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

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Russell Chang

Heard: April 28-29, September 1-2, 2015 in Vancouver, British Columbia
Decision and Reasons (Misconduct): December 7, 2015.

DECISION AND REASONS
(Misconduct)

Hearing Panel of the Prairie Regional Council:

Jean P. Whittow, Q.C.	Chair
Brian Cheung	Industry Representative
Susan Monk	Industry Representative

Appearances:

Clement Wai and Christopher Corsetti	))	Counsel for the Mutual Fund Dealers Association of Canada
	)	
Owais Ahmed	)	Counsel for the Respondent
	)))	

I. INTRODUCTION

1. On October 14, 2014, a Notice of Hearing ("NOH") was issued by the Mutual Fund Dealers Association of Canada ("MFDA") to Russell Chang (the "Respondent") pursuant to section 20 and 24 of MFDA By-law No. 1 alleging violations of MFDA By-laws, Rules and Policies as follows:

> **Allegation #1:** Between May 29, 2012 and June 12, 2012, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of the Member by selling, recommending, referring or facilitating the sale outside the Member of $550,000 of investment products to two clients and one other individual, contrary to MFDA Rules 1.1.1(a), 2.4.2 and 2.1.1.
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> **Allegation #2:** Between May 29, 2012 to August 1, 2012, the Respondent had and continued in another gainful occupation that was not approved by the Member by being employed by an investment company and by selling, recommending, referring or facilitating the sale of $550,000 of investment products to three investors on behalf of the investment company, contrary to MFDA Rules 1.2.1(c) and 2.1.1.

2. On October 14, 2014, the Respondent was served with the NOH by notice to his counsel. The Respondent has been represented by counsel at all times in these proceedings.

3. The burden of proof is upon the MFDA to prove that a Respondent engaged in misconduct on a balance of probabilities. Evidence must be "sufficiently clear, convincing and cogent" to satisfy that test (*F.H. v. McDougall*, [2008] 3 S.C.R. 41).

II. THE REPLY

4. The Respondent delivered a Reply dated December 18, 2014, in which he denied the Allegations, admitted to paragraphs 1, 2, 4, 8, 9, 14, 20 and 21 of the NOH, and made other partial admissions. The Reply is summarized below.

5. The Respondent admitted that, from June 30, 2008 to August 1, 2012, he was registered in British Columbia and Alberta as a mutual fund salesperson (now called a "dealing representative") with Investia Financial Services Inc. ("Investia"), a Member of the MFDA and worked from an Investia branch in Richmond, BC. The Respondent resigned from Investia on August 1, 2012. (NOH para. 1, Reply para. 4) and is not registered in the securities industry in any capacity (NOH para. 2, Reply, para. 4).

6. The Respondent in his Reply admitted paragraph 4 of the NOH which states "[b]eginning in January 2012, the Respondent was recruited by Providence to establish an office for Providence in Vancouver, British Columbia. In or around April 2012, the Respondent visited the Providence offices in Asia. Providence paid the Respondent's expenses for this trip." Providence was used in the NOH as a defined term to include Providence Preferred Financial Corp. ("Providence Preferred") and the Providence Companies. Near the end of May 2012, the Respondent accepted an offer of employment from Providence Preferred which was to commence on June 1, 2012 (NOH, para. 5, Reply para. 6).

7. The nature and extent of the Respondent's activities in "selling, recommending, referring or facilitating the sale" of Providence investments while he was registered with Investia is an area of dispute in these proceedings. The Respondent admits paragraph 8 and 9 of the NOH:

> 8. According to the Respondent, he was close friends with JL, AC and TL (collectively the "Investors"). JL and AC were clients of Investia and the Respondent was the dealing representative responsible for servicing their accounts. The Respondent met the Investors once a week for coffee. During some of these meetings between January and May 2012, they discussed the Respondent's potential job opportunity with Providence.
>
> 9. The Respondent introduced the Investors to a representative of Providence. According to the Respondent, the representative explained an investment product offered by Providence Preferred called Series I-A Notes (the "Notes") to the Investors.

8. The Respondent denied the first sentence of paragraph 11 of the NOH but admitted the balance of the paragraph, which states:

The Investors made the following investments in the Notes:

No.	Investor	Type of securities purchased	Total purchase price (Canadian $)	Exemption Claimed	Date of Investment
1.	TL	Series I-A Notes (20% interest paid at maturity – 1 year term)	$250,000	Accredited Investor NI 45-106 (j)	May 29, 2012
2.	Client JL	Series I-A Notes (20% interest paid at maturity – 1 year term)	$100,000	Accredited Investor NI 45-106 (j)	June 1, 2012
		Series I-A Notes (20% interest paid at maturity – 1 year term)	$150,000	Accredited Investor NI 45-106 (j)	June 1, 2012
3.	Client AC	Series I-A Notes (10.25% interest paid at maturity – 1 year term)	$50,000	Accredited Investor NI 45-106 (k)	June 12, 2012
			Total: $550,000		

9. In paragraph 12 of the NOH, the MFDA alleged that AC redeemed $4195.38 of mutual funds from his Tax Free Savings account and $47,401.88 from his unregistered account. The Respondent admitted the redemptions as alleged in paragraph 12 of the NOH, but stated that he did not recommend that AC redeem his mutual funds and that the redemption was unsolicited.

