

Re Wilkins

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Clive George Wilkins

2024 CIRO 71

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: July 31, 2024 by electronic hearing in Toronto, Ontario

Decision: July 31, 2024

Reasons for Decision: September 15, 2024

Hearing Panel:

Frederick H. Webber, Chair

Kenneth Mann, Industry Representative

Melody Potter, Industry Representative

Appearances:

Paul Blasiak, Senior Enforcement Counsel

Samantha Wu, Enforcement Counsel

Clive George Wilkins (Absent)

REASONS FOR DECISION

I. ALLEGATIONS AND PROPOSED SANCTIONS

¶ 1 On May 2, 2024, CIRO made the following allegations in a Fresh as Amended Notice of Hearing (the “ANOH”) in respect of Clive George Wilkins (the “Respondent”):

Allegation #1: Between August 3, 2011 and November 2021, the Respondent borrowed monies from clients and was indebted to clients, which gave rise to conflicts or potential conflicts of interest that the Respondent failed to disclose to the Member or otherwise ensure were addressed by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to the Member’s policies and procedures and MFDA Rules 2.1.1, 2.1.4, and 1.1.2 (as it relates to MFDA Rule 2.5.1).

Allegation #2: Between March 2020 and February 2021, the Respondent made false or misleading statements to the Member and the MFDA during the course of investigations into his conduct, contrary to MFDA Rule 2.1.1.

Allegation #3: Commencing on or about January 13, 2023, the Respondent failed to cooperate with an investigation into his conduct by Staff of CIRO, contrary to Mutual Fund Dealer Rule 6.2.1.

¶ 2 Staff of CIRO (“Staff”) asked the Hearing Panel to determine that the Respondent engaged in the misconduct set out in paragraph 1 and to impose the following penalties on the Respondent:

- (a) a permanent prohibition on the Respondent’s authority to conduct securities related business while in the employ of or associated with any Dealer Member of CIRO, pursuant to s. 24.1.1(e) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(e));
- (b) a fine of \$90,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(b)); and
- (c) costs of \$10,000, pursuant to s. 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2).

II. RESPONSE TO ANOH

¶ 3 The Respondent did not submit a Reply to the ANOH, nor did he appear at, or participate in proceedings brought by Staff or the hearing held on July 31, 2024, despite numerous attempts by Staff to contact him regarding these matters. Various affidavits from Staff members confirming their efforts to contact the Respondent were filed as exhibits at the hearing.

¶ 4 Since the Respondent did not file a Reply, nor appear at the hearing, in accordance with Mutual Fund Dealer Rule 7.3.4 and procedural rules 8.4 and 13.5, the hearing panel accepted as true, the facts set out in the ANOH. These facts are reviewed below. The panel also agreed with the allegations of misconduct and sanctions requested by Staff as set out in the ANOH.

III. ALLEGATION 1: RESPONDENT BORROWING

¶ 5 During the material time, clients GR, MK, SF, PB2, HH and MM were or became Approved Persons of the Dealer Member, and the Respondent was the branch manager responsible for supervising their activities at the Dealer Member.

¶ 6 In response to proceedings between the Respondent and the Canada Revenue Agency (“CRA”), on November 16, 2015, the Ontario Securities Commission (the “OSC”) imposed terms and conditions on the Respondent’s registration effective December 1, 2015, which included a period of close supervision by the Dealer Member.

¶ 7 Between February 24, 1997 and September 23, 1999, the Respondent borrowed a total of approximately \$55,000 from clients MM and IM. Although the said principal was eventually repaid, the Respondent failed to repay all of the interest owed to MM and IM, in the amount of \$4562.82.

¶ 8 Between August 3, 2011 and December 14, 2015, the Respondent borrowed a total of approximately \$160,000 from client GR all of which was repaid.

¶ 9 In 2013, the Respondent borrowed amounts totalling approximately \$6,000 from client PB1 who was then 76 years old and retired. The Respondent was the Approved Person responsible for servicing client PB1’s accounts at the time. Although the Respondent promised to repay each loan a month later, he did not repay the second and third loans until about two months later.

