examine any of Staff's witnesses or present any testimony or documentary evidence of its own. The Respondent chose not to make any closing submissions. As a consequence, the evidence of Staff was uncontested.

74. On the other hand, the law is clear that Staff bears the burden of proof on a balance of probabilities.

75. In the view of the Hearing Panel, the evidence presented by Staff on each of the Allegations was clear, extensive and persuasive. At the completion of the evidentiary portion of the Hearing on the Merits, the Hearing Panel had no hesitation in, unanimously, concluding that all 4 Allegations had been clearly established.

76. Staff called the following witnesses:

a) Lucy Alfenore – Senior Investigator with the MFDA;

b) Antoinette Pierre – Senior Compliance Officer with the MFDA;

c) Sarah Asals – Manager, Compliance Department, MFDA; and

d) Melody Potter – Chief Compliance Officer with the Respondent, TeamMax, from April 2014 to January 2018.

77. A synopsis of the testimony and documentary evidence with respect to each of the Allegations follows:

> Allegation #1: Between February 2016 and April 2017, the Respondent failed to adequately supervise an Approved Person with respect to concerns the Approved Person was not accurately recording Know-Your-Client information, contrary to MFDA Rules 2.5.1., 2.2.1., 2.1.2 and MFDA Policy No. 3.

78. The evidence before the Hearing Panel established that in 2015, MFDA Compliance Staff advised the Respondent that a MFDA Compliance examination had determined that the Know Your Client ("KYC") information gathered by Approved Person Elson Yi Cong Qin ("EYCQ") exhibited signs of what was referred to as "KYC Patterns". A KYC Pattern is where the same KYC information is recorded for multiple clients. This is also referred to as "KYC Uniformity".

79. Thereafter, the Respondent's Chief Compliance Officer ("CCO"), Melody Potter ("Potter"), began raising concerns with the Respondent's UDP, sole director and owner, Anthony Chau ("Chau") about the business conduct of Approved Person EYCQ.

80. Among other concerns, Potter noted that EYCQ was failing to accurately gather and record client KYC information. She warned the Respondent that EYCQ appeared to be engaging in KYC Uniformity.

81. Notwithstanding the concerns raised by Potter, the evidence is clear that the Respondent failed to take the adequate steps to ensure that the compliance deficiencies were appropriately investigated and addressed.

82. The principal supervisory step allegedly taken by the Respondent to address these concerns was for UDP Chau to have conversations with EYCQ to discuss these issues. Chau failed to make any records of these alleged conversations.

83. The evidence before the Hearing Panel was clear that, at all material times, the Respondent had policies and procedures in place which should have prevented what occurred or immediately corrected it when discovered.

84. These policies and procedures included that:

a) the Respondent and its Approved Persons were required to use due diligence to learn the essential facts relative to each client and to each order or plan accepted; to ensure that the acceptance of any order for any plan is within the bounds of good business practice; and to ensure that each order accepted or recommendation made, including recommendations to borrow to invest, for any plan of a client is suitable for the client based on the essential facts relative to the client and any investments within the plan;

b) supervisory staff had a duty to ensure compliance with the Respondent's policies and procedures and MFDA regulatory requirements, which included the general duty to effectively supervise and to ensure that appropriate action was taken when a concern was identified;

c) supervisory staff was required to maintain records of compliance issues identified, action taken, and resolutions achieved;

d) the Respondent's management team was responsible for supervising and directing the activities of the Member, in order to ensure compliance with applicable rules and regulations with respect to areas of their management responsibilities; and

e) the Respondent would take appropriate disciplinary measures, including withholding commissions and termination, where potential trade issues were identified and not addressed to the satisfaction of compliance staff of the Respondent.

85. Even if Chau did have corrective conversations with EYCQ, as he claimed, these conversations were insufficient to satisfy the Respondent's supervisory obligations. Staff led evidence that MFDA Policy No. 3 requires that Members, like the Respondent, are required to take reasonable supervisory action, including investigations and internal discipline, when the Member receives information about any potential contraventions of MFDA By-laws, Rules and Policies.

86. On April 20, 2022, Chau entered into a Settlement Agreement with Staff wherein he admitted to Allegation #1.

87. At all material times, Chau was an Approved Person of the Respondent. He was also the directing mind of the Respondent at the time of the alleged misconduct. As indicated above, he was the UDP, owner and sole director of the Respondent.

88. MFDA Rule 2.1.2 states that:

> "Each Member shall be responsible for the acts and omissions of each of its Approved Members and other employees and agents relating to its business for all purposes under the By-laws and Rules."

89. We agree with the submissions of Staff that Members are responsible for ensuring that appropriate and competent individuals are selected for the senior supervisory positions and for ensuring that appropriate systems are in place to make certain the Members remain in compliance with regulatory requirements. Holding Members accountable for such failures, therefore, ensures that owners, shareholders, and directors are incentivized to fulfill those responsibilities.