10. As to the Respondent's actions to obtain permission from Investia to a dual occupation, the Respondent admits to paragraph 14 in the NOH:

> 14. At all material times, Investia's policies and procedures, consistent with MFDA Rule 1.1.1(a), prohibited its Approved Persons from engaging in the sale of any investments that would be considered securities under applicable legislation through any entity other than Investia.

11. In the Reply (para. 7 and 16), the Respondent states he disclosed his "impending employment" in a conversation with his branch manager at Investia on May 31, 2012.

12. At paragraph 17 of the NOH, the MFDA asserted that the Respondent submitted a completed form to request permission to perform a dual occupation ("OBA Form") to Investia by way of email on June 14, 2012. In the Reply, the Respondent says the OBA Form was sent on June 12, 2012.

13. The Respondent admitted the latter portion of paragraph 17 of the NOH, set out below:

> 17… The Respondent disclosed [on the OBA Form] the following details of his involvement with Providence Preferred:
>
> - Name of Employer/Business: Providence Preferred Financial Corp.
> - Start Date: June 1, 2012
> - Nature/Type of Business: Trade Finance
> - Your Title/Position: Canadian Director
> - No. of Hours per Week: 35
> - Is this Activity Held during Normal Business Hours: Yes
> - Annual Salary: $72,000.00
> - Categories: Other - International Trade Finance
> - Details of Activities Conducted: Helping Providence Preferred raise capital for company's own use to expand their business in Emerging Markets. Raising capital in Hong Kong, Singapore and Suzhou, China; and
> - Is there any potential conflict of interest between your duties as Investia Mutual Fund Representative and your OBA of to your clients? - No

14. In the Reply, the Respondent stated that he "was responsible only for running Providence Preferred's office in Vancouver" (para. 8).

15. The Respondent admitted paragraph 20 from the NOH (Reply, para. 4):

> 20. Between June 22, 2012 and July 3, 2012, the Respondent received the following wire deposits from Providence totaling $15,420:

Date of Deposit	Financial Institution	Amount	Reason for Deposit
June 22, 2012	TD	$6,490	Advance from Providence

	Canada Trust		Preferred for office expenses and office set up
June 27, 2012	TD Canada Trust	$5,390	Expense reimbursements from Providence Preferred
July 3, 2012	TD Canada Trust	$3,540	Expense reimbursements from Providence Preferred
	Total	$15,420	

16. The Respondent admitted that Providence Preferred did not have a referral arrangement with Investia, and denied that the Respondent contravened MFDA Rule 2.4.2.

17. The Respondent denies that he recommended, sold, referred or facilitated the sale of $550,000 of investments in Providence to Investors. His position is set out at paragraph 9 of the Reply: He states that in the course of describing his potential employment with Providence Preferred with "three close personal friends (being the Investors)", they "expressed interest in learning more about the company for the purpose of making an investment"; that he told them he was not sufficiently knowledgeable about Providence "to provide the Investors with any details and/or make any recommendation" and gave them the contact details of a representative of Providence; and that the Providence representative subsequently contacted him, advised that the Investors had decided to make an investment in Providence Preferred and asked that the Respondent meet with each of the Investors to have them complete a subscription agreement with their social insurance number and date of birth, execute the subscription agreement and then return each of them to the representative. This he did. The Respondent further says that while he did as requested, he "did not discuss with the Investors any of the details of their respective investments and/or subscription agreements."

III. EVIDENCE AND FINDINGS OF FACT

A. INDIRA NADARAJAN

18. At the outset of the hearing, the MFDA tendered an affidavit sworn by Indira Nadarajan, the MFDA's Manager of Investigation, and expressed its intention to call her to provide oral

testimony. The Respondent objected to the admission of Ms. Nadarajan's affidavit and her testimony on the basis that 1) the MFDA had failed to comply with its rules regarding the timely provision of notice of the intended evidence; 2) that the affidavit contained inadmissible evidence in the form of impermissible opinions or argument, attached the transcript of a witness that the MFDA had interviewed but did not intend to call as a witness, and attached irrelevant documents.

19. The MFDA argued that the Panel is not bound by the rules of evidence, relying on Rule 1.6 of the MFDA Rules of Procedure:

> **1.6** ***Admissibility of Evidence***
>
> (1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.
>
> (2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.
>
> (3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.

20. The MFDA argued that the affidavit was providing the fruits of the investigation, copies of which had previously been disclosed to the Respondent.

21. After hearing the argument, the Panel ordered that the Affidavit be admitted subject to removal of pages 15 through 18 and a related exhibit. This was the portion of the affidavit that dealt with the evidence of an Approved Person that the MFDA did not intend to produce for cross examination. The MFDA took the position that it was unable to compel the attendance of an Approved Person and the Panel was not prepared to admit this evidence unless the Respondent has an opportunity to conduct cross-examination.