¶ 10 On February 14, 2013 and July 2, 2014, the Respondent borrowed a total of \$7,000 from

client AB who was 79 years old and retired. The Respondent was the Approved Person responsible for servicing client AB's accounts at the time. To date, the Respondent still owes client AB \$1,500.

¶ 11 On May 15, 2017, the Respondent borrowed \$2,500 from client SF. He promised to repay client SF by the end of the week, but failed to do so. When SF became a client on October 18, 2018, the Respondent owed client SF approximately \$500 of the \$2,500 that he borrowed. The Respondent repaid client SF by December 2018.

¶ 12 On October 17, 2017, the Respondent borrowed \$15,000 from client PB2. This loan was not repaid until 2020.

¶ 13 On December 12, 2017 and February 7, 2018, the Respondent borrowed amounts totalling \$5,500 from client MK, each time promising to pay within a few weeks. The Respondent was the Approved Person responsible for servicing client MK's accounts at the time. The Respondent did not repay the loans that he obtained from client MK on or before the dates when the Respondent had promised to repay her.

¶ 14 On July 4, 2018, the Respondent borrowed \$5,000 from client HH. The Respondent fully repaid client HH.

¶ 15 None of the loans that the Respondent obtained from clients SF, MK, PB1, AB, PB2, and HH were documented in loan agreements.

¶ 16 The matters set out in paragraphs 8-15 support the panel's conclusion that the Respondent, in fact, borrowed money from clients.

¶ 17 Based on the following, the panel also agreed with Staff submissions that Respondent's borrowing of monies from clients and being indebted to clients when they were clients of the Dealer Member gave rise to conflicts or potential conflicts of interest that the Respondent failed to disclose to the Dealer Member or otherwise ensure were addressed by reasonable business judgement, influenced only by the best interests of the client.

¶ 18 The version of MFDA Rule 2.1.4 that was in effect between August 3, 2011 and June 30, 2021, when amendments to MFDA Rule 2.1.4 came into effect, stated:

(a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member;

(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d);

(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest; and

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

¶ 19 The version of MFDA Rule 2.1.4(2) that was in effect between June 30, 2021 and November 2021 was to the same effect.

¶ 20 As explained by the Hearing Panel in *Gaunt (Re)* [2013] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201232, Reasons for Decision dated September 20, 2013 at para. 47:

A conflict of interest occurs when one party to a matter advances, uses or pursues his own interests in dealing with another person, to whom he has an obligation of dealing fairly, to the detriment of that other person or to his own advantage rather than the person to whom he owes the duty of fairness.

¶ 21 MFDA Staff Notice MSN-0047 also confirmed MFDA's position that:

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

¶ 22 Hearing Panels have reached the same conclusion in finding that Approved Persons who borrowed monies from clients contravened MFDA Rule 2.1.4. See for example:

Nunweiler (Re), [2012] Hearing Panel of the Pacific Regional Council, MFDA File No. 201030, Reasons for Decision dated May 28, 2012 at paras. 15-19,

Yalkezian (Re), 2022 LNCMFDA 13 at paras. 8-10, 13,

Rahman (Re), 2021 LNCMFDA 75 at paras. 52-53, 55,

Chapman (Re), 2020 LNCMFDA 118 at paras. 20-21.

¶ 23 By borrowing monies from clients and not disclosing the loans to the Dealer Member, the Respondent contravened MFDA Rule 2.1.4 (now Mutual Fund Dealer Rule 2.1.4(2)).

¶ 24 MFDA Rule 2.5.1 (now Mutual Fund Dealer Rule 2.5.1) requires Members to establish and maintain written policies and procedures for ensuring compliance with the By-law, Rules, and Policies of the MFDA (now CIRO) and applicable securities regulation. Approved Persons have a corresponding obligation to comply with those policies and procedures pursuant to MFDA Rule 1.1.2 (now Mutual Fund Dealer Rule 1.1.2).