90. The Hearing Panel is, unanimously, of the view that Allegation #1 has been established.

91. Allegation #2 states as follows:

> "Commencing on or about October 30, 2016, the Respondent failed to ensure its compliance with the terms of an Order of a MFDA Hearing Panel, dated July 8, 2014, in MFDA File No. 201406, contrary to MFDA Rules 2.1.1 and 2.1.2."

92. On account of multiple compliance failures by the Respondent, an MFDA Hearing Panel made on Order, on July 8, 2014, that, *inter alia*, prohibited the Respondent from:

i. opening any new non-registered leveraged accounts;
ii. making any new leverage trade recommendations; or
iii. processing any leveraged trades in any existing non-registered accounts.

93. On October 30, 2016, CCO Potter advised the Respondent that, based upon her compliance review, she had reason to suspect that a number of Approved Persons were engaging in recommending and processing leveraged trades contrary to the 2014 MFDA Order.

94. Potter specifically named the Approved Persons and indicated that she wished to speak with them and have them confirm the source of the funds for the trades that she believed may have been leveraged.

95. Chau instructed Potter not to speak with the Approved Persons about the issue until he had an opportunity to speak with them personally.

96. Chau claims that he spoke with the Approved Persons. However, he maintained no notes or records of any such conversations. Chau never followed up with Potter. Consequently, she was unable to complete her review.

97. On April 20, 2022, Chau admitted that "commencing on or about October 30, 2016 [he], while acting in the capacity as Ultimate Designated Person failed to take adequate steps to ensure the Member's compliance with the terms of an Order of the MFDA Hearing Panel dated July 8, 2014 in MFDA File No. 201406, contrary to the terms of the Order and MFDA Rules 2.5.2 and 2.1.1."

98. As at the time Chau was the UDP, owner and sole director of the Respondent, this admission binds the Respondent.

99. Accordingly, the Hearing Panel is, unanimously, of the view that Allegation #2 has been established.

100. Allegation #3 states as follows:

> "Between March 2017 and October 2019, the Respondent failed to implement a Branch Review Program compliant with the requirements set out in MFDA Policy No. 5, MFDA Rule 2.5.1, and the Respondent's policies and procedures."

101. Staff led evidence that in 2017 the Respondent entered into a Settlement Agreement ("2017 Settlement Agreement") with Staff wherein the Respondent admitted that between March 2010 and July 2015 the Respondent had failed to implement a Branch Review Program compliant with the requirements set out in MFDA Policy No. 5. As a result of this admission, and others, the Respondent was required to pay a fine of $60,000 and costs in the amount of $10,000.

102. As part of the settlement, the Respondent agreed that, in the future, it would comply with, *inter alia*, Policy No. 5.

103. The evidence presented to the Hearing Panel showed that in 2019, MFDA Compliance Staff conducted a compliance examination of the Respondent that covered the period March 1, 2017 to August 30, 2019 ("2019 Compliance Examination").

104. The evidence showed that, at the time of the 2019 Compliance Examination, the Respondent had 11 registered locations (branches and sub-branches) on the National Registration Database ("NRD"), including its head office.

105. The 2019 Compliance Examination showed that the Respondent had not done any branch reviews in 2019 or 2018 and only completed one in 2017. Further, MFDA Compliance Staff found that:

a) 1 location had not been reviewed by the Respondent and had been registered on NRD for more than 3 years;

b) 7 locations were not reviewed within a 36 month period; and

c) 2 locations were risk ranked as "High" by the Respondent but were not reviewed within a 12 month period.

106. During the material time, the evidence showed that the Respondent's policies and procedures provided the following concerning the branch review cycle it was to employ:

> "We generally perform an on-site review of our branches no less than once every three years. However, we will review certain branches more frequently if justified based on risk. Under no circumstances, will we never perform an on-site review of a branch. According to our risk ranking, locations identified as high risk will be audited annually, medium risk locations will be reviewed every 2 years and low risk locations will be audited once every 3 years."

107. The relevant MFDA Policy No. 5 stated the following for the minimum standard for a branch review cycle:

> "Members are generally expected to perform an on-site review of their branches no less than once every three years. However, Members must review certain branches more frequently than once every three years if justified based on risk. Where, under unusual circumstances, a Member exceeds a three year branch review cycle, the Member must be able to justify the longer review cycle by demonstrating that the branches that have not been subject to an on-site review are low risk and have been subject to alternative compliance review procedures performed by head office, such as off-site desk review. Under no circumstances however, should a Member never perform an on-site review of the branch."

108. MFDA Rule 2.5.1 requires that a Member establish, implement and maintain appropriate policies and procedures to ensure that its business is conducted in accordance with the MFDA's By-law, Rules and Policies The Respondent's policies and procedures adopted, and in fact exceeded, the branch review cycle requirement set out in MFDA Policy No. 5. The problem was that the Respondent failed to either implement or follow its own policies and procedures.