22. Further, the Panel further ordered that the proceedings be adjourned to give the Respondent adequate opportunity to review its contents. The MFDA is obliged under the Rules to give specified notice of evidence, which was not done.

23. The Respondent elected to proceed with the hearing.

24. Ms. Nadarajan's affidavit contains her opinion on matters in issue in this hearing. She draws conclusions upon facts that are directly in issue. She was not qualified as an expert in this hearing. The Panel is required to make a decision on the Allegations. The Panel has disregarded opinions expressed by Ms. Nadarajan.

25. While the Panel has a discretion to admit evidence that may not conform to the rules of evidence, we are concerned that it may be unfair to abandon the rules of evidence concerning documents which contain hearsay if the respondent does not have an opportunity to test the veracity of the author or the contents. That said, in the present case there appears to be no dispute as to the reliability of the documents attached as exhibits to Ms. Nadarajan's affidavit, including the Notes, an extract from Investia's Compliance Policy and Procedure Manual and a letter from Investia to the MFDA dated December 14, 2012.

26. The letter from Investia to the MFDA dated December 14, 2012 states: "The OBA was not approved and was still pending with the Member at the time of the Approved Person's resignation from the firm." This appears to be undisputed. The Panel finds as fact that the Respondent had not been approved for a dual occupation by the Member when he ceased employment on August 1, 2012.

B. THE RESPONDENT

27. The Respondent did not give viva voce evidence at the hearing. Attached to Ms. Nadarajan's affidavit is the transcript of an interview conducted of the Respondent pursuant to sections 21 and 22 of the MFDA By-law on July 30, 2013 (the "Interview"). The references to the Respondent's evidence below are from the Interview.

28. The Respondent described the process by which he was "recruited" by Providence between January and April 2012. His principal contact during this time was JW, a "good friend"

and his director at a former employer. He met the principals of Providence and, at their invitation, visited their office in China in April 2012. Near the end of May, the Respondent accepted an offer of employment at an annual salary of $72,000, to commence June 1, 2012.

29. The Respondent described the business of Providence Preferred as follows:

> The company is in trade finance where --- in Brazil it's called factoring, where they would take capital and purchase receivables and the receivables is regulated in the legal framework of Brazil, which is through the Central Bank of Brazil. And companies --- financial companies would give credit or working capital, if you will, to firms if they're able to sell their receivables. And legally financial firms can only discount a certain percent on a monthly basis how much they can buy the receivables for. And the Central Bank of Brazil posts a daily percentage of what the discount rate is, usually between 4 to 5 percent per month. So a company that's legal and proper in Brazil, could buy receivables with returns up to 60-plus percent return a year. And through those profits is how we can give the investors the returns that we're advertising.

30. In the Interview, the Respondent said he was close friends with JL, TL and AC. He met with TL and JL, who are sisters, about once a week for coffee, and during those meetings:

> I talk about what was presented to me or what [JW] talked to me about, about Providence and what they do. And about how the company gets their returns and how I'm excited about this, how I'm going to go to China and do some due diligence to make sure it actually is what it is. And they're kept abreast, often through our weekly coffees of my due diligence, of my findings on the company and how trip by trip or conversation by conversation, I was building my confidence towards Providence and their offerings and their business process. And that's how we talked about the returns, about what I was doing.

31. The Respondent said that the purpose of his meetings with TL and JL was not to generate business for Providence, that he did not promote Providence to them or suggest that they invest. He said that his knowledge of the actual mechanics of the investment was "in its infancy" and he "directed them to [JW]", who would be the one that would "explain the returns" and "be the one involved with selling the product". Specifically as to TL, the Respondent said:

> Well, [TL]'s interest to invest in the company, she approached me and said can I invest in this, what do I do? And like I said, I don't know much about, at the time, how it got its profits and how it generated returns, and what it looks like. And that's when I tell her I'll

> contact [JW] and you guys can talk about it and figure out what it looks like, and if I can help in any way, I will.

32. However, as set out in paragraph 30 above, when the Respondent met with TL, he described the business of Providence and the nature of its investments. At the same time, he was describing to TL his growing excitement about his opportunity with Providence and his growing knowledge though his "due diligence and findings on the company". The Panel has no doubt that the Respondent's enthusiasm and growing confidence in Providence had the effect of promoting Providence and its products.

33. The Respondent said that after this, JW contacted him and advised that TL had decided to invest, sent him a partly completed subscription form by email, asked that he meet TL to complete the form and return it. The Respondent met with TL. He said he couldn't recall whether the explained to TL what the form was about, but they were both under the understanding that this is the form to initiate the process to invest with Providence. He did not "encourage" or "recommend" the investment to TL.

34. The Respondent said that the process with JL was similar. He did not "recommend or facilitate the sale" to JL. He completed the subscription agreement in the manner described above.