¶ 25 The Dealer Member had policies and procedures that prohibited its Approved Persons from borrowing monies from clients and other Approved Persons at the Dealer Member.

¶ 26 In each year between 2011 and 2020, the Respondent completed and submitted to the Dealer Member a "General Representative Attestation" in which he answered "yes" to the following statement: "*I understand that I must not and will not accept cash from a client, a recruit or a representative, nor be involved in any kind of borrowing/lending money arrangement with a client, a representative or recruit.*"

¶ 27 As stated by the Hearing Panel in *Franco (Re)*:

The obligation of Approved Persons to comply with the policies and procedures of the Member that they are registered with is a cornerstone of the self-regulatory system. When Approved Persons disregard those obligations, the Member's ability

to supervise the conduct of such Approved Persons and protect the interests of clients and the public is undermined.

Franco (Re), 2011 LNCMFDA 55 at para. 38

Yalkezian (Re), *supra* at paras. 14-17, 27,

MFDA Rules 1.1.2, 2.5.1.

¶ 28 Accordingly, by borrowing monies from and being indebted to clients and other Approved Persons at the Dealer Member, the Respondent contravened the Dealer Member's policies and procedures and MFDA Rule 1.1.2 (as it relates to MFDA Rule 2.5.1) (now Mutual Fund Dealer Rules 1.1.2 and 2.5.1).

¶ 29 The standard of conduct codified by MFDA Rule 2.1.1 (now Mutual Fund Dealer Rule 2.1.1) requires that Members and Approved Persons deal fairly, honestly, and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest. The Rule is central to the MFDA (now CIRO) mandate of enhancing investor protection and strengthening public confidence in the Canadian mutual fund industry.

¶ 30 This panel agrees with prior hearing panels that held that borrowing from clients and breaching the Member's policies and procedures contravenes the standard of conduct set out in MFDA Rule 2.1.1 (now Mutual Fund Dealer Rule 2.1.1).

Nunweiler (Re), *supra* at paras. 15, 24,

Rahman (Re), *supra* at paras. 52, 56-57,

Boker (Re), [2022] Hearing Panel of the Central Regional Council, MFDA File No. 202179, Panel Decision dated May 11, 2022 at para. 21,

Yalkezian (Re), *supra* at paras. 6, 8, 13,

Chapman (Re) (Misconduct), *supra* at para. 20.

IV. ALLEGATION 2: FALSE OR MISLEADING STATEMENTS

¶ 31 The Dealer Member submitted a report to the MFDA, on the Member Event Tracking System ("METS") reporting allegations that it received, indicating the Respondent had borrowed monies from "other [Approved Persons registered with the Member] who are also Member clients".

¶ 32 On March 16, 2020, Staff wrote to the Dealer Member and requested that it obtain a written statement from the Respondent addressing, among other things, whether the Respondent had borrowed from clients or other Approved Persons registered with the Dealer Member, and the Respondent's reasons for any such borrowing.

¶ 33 On the same date, the Dealer Member informed the Respondent of the foregoing and reviewed with the Respondent, Staff's request for information set out in Staff's March 16, 2020, letter. At this time, the Respondent told the Dealer Member that he had borrowed monies from a client in 2003 that had since been reported to and dealt with by the Dealer Member. The Respondent further stated to the Dealer Member that he had not borrowed any monies from clients since the incident in 2003.

¶ 34 On March 31, 2020, in response to Staff's March 16, 2020 letter, the Respondent submitted a written statement stating that he had not borrowed monies from Member clients or

representatives. He failed to disclose that he had borrowed monies from clients (several of whom were also Approved Persons of the Dealer Member), as described above.

¶ 35 On April 6, 2020, the Dealer Member conducted a telephone interview with the Respondent, during which it informed the Respondent that his statements conflicted with other information the Dealer Member had received indicating he had borrowed monies from clients. The Respondent then admitted to the Dealer Member that he had borrowed money from GR but stated that he had not borrowed monies from any other Approved Persons or clients of the Dealer Member.