109. Accordingly, the Hearing Panel is, unanimously, of the view that Allegation #3 has been established.

110. Allegation #4 states as follows:

> "From in or about January 2018 to October 2020, the Respondent failed to adequately detect and query uniformity in the Know-Your-Client information recorded by its Approved Persons, contrary to MFDA Rule 2.2.1 and MFDA Policy No. 2.

111. In the 2017 Settlement Agreement, the Respondent admitted that it failed to adequately detect and query patterns in the KYC information collected from clients by 3 Approved Persons,

contrary to MFDA Rule 2.2.1 and MFDA Policy No. 2. In the 2017 Settlement Agreement, the Respondent advised that it would be producing quarterly reports showing the KYC information of each client account of each Approved Person and that it would review these reports to detect and query any patterns identified. This procedure was incorporated into the Respondent's policies and procedures towards the end of 2014.

112. During the 2019 Compliance Examination, the evidence showed that MFDA Compliance Staff determined that KYC information collected by 3 Approved Persons with the Respondent exhibited KYC Uniformity and had not been queried. One of the Approved Persons identified by MFDA Compliance Staff had also been identified in the 2017 Settlement Agreement with respect to the same KYC Uniformity concern. MFDA Compliance Staff further found that the Respondent could not produce any evidence that it had produced and reviewed the quarterly KYC Pattern Reports its policies and procedures required. Moreover, the Respondent could also not show that it had detected or queried the KYC Uniformity that was identified by MFDA Compliance Staff during the 2019 Compliance Examination.

113. Potter testified that she had produced KYC Pattern Reports while she was CCO. However, she ceased being CCO in January of 2018 and MFDA Compliance Staff could find no evidence that the Respondent continued the practice after January of 2018.

114. While the Respondent established a policy of producing and reviewing KYC Reports, it failed to follow its own policy. The Respondent also failed to maintain any evidence that it was conducting any supervisory review to detect and query KYC Uniformity.

115. The Hearing Panel is, unanimously, of the view that Allegation #4 has been established.

III. PENALTY HEARING

116. As indicated above, the Penalty Hearing took place on July 22, 2022.

117. The Hearing Panel was presented with an Agreement of Joint Submission ("Agreement") executed by both the Respondent and Staff.

118. Paragraph 5 of the Agreement echoed what the Hearing Panel had stressed to the parties when it provided that:

"The Respondent understands that subject to the applicable legal tests, the Hearing Panel has the discretion to not accept the Joint Submission and impose any sanction it deems appropriate as provided for in section 24.1.2 of MFDA By-law No. 1."

119. The Hearing Panel was concerned with both the magnitude of the offences committed by the Respondent and by the fact that some of these were repeat offences. Staff indicated that it shared those concerns but felt that it was addressed by paragraph 7 in the Agreement which provided, in part, as follows:

> "Staff and the Respondent agree that if the Joint Submission is accepted, then upon the MFDA's receipt of the full payment of the fine and costs within the schedule set out above, the MFDA will accept the Respondent's resignation from its membership in the MFDA."

120. Another salient term of the Agreement was that the Respondent did not dispute the conclusions of the Hearing Panel, announced on June 30, 2022, that all of the Allegations were found to be established.

121. Paragraph 9 of the Agreement provided as follows:

> "The Respondent agrees to waive any rights to a full hearing or appeal before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of this proceeding, including both the misconduct and sanction portion of the Hearing on the Merits, before any court of competent jurisdiction."

122. The amount of the proposed fine and costs were at the very low end of the range which the Hearing Panel felt was appropriate. The fact that same was to be paid over a period of time was not acceptable to the Hearing Panel, in all of the circumstances, including the history of the Respondent.

123. After retiring to consider the matter, the Hearing Panel, as indicated above, advised the parties that it would only accept the Agreement if the fine and costs were paid immediately.

124. Counsel for the Respondent obtained instructions that the fine and costs would be paid immediately. The Agreement was amended to reflect this fact.

125. As a consequence, the Hearing Panel accepted the amended Agreement and issued an Order as follows:

a) The Respondent shall pay a fine in the amount of $60,000 on the date of this Order, pursuant to section 24.1.2(b) of MFDA By-law No. 1.

b) The Respondent shall pay costs in the amount of $10,000 on the date of this Order, pursuant to section 24.2 of MFDA By-law No. 1.

c) If at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 7th day of February, 2023.

"Thomas J. Lockwood"
Thomas J. Lockwood, K.C.
Chair

"Brigitte J. Geisler"
Brigitte J. Geisler
Industry Representative

"Kenneth P. Mann"
Kenneth P. Mann
Industry Representative

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