35. The Respondent said he was friends and met for coffee often with AC. AC expressed dissatisfaction with his mutual funds and when he expressed an interest in investing in Providence, the Respondent "directed towards [JW] because [JW] handled the sales, pitching, and things like that with the product. And after he was satisfied with what [JW] told him, he wanted to invest, he rung me up and asked me to sell his portfolio so he can invest with Providence. The Respondent said that the conversation then probably went "are you sure", and then he took those instructions. The Respondent said he did not describe the benefits of the investment to AC.

36. In the Interview, the Respondent described his intended employment as "to set up the office and infrastructure in Canada, specifically here in Vancouver, vis-à-vis looking for an

office, staff, staffing the office, furnishing the office, hire a copywriter to work on some marketing materials. That was my scope initially or at the beginning." However, the Panel notes that in the OBA Form prepared by the Respondent in June 2012, the Respondent described his intended employment as: "Helping Providence Preferred raise capital for company's own use to expand their business in Emerging Markets. Raising capital in Hong Kong, Singapore and Suzhou, China". The Panel finds that the document that the Respondent prepared at the time he began his employment is the better evidence as to his intended activities.

37. As to the Respondent's communications with Investia about his new employment, the Respondent said that he had a telephone conversation with his Investia branch manager on May 31, 2012 in which he disclosed "how it's a possibility that I may be involved in another firm". In fact, by this date, the Respondent had accepted the position. Further:

> MR. CHEE: During this telephone conversation with David, did you disclose specifically to David that you were interested in Providence Preferred Financial Corp.?
> MR. CHANG: The company name didn't come up, but I explained to him the situation.
> MR. CHEE: Can you be more specific when you say you explained the situation?
> MR. CHANG: How I was looking at another firm and the nature of the work. And whether I needed to resign from Investia to proceed with that new venture, and I asked for some advice.
> MR. CHEE: What did David say to you in return?
> MR. CHANG: Like I said, he suggested I fill in the OBA form, send it in to Investia for review and if my OBA was approved, then there's no need to resign from the firm and I can --- I would imagine, work concurrently, was his idea. And if it was not improved, then I can resign from the firm. I remember him saying send it in, see how it goes.
> MR. CHEE: Do you remember whether David Ong handed you this form personally?
> MR. CHANG: No, he would have most likely directed me to a website.
> MR. CHEE: Just for the record, May 31st, 2012, you had a discussion with David Ong but did not mention specifically Providence Preferred?
> MR. CHANG: Correct.
> MR. CHEE: Did he ask you any further questions about the nature or type of business that you were interested in?
> MR. CHANG: I can't recall.

38. The Respondent said that he completed the OBA Form on June 3, 2012 and sent it to Investia by email in the evening of June 13, 2012. This explains why the form was received by Investia on June 14, 2102. As to the delay, the Respondent said "[t]here's no reason for a specific delay. Being involved with a new venture is a busy time and there's no specific reason".

C. TL

39. TL was called by the Respondent, entered an affidavit in lieu of evidence in chief and was subject to cross-examination by the MFDA.

40. In summary, in her affidavit, TL deposed as follows: She has been close friends with the Respondent since 2006. In the spring of 2012, she and JL spoke with the Respondent about his potential job with Providence. Both she and JL "expressed an interest in learning more about the company and even potentially investing in it." The Respondent then told them he did not know much about Providence Preferred and if they wanted more information they could contact JW. TL deposed that after speaking with JW about the details of Providence and the products, she decided to invest, and her decision was "entirely because of the information [she] received from JW. JW told her that because he was not in Vancouver, she should meet with the Respondent to execute her subscription agreement.

41. TL testified that in deciding to make the investment, she and her sister "got some information from [JW]". Asked about the uncertainty she appeared to express about the investment and Providence, she explained that "a lot of what I do is based off faith and trust, so I don't always look so much into the details", and that her philosophy with respect to investment was that if she lost it, she could always make it back. When it was suggested to her by counsel for the MFDA that she had faith and trust in the Respondent, she said "at the time he was looking at it [Providence], I didn't, which is why I wanted to look into it". This is surprising evidence, given her close relationship with the Respondent and given that TL, her sister and her parents were all clients of the Respondent at that time.

42. TL then explained that she "educated herself" about this investment. She also testified that part of her motivation was to protect her friend, the Respondent, from "getting into something that was over his head".

43. In addition, TL initially testified that the Respondent told her when they met for coffee that he was looking for "opportunities" but never that he intended to work for Providence, and that she did not know until months after her investment was made that he was so employed.

44. Later, when referred to her affidavit, TL testified that in her meetings with the Respondent, in the spring of 2012, and before deciding to make the investment, she discussed the business of Providence with the Respondent: "we talked about Brazil and the economies and the factoring business". Counsel asked TL what the Respondent told her about factoring. TL then testified that the Respondent told her "the way they do business in Brazil" and repeated the description of factoring that she had been given by the Respondent. The description given by TL as to what the Respondent told her corresponds to the investment she later made.