¶ 36 The Respondent's statements to the Dealer Member on March 16 and April 6, 2020, as well as the Respondent's statement in response to MFDA Staff's request for information on March 31, 2020, were false or misleading as the Respondent had borrowed monies from clients (some of whom were also Approved Persons of the Member), as described above.

¶ 37 On April 9, 2020, the Respondent submitted an updated written statement for MFDA Staff in which he admitted to borrowing money from clients GR, SF, PB2, MK and HH ("April 9, 2020 statement") but falsely denied having borrowed monies from other clients.

¶ 38 On February 19, 2021, the Respondent admitted to Staff that his initial statement in response to MFDA Staff's request for information on March 31, 2020, was "not the truth".

¶ 39 During the interview, the Respondent denied that he borrowed from any other advisors or clients that he didn't disclose in his April 9, 2020 statement. The Respondent's April 9, 2020 statement was false or misleading as he had borrowed from clients AB, MM (who was also an Approved Person of the Member), IM, and PB1, as described above. At no time did the Respondent disclose to the Dealer Member or the MFDA during their investigations into his conduct that he had borrowed monies from clients IM, MM, AB, and PB1.

¶ 40 Based on the foregoing, it was clear to the panel that, in fact, the Respondent made false or misleading statements to the Dealer Member and the MFDA during the investigations into his conduct.

¶ 41 Hearing Panels have held that misleading the Member and MFDA when questioned about possible misconduct contravenes the standard of conduct set out in MFDA Rule 2.1.1. By giving the Dealer Member and the MFDA false or misleading answers, the Respondent undermined:

- (a) the Dealer Member's ability to fulfil its supervisory role and ensure the handling of its business was following MFDA Rules; and
- (b) the MFDA's ability to investigate the conduct of participants in the mutual fund industry who are subject to its jurisdiction, as well as its ability to fulfill its regulatory mandate of protecting the public.

¶ 42 As a result of the Respondent misleading the Dealer Member and the MFDA, his client borrowing went undetected until the Dealer Member received other information indicating he had borrowed monies from and was indebted to clients, and the Dealer Member and MFDA's investigations closing prematurely. Client harm may have also arisen.

¶ 43 By making false or misleading statements to the Dealer Member and the MFDA during their investigations, the Respondent contravened MFDA Rule 2.1.1 (now Mutual Fund Dealer Rule 2.1.1).

¶ 44 Therefore, the panel concluded that allegation 2 has been proven.

V. ALLEGATION 3: FAILURE TO COOPERATE

¶ 45 Between July and September 2022, the Dealer Member reported to the MFDA that it was investigating reports it received that clients MM, IM, AB, and PB1 had disclosed to it that the Respondent had borrowed monies from them. Staff commenced an investigation into these allegations and informed the Respondent about its investigation.

¶ 46 On November 25 and 28, 2022, the Respondent agreed to attend an interview with Staff on January 13, 2023, in relation to the matters under investigation.

¶ 47 On December 7, 2022, Staff sent a letter and email to the Respondent, confirming the Respondent's agreement to attend an interview with Staff on January 13, 2023. Staff's letter also stated that if the Respondent failed to attend the interview, Staff could seek authorization to commence enforcement proceedings against the Respondent for failing to cooperate with Staff's investigation.

¶ 48 On January 11, 2023, Staff emailed the Respondent the link to participate in the interview videoconference on January 13, 2023.

¶ 49 The Respondent did not respond to either Staff's December 7, 2022 letter or January 11, 2023 email.

¶ 50 On January 13, 2023, the Respondent failed to attend the interview as scheduled, or at all.

¶ 51 On January 18, 2023, Staff emailed the Respondent providing a further opportunity for the Respondent to attend an interview and asked him to contact Staff to arrange an interview by no later than January 31, 2023. The Respondent did not respond to Staff's email.