45. TL testified that she is happy with her investment in Providence Preferred. It has paid a 20% return per year, and she has reinvested. After investing, she and JL visited the operations of Providence in Miami and Brazil. Her parents have invested. She maintains her relationship with the Respondent. It was apparent in her testimony that TL wished to support her friend and sought to underplay her communications with him regarding Providence.

IV. SUMMARY

46. To summarize the above, the Panel finds the following facts:

47. The Respondent was registered in British Columbia from June 30, 2008 to August 1, 2012 and at all times with Investia.

48. Between January 2012 and April 2012, the Respondent was recruited for employment at Providence Preferred.

49. During this time, the Respondent told his friends and clients TL, JL and AC that he was pursuing an opportunity with Providence and the nature of its business.

50. The Respondent did not “encourage” or “recommend” that the Investors purchase the Notes. However, the tone of the Respondent’s conversations with TL and JL, set out above, and his description to them of the Providence investments, had the effect of promoting its products.

51. When TL, JL and AC expressed an interest in investing in Providence, the Respondent gave them the name and contact information for a representative, JW, and, in his words, “directed” or “referred” them to JW.

52. Near the end of May, 2012, the Respondent accepted an offer of employment from Providence to commence June 1, 2012.

53. On May 29, 2012, the Respondent was asked by JW to meet with TL to complete a partially completed subscription form for the purchase of the Notes, which he did. On May 29, 2012 TL purchased $250,000 of Notes.

54. On May 31, 2012, the Respondent spoke with his manager about the “possibility that [he] may be involved in another firm”, but did not did not disclose the name of the company, or that he had already accepted an offer of employment. This does not constitute approval by Investia.

55. On June 1, 2012 the Respondent commenced employment at Providence Preferred.

56. At the request of JW, the Respondent met with JL on June 1, 2012 and assisted her to complete her subscription agreement for the purchase of $100,000 and $150,000 of Notes and submitted these to Providence.

57. On June 6, 2012 client AC redeemed approximately $50,000 from his mutual fund account with Investia. The only evidence before this Panel is that the redemption was unsolicited. Further, it did not result in any commission to the Respondent.

58. At the request of JW, the Respondent met with AC on June 12, 2012 and assisted him to complete a subscription agreement for the purchase of $50,000 of Notes, which he submitted to Providence.

59. On June 13, 2012 the Respondent sent an e-mail to Investia attaching his OBA Form disclosing his involvement in Providence Preferred.

60. On July 23, 2012 the Respondent tendered his resignation letter to Investia, with an effective resignation date of August 1, 2012.

61. Investia did not at any time approve of the Respondent's involvement with Providence Preferred.

V. FINDINGS

A. ARGUMENT ON FORM OF CHARGE

62. The Respondent referred to *Blackmont Capital Inc*. (Re), 2011 BCSECCOM 490 ("*Blackmont*") and authorities relying upon that decision, (being *Roberta Merlin McInstosh*, BCSECCOM 405 and *Weiquing Jane Jin*, 2014 BCSECCOM 194) for the principle that a panel has no jurisdiction to make determinations of matters that are not alleged in the notice of hearing:

> 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. *Blackmont* para. 24.

63. The Respondent firstly referred to these authorities for the proposition that the MFDA could not seek a finding that the Respondent had breached the policies of Investia as he was not so charged.

64. The Panel agrees. In order to seek a finding that the violation of the Member's policies constitutes misconduct or a breach of the MFDA Rules, the MFDA ought to have so charged. In *In the Matter of Arnold Tonnies*, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Panel Decision dated June 27, 2005 ("*Re Tonnies*"), it was alleged that the respondent "failed to abide by the policies and procedures of the Member regarding conflicts of interest…thereby failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule. 2.1.1(b)". In the present case, no such allegation is made.

65. This does not dispose of the issue of whether the Respondent's conduct, as described in each Allegation, violated MFDA Rule 2.1.1.

66. The Respondent secondly argues that this principle requires that every element of each charge precisely as alleged must be proven. He notes the MFDA has charged that the Respondent contravened "MFDA Rules 1.1.1(a), 2.4.2 and 2.1.1." and "MFDA Rules 1.2.1(c) and 2.1.1". He argues therefore that the MFDA must prove that the Respondent breached all of the sections of the MFDA Rules referred to in each Allegation.

67. The Panel disagrees. The Panel was not provided any authority for the proposition that every section alleged to have been breached must be proven. The wording of a charge in administrative proceedings is not treated the same way as a criminal charge. The purpose of the NOH is to give the Respondent notice of the conduct or transaction in issue and the manner in which it is alleged to have violated the MFDA's standards. The Panel is satisfied that the Allegations as worded gave adequate notice that the Respondent may be found to have violated any one of the stated Rules.

B. ALLEGATION #1

68. Allegation #1 charges that the Respondent "engaged in securities related business…by selling, recommending, referring or facilitating the sale outside the Member of $550,000 of investment products to two clients and one other individual" contrary to MFDA Rules 1.1.1(a), 2.4.2 and 2.1.1.

69. MFDA Rule 1.1.1(a) states:

> 1.1.1 **Members** No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:
>
> (a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than:
>
> (i) such business as relates solely to trading in deposit instruments conducted by any Approved Person not on account of the Member; and
>
> (ii) such business conducted by an Approved Person as an employee of a bank and in accordance with the *Bank Act (Canada)* and the regulations thereunder and applicable securities legislation.

70. "Securities related business" is defined in MFDA By-law No. 1 in broad terms:

> "securities related business" means <u>any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities</u> for the purposes of applicable securities legislation in any jurisdiction in Canada, including for greater certainty, securities sold pursuant to exemptions under applicable securities legislation; (emphasis added)

71. The word "security" is defined in the BC *Securities Act* RSBC 1996 c. 418 as including "(c) a document evidencing an option, subscription or other interest in or to a security, and (d) a bond, debenture, note or other evidence of indebtedness …" The Respondent concedes that the Notes were securities and we so find.

72. Trade is defined in s. 1 of the *Securities Act* to include:

> (a) a disposition of a security for valuable consideration whether the terms of payment be on margin, installment or otherwise, but does not include a purchase of a security or a transfer, pledge, mortgage or other encumbrance of a security for the purpose of giving collateral for a debt,
>
> (a.1) entering into a futures contract,
>
> (b) entering into an option that is an exchange contract,

(c) participation as a trader in a transaction in a security or exchange contract made on or through the facilities of an exchange or reported through the facilities of a quotation and trade reporting system,

(d) the receipt by a registrant of an order to buy or sell a security or exchange contract,

(e) a transfer of beneficial ownership of a security to a transferee, pledgee, mortgagee or other encumbrancer under a realization on collateral given for a debt, and

(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e);

73. The MFDA argues that the relevant component of the definition of trade is (f). In particular, the MFDA argues that the Respondent engaged in acts in furtherance of a trade by meeting with the Investors to have them complete and execute the subscription agreements and forwarding them to Providence. In contrast, the Respondent argues that his activities were so minimal that they did not constitute actions in furtherance of a trade.

74. Both parties referred to the authorities concerning what constitutes an act "directly or indirectly in furtherance of a trade". This is a question of fact to be determined in all the relevant circumstances. No single action is determinative, rather the totality of the conduct should be considered. Both parties referred to the following passages from *Sabourin (Re),* 2009 LNONOSC 203:

[57] In *Costello* [*Costello (Re)* (2003), 26 O.S.C.B. 1617], the Commission stated at para. 47:

There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.

[58] In *Lett* [*Lett (Re)* 2004, 27 OSCB 3215], there was no allegation of any actual trades, but the respondents opened brokerage accounts, accepted and deposited monies from investors for the purpose of participating in a third party investment program, and provided letters to third parties documenting the investments. The Commission found these actions were acts in furtherance of trades. (*Lett, supra* at paras. 48-64.)

> [59] In *Momentas* [*Momentas Corp. (Re)* (2006), 29 O.S.C.B. 7408], the Securities Commission listed examples of activities found to have been "acts in furtherance" of a trade, at para. 80, including:
>
> (a) providing potential investors with subscription agreements to execute;
> (b) distributing promotional materials concerning potential investments;
> (c) issuing and signing share certificates;
> (d) preparing and disseminating materials describing investment programs;
> (e) preparing and disseminating forms of agreements for signature by investors;
> (f) conducting information sessions with groups of investors; and
> (g) meeting with individual investors.
>
> [61] The Commission has also found, in other cases, that evidence that a respondent "received consideration or other benefit from an eventual sale would be an indication of a promotional purpose and thus an act in furtherance of a trade." (*Momentas*, supra at paras. 87-88.)
>
> [62] The Commission reaffirmed these principles in *Limelight* [*Limelight Entertainment Inc. (Re)* (2008), 31 O.S.C.B. 1727], stating at para. 131:
>
> The Commission has taken "a contextual approach" that examines "the totality of the conduct and the setting in which the acts have occurred." The primary consideration is, however, the effect of the acts on investors and potential investors…

75. The MFDA also relied upon *Breckenridge (Re),* [2007] Hearing Panel of the Central Regional Council, MFDA File No. 200718, Panel Decision dated November 14, 2007, for the proposition that acting as an "intermediary" between the client and the seller of an investment constitutes securities related business. In that case, the registrant was found to have "recommended" and "facilitated the transfer...of over $1.8 million in clients' funds", which goes far beyond the alleged conduct of the Respondent. However, a dictionary definition of intermediary is a person who acts as a "link" or "go-between". To that extent, the Panel is satisfied that the Respondent acted as an intermediary between the Investors and Providence.

76. In terms of the factors listed in *Re Momentas*, the Respondent argues that his only involvement was providing the Notes to the Investors and being present while they signed the Notes, after they had made a decision to invest.

77. The Respondent also argued that *Re Momentas* distinguishes between activities that are "promotional" rather than "informational", emphasizing that he simply told the Investors to contact JW and did not himself recommend or promote the Notes.