¶ 52 On February 7, 2023, Staff emailed and sent a letter by personal service to the Respondent, informing him that Staff would recommend enforcement action against the Respondent for failing to cooperate with Staff's investigation. The Respondent did not respond to Staff's letter.

¶ 53 As a result of the Respondent's failure to cooperate with Staff's investigation, Staff could not determine the full nature and extent of the Respondent's conduct, including whether he borrowed monies from other clients, and the source of the monies he repaid to the clients.

¶ 54 Pursuant to Mutual Fund Dealer Rule 6.1 (formerly section 21 of MFDA By-law No. 1), CIRO is empowered to conduct examinations of and investigations into the conduct, business, or affairs of any of its Approved Persons within its jurisdiction as it considers necessary or desirable in connection with any matter relating to compliance with CIRO By-laws and Rules, any applicable securities legislation or the by-laws, rules, regulations and policies of any self-regulatory organization.

¶ 55 Correspondingly, pursuant to Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1), all Approved Persons and former Approved Persons have an obligation to answer questions and attend interviews when requested by Staff to do so.

¶ 56 In *British Columbia Securities Commission v. Branch*, [1995] S.C.J. No. 32 the SCC found that it was reasonable for a securities regulator to compel individuals under its jurisdiction to attend oral examinations to answer questions relevant to an investigation.

¶ 57 As stated by the Ontario Divisional Court in *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704, "Fundamentally, every professional has an obligation to cooperate with his self-governing body."

¶ 58 Hearing Panels have repeatedly held that an Approved Person's failure to cooperate with

an MFDA investigation, including by failing to attend an interview when requested to do so, contravenes Mutual Fund Dealer Rule 6.2.1 (formerly s. 22.1 of MFDA By-law No. 1). Approved Persons must attend an interview to give information when requested to do so. To hold otherwise would hinder CIRO's ability to investigate the conduct of participants in the mutual fund industry who are subject to its jurisdiction and could undermine its ability to fulfil its regulatory mandate of protecting the public.

Tan (Re), 2022 LNCMFDA 24 at para. 49,

Trieu (Re), 2023 LNCMFDA 1 at paras. 7, 9, 21, 29,

Li (Re), 2020 LNCMFDA 181 at paras. 7, 16.

¶ 59 As described above, Staff repeatedly requested the Respondent to attend an interview in respect of the matters that were under investigation. He failed to do so.

¶ 60 The panel has therefore concluded that the Respondent failed to cooperate with Staff's investigation, contravening Mutual Fund Dealer Rule 6.2.1 (formerly section 22.1 of MFDA By-law No. 1).

VI. SANCTIONS

¶ 61 If in the opinion of a hearing panel, an Approved Person has failed to comply with the provisions of any By-law, Rule, or Policy of the MFDA (now CIRO), a panel can impose any of the penalties set out in sections 24.1.1(a) to (f) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(a) to (f)).

¶ 62 Section 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2) grants a hearing panel the discretion to require an Approved Person to pay the whole or part of the costs of the proceeding before the panel and any investigation relating to that proceeding.

¶ 63 In *Pezim v British Columbia (Superintendent of Brokers)*, the SCC held that the primary goals of securities regulation are the protection of investors and ensuring public confidence in the industry. Disciplinary sanctions imposed in a securities regulatory context are intended to restrain future misconduct in furtherance of those goals. Sanctions should also be preventative, protective and prospective.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at paras. 59 and 68,

Tonnies (Re), [2012] Hearing Panel of Prairie Regional Council, MFDA File No. 200503, Decision and Reasons dated June 27, 2005 at pp. 21-22.

¶ 64 *Tonnies (Re) (supra)* also stated that in determining whether a sanction is appropriate, the Hearing Panel should consider the following:

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

¶ 65 Other factors that hearing panels frequently consider when determining the appropriate penalty to be imposed on a Respondent include the following:

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

Tonnies (Re), *supra*, at p. 23.

¶ 66 The hearing panel also referred to CIRO's Sanction Guidelines, which came into effect on February 1, 2024. They are not mandatory or binding on the panel but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of hearing panels, are also described in the Sanction Guidelines.