78. The Respondent also relied upon *Re Aviawest Resorts Inc. et al*, 2013 BCSECCOM 319. That case concerned whether the company and a number of persons associated with it contravened s. 61(1) of the BC *Securities Act* by distributing securities without a prospectus. It was held that the regulatory manager, marketing manager, and accountant, issued and signed notes and thereby participated in their distribution. However, a fourth person, who was responsible for operations of the resort and had no role at all in the issue or assignment of notes other than to sign an occasional note on behalf of the company if none of the others were available, did not. The Respondent argued that he did even less that the person who was not found liable in *Re Aviawest Resorts.*

79. The MFDA argued that the Respondent also provided marketing materials to TL. The Panel is unable to determine when the materials were provided in relation to TL's purchase. They may have been provided well afterwards. We therefore do not find that this is an action by the Respondent in furtherance of a trade.

80. The Panel also notes that there is no evidence that the Respondent received any remuneration in connection with the Investors' purchases of the Notes.

81. As set out above, the Panel has found that the Respondent:

- informed the Investors of the business of Providence and explained to TL the nature of the Providence investment, i.e., factoring;
- gave each Investor the name of the person at Providence who was responsible (or, for TL, contacted JW on her behalf) for selling the investment and in his words, "directed" or "referred" them to him;
- received a partially completed subscription form from JW for completion with the Investors;
- met with each Investor and completed the subscription;
- submitted the completed subscription to Providence.

82. These actions occurred at a time when the Respondent was, to the knowledge of the Investors, developing a relationship or taking employment with Providence.

83. The effect of the Respondent's actions was that the Investors purchased Notes.

84. In the Panel's view, the Respondents actions were in direct and indirect furtherance of a trade.

85. The second MFDA Rule alleged to have been breached in Allegation #1 is Rule 2.1.1. This is described as the "conduct unbecoming" allegation. MFDA Rule 2.1.1 provides:

> 2.1.1 **Standard of Conduct.** Each Member and each Approved Person of a Member shall:
>
> (a) deal fairly, honestly and in good faith with its clients;
>
> (b) observe high standards of ethics and conduct in the transaction of business;
>
> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
>
> (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

86. The MFDA argues that the Respondent's conduct fell below the standards required by Rule 2.1.1. It relies upon *Re Tonnies* and *Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill (Re),* [2009] MFDA Central Regional Council, MFDA File No. 200834, Hearing Panel Decision dated June 23, 2009.

87. The Respondent argues that in order to amount to a violation of Rule 2.1.1, the MFDA must show that the conduct was unethical, blameworthy, or for an improper purpose. The Respondent relies upon *Zosaik and Brighten (Re)*, 2012 IIROC 59, *Octagon Capital Corp. (Re),* [2007] I.D.A.C.D. No. 16 ("*Re Octagon*") and *Blackmont*.

88. These three cases concerned the interpretation of IDA Rule 29.1, which is similar, though not identical, to Rule 2.1.1 and provides:

> 29.1. Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

89. In *Re Octagon,* the relevant analysis concerned an allegation that Octagon failed to make adequate inquiries to detect that it was accepting orders to trade from an individual with a history of securities violations, and thereby engaged in conduct unbecoming or detrimental to the public interest, contrary to By-law 29.1. The panel found that the investigations made were exactly those that a reasonable person would make, but it failed in these investigations to detect the individual's history. It dismissed that allegation. It reasoned:

> 44. There is no evidence Octagon acted unethically or for an improper purpose. There is no evidence that Octagon had a conflict of interest. There is no evidence of dishonest motive or blameworthy conduct by Octagon . . . .
>
> 45. Octagon was under a regulatory duty which required it to exercise reasonable care. Breach of a duty of care is negligence, but it does not follow that mere negligence constitutes a disciplinary offence. Aggravated negligence or negligent conduct which leads to conduct unbecoming can, in fact, lead to a disciplinary offence. It could be said that Octagon was negligent but that finding, if made, is not sufficient to constitute conduct unbecoming or detrimental to the public interest contrary to By-law 29.1. Only aggravated negligence could lead to that conclusion. . . .
>
> 46. In short, negligent conduct may give rise to other remedies but does not constitute conduct unbecoming or detrimental to the general public…

90. In *Blackmont*, the Securities Commission approved *Re Octagon*. In *Blackmont*, the Securities Commission set aside findings of an IIROC Panel that Blackmont and one of its principals engaged in conduct unbecoming or detrimental to the public interest, as prohibited by IIROC Rule 29.1 by entering paying commission to a third party without the disclosure to clients required by s. 53 of the *Securities Act*. The Commission upheld the finding that disclosure had not been made on the basis that there was no evidence in Blackmont's file of disclosure. However, it held there was no basis for the IIROC panel's conclusion that this was other than an inadvertent error. Further, it held there "was no evidence that the respondents' conduct in contravening section 53 was intentional, was motivated by dishonest intent or for an improper

purpose, or was otherwise unethical….[or] likely to impair the public's trust of the industry" (para. 55). Therefore, the Commission overturned the finding that the respondent's conduct in breaching s. 53 of the *Securities Act* constituted a breach of Rule 29.1.

91. In *Re Zosaik and Brighten,* the allegation of a conduct unbecoming was that Ms. Zosiak "failed to perform her role as a gatekeeper to the capital markets" by failing to make inquiries to ensure the legitimacy of transactions in accounts for which she was responsible, "thereby facilitating a securities fraud". The panel held that it was bound by the analysis described above and "that to succeed in this case IIROC must show that whatever omissions or failures may properly be brought home to Ms. Zosiak should be characterised as 'aggravated negligence' or that she 'acted unethically or for an improper purpose . . . or had a conflict of interest. . . [or a] dishonest motive or blameworthy conduct'."

92. It is fundamental to the regulation of the industry that Approved Persons engage in securities related business through the Member. The sale of "off-book" securities deprives the investor of the protection intended to be afforded through the offices of a Member. That requirement is stated in the MFDA Rules, to which the Approved Person agrees to adhere as a condition of approval. It is also stated in the policies of Investia. It must have been known to the Respondent.

93. The Respondent's conduct was not inadvertent or unintentional. He knew that the Notes were not approved by the Member, and he knew that he was facilitating their purchase when he assisted in the completion of the subscription agreements for JL, TL and AC.

94. In the Panel's view, this conduct falls below the high ethical standards contemplated by MFDA Rule 2.1.1 (b) and (c).

95. The Panel is therefore satisfied on the balance of probabilities that the Respondent engaged in securities related business that was not carried on for the account of the Member contrary to MFDA Rules 1.1.1(a) and 2.1.1. The evidence is clear, cogent and convincing. Allegation #1 is proven.

96. The MFDA did not pursue the allegation that the Respondent's conduct violated Rule 2.4.2.

C. ALLEGATION #2

97. Allegation #2 is that the Respondent engaged in a dual occupation (by selling, recommending, referring or facilitating the sale of investment products to three investors) on behalf of the investment company contrary to MFDA Rule 1.2.1(c) and Rule 2.1.1.

98. The Panel has found that the Respondent engaged in actions in furtherance of a trade, and those findings are imported here. The additional question for a finding in relation to Allegation #2 is whether the Respondent engaged in a dual occupation.

99. MFDA Rule 1.2.1(c) provides:

> 1.2.1(c) **Dual Occupations**. An Approved Person may have, and continue in, another gainful occupation, provided that:
>
> …(iii) *Member approval*. The Member for which the Approved Person carries on business either as an employee or agent is aware and approves of the Approved Person engaging in such other gainful occupation;

100. The Respondent admitted that he accepted employment with Providence "near the end of May, 2012" and commenced the employment on June 1, 2012.

101. He disclosed to his manager on May 31, 2012 that he "was looking at another firm", but did not disclose its name or that he had accepted a job. According to the Respondent, the manager told him to fill in the OBA Form and send it in. The Respondent does not suggest that this conversation constituted approval by the Member.

102. By the time the Respondent filled in the OBA Form and sent it to Investia on June 13, 2012, all the investments in Providence referred to in the NOH had been made.

103. The Respondent resigned from Investia effective August 1, 2012. Investia's letter to the MFDA dated December 14, 2012 states: The OBA was not approved and was still pending with the Member at the time of the Approved Person's resignation from the firm.

104. In the absence of that approval, the Respondent acted contrary to MFDA Rule 1.2.1(c).

105. The MFDA argues secondly that the Respondent's conduct violates MFDA Rule 2.1.1.

106. The MFDA argues that the Respondent's behaviour was contrary to the policies of the Member and the Panel should find that his conduct violates Rule 2.1.1. As we have ruled above, the Respondent was not charged with breaching the policies of the Member. However, in our view the question of whether the Respondent has breached MFDA Rule 2.1.1 remains before us.

107. In the Panel's view, the import of Investia's policies was to bring home to the Respondent his obligation as an Approved Person to obtain approval to the dual occupation. To be effective, approval has to be granted before the activity is undertaken.

108. The underlying rationale for the prohibition upon unapproved outside occupations is to guard against conflicts of interest and to ensure that the activities of the Approved Person do not compromise the regulation of the industry.

109. Involvement in a company that sells investments that are not approved for sale by the Member gives rise to a potential conflict between the interests of the Respondent, the Member and the investor. This is so even though there is no evidence that the Respondent received any direct pecuniary benefit from the Investors' purchases of the Notes.

110. The Panel is satisfied that the Respondent's conduct failed to observe high standards of ethics and conduct in the transaction of business and was contrary to Rule 2.1.1.

111. The Panel is satisfied that Allegation #2 is proven on a balance of probabilities.

DATED this 7th day of December, 2015.

"Jean P. Whittow"

Jean P. Whittow, Q.C.
Chair

"Brian Cheung"

Brian Cheung
Industry Representative

"Susan Monk"

Susan Monk
Industry Representative

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