¶ 67 Set out below are factors that are particularly relevant in determining appropriate sanctions for this case.

Seriousness of the Respondent's Misconduct

¶ 68 The proposed sanctions reflect the seriousness of the Respondent's self-serving and dishonest misconduct, involving multiple contraventions of MFDA (now CIRO) and Mutual Fund Dealer Rules, viz. borrowing from clients, misleading statements to, and failure to cooperate with the Dealer Member and MFDA (now CIRO). Such conduct seriously undermines public confidence in the market and its regulation.

¶ 69 As supported by *Franco (Re)*, *supra* at paras. 38, 68, it is fundamental that Approved Persons comply with Dealer Members' policies and procedures. Dealer Members have an obligation to supervise Approved Persons and protect clients, which can only be accomplished when Approved Persons follow the rules that have been established. When Approved Persons disregard their obligations to comply with a Dealer Member's policies and procedures, the Dealer Member's ability to supervise the conduct of such Approved Persons and protect the interests of clients and the public is undermined.

¶ 70 Misleading the Dealer Member and the MFDA (now CIRO) is serious misconduct that undermines the Dealer Member's ability to satisfy its regulatory obligations and supervise Approved Persons, CIRO's regulatory function, and public confidence in the securities industry. The resulting penalty should help re-establish the public's trust.

¶ 71 Failure to cooperate with CIRO's investigation is serious misconduct, undermining CIRO's ability to perform its regulatory function by fully investigating a matter and determining all of the facts. A determination that an Approved Person has breached their obligation to cooperate with a CIRO investigation attracts significant penalties, including a permanent ban on their ability to conduct securities related business in any capacity while in the employ of or associated with any Dealer Member of CIRO, and a significant fine.

Chapman (Re), 2021 LNCMFDA 99 at paras. 10, 28,

Ali (Re), 2023 LNCMFDA 4 at paras. 62-63, 76,

McIvor (Re), 2020 LNCMFDA 74 at paras. 61, 74-78, 84.

¶ 72 The imposition of the obligation on subjects of regulatory investigations to cooperate with an investigation is in the public interest. Often the most expeditious and cost-effective way that Staff can obtain records or information within the knowledge, possession, power, or control of a subject of an investigation is from the subject directly. Furthermore, the subject of an investigation is sometimes the only potential source of the information relevant to matters under investigation.

Vitch (Re), [2021] Hearing Panel of the Central Regional Council, MFDA File No. 201103, Panel Decision dated September 22, 2011 at para. 55.

¶ 73 In summary, the foregoing establishes for this panel that the Respondent engaged in serious misconduct over an extended period of time, involving multiple clients, conflicts of interest, and breaches of MFDA (now CIRO) and Mutual Fund Dealer Rules. The decisions in previous cases which CIRO counsel presented to the panel support the conclusion that such serious misconduct should result in lengthy to permanent prohibitions and/or substantial fines.

¶ 74 The Respondent being a branch manager at the time of the misconduct increases its seriousness. A branch manager is an important part of the MFDA (now CIRO) regulatory regime. The branch manager has a critical responsibility of ensuring that the Member's business is carried on in accordance with regulatory requirements and that the clients of the Member are afforded all of the protections of that regime. A branch manager should set an example and be a standard bearer for compliance. In this case, the Respondent shirked his responsibilities as branch manager, breached regulatory requirements so he could obtain personal benefits, and placed clients' monies at risk.

Durotoye (Re), [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201328, Panel Decision dated May 20, 2014 at para. 3,

Gabriele Gentile and Ronald Bruce Brinson (Re), 2015 LNCMFDA 193 at para. 186.

Deterrence

¶ 75 Deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets to protect investors. In *Cartaway Resources Corp. (Re)*, the SCC stated:

.... A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary

according to the breach of the Act and the circumstances of the person charged with breaching the Act.

Cartaway Resources Corp. (Re), 2004 SCC 26 at paras. 52-62.

¶ 76 A permanent prohibition from conducting securities related business and a significant financial fine, achieve the goals of both specific and general deterrence. The proposed sanctions will specifically deter the Respondent from engaging in similar misconduct, viz. using his position as an Approved Person to borrow from clients and Approved Persons of the Dealer Member. Furthermore, the Respondent has demonstrated that he is ungovernable by making misleading or false statements to the Dealer Member and the MFDA during their investigations into his conduct, and by failing to cooperate with CIRO's investigation. Failing to cooperate with CIRO undermines the integrity of the regulatory system and therefore warrants the strongest measures of deterrence.

¶ 77 The proposed sanctions will also act as a general deterrent by demonstrating that Approved Persons who engage in similar misconduct will be subject to meaningful sanctions.

Harm to Clients and Benefit to Respondent

¶ 78 As a result of the Respondent's misconduct, client AB suffered a loss of \$1,500. The Respondent repaid amounts that he borrowed from clients, excepting client AB. The Respondent, however, did not repay many of the loans when they became due. Clients SF, PB2, GR, MM, and IM were deprived of the use of their monies for years, in client MM and IM's case, decades. Client MM also had to pay \$4,562 in interest on the line of credit that was the source of client MM and IM's \$10,000 loan to the Respondent. Clients MM and IM were also not paid the interest promised by the Respondent.

¶ 79 The Respondent obtained personal benefits from the loans by accessing capital which he may not have been able to otherwise obtain on similar terms. He used the monies he borrowed to pay personal expenses, including to pay his outstanding tax arrears. The Respondent benefited from the use of borrowed monies for years, even decades, before fully repaying clients SF, PB2, GR, MM and IM.

¶ 80 The proposed fine disgorges the \$1,500 that the Respondent retained from his misconduct, and has not repaid to client AB. The panel emphasizes that the repayments may be a mitigating factor in determining sanctions, but the essence of the misconduct is the borrowing from clients.

The Respondent's Experience

¶ 81 The Respondent was registered with the Dealer Member for 25 years, and a branch manager for 13 years. Especially due to his experience and seniority in the industry, he knew or ought to have known that borrowing from clients of the Dealer Member raised significant conflicts of interests that would be impossible to resolve in favour of them. The exercise of responsible business judgment would have required a prohibition on such borrowing. He knew or ought to have known that borrowing from clients of the Dealer Member breached the Dealer Member's policies and procedures and MFDA Rules.

¶ 82 Similarly, the Respondent also knew or ought to have known that making false or misleading statements to the Dealer Member and the MFDA during their investigations, and failing to cooperate with Staff's investigation were significant breaches of MFDA Rules.

Previous Decisions Made in Similar Cases

¶ 83 The proposed penalties are consistent with the penalties imposed by hearing panels in previous cases involving similar circumstances, cited by MFDA counsel and reviewed by the panel. These cases were:

Boker (Re), [2022] MFDA File No. 202179

Yalkezian (Re), 2022 LNCMFDA 13

Rahman (Re), 2021 LNCMFDA 75

Chapman (Re), 2021 LNCMFDA 99

Ali (Re), 2023 LNCMFDA 4

McIvor (Re), 2020 LNCMFDA 74

VII. COSTS

¶ 84 The panel agrees with Staff submissions that the Respondent should pay costs of \$10,000. This amount is reasonable and less than the full cost to the MFDA as set out in its bill of costs.

¶ 85 By awarding costs, the panel is appropriately holding the Respondent responsible for a portion of the costs incurred by the MFDA as a result of his misconduct, thus transferring some of the financial costs of investigating and prosecuting the Respondent from the CIRO membership to the Respondent who contravened his regulatory obligations.

DATED at Toronto, Ontario this 15 day of September 2024.

“Frederick H. Webber”

Frederick H. Webber, Chair

“Kenneth Mann”

Kenneth Mann, Industry Representative

“Melody Potter”

Melody Potter, Industry Representative

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