

Decision and Reasons (Misconduct)

File No. 201512



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: Edward Jonathan Okopny

Heard: February 29, 2016 in Toronto, Ontario
Decision and Reasons (Misconduct): April 21, 2016

**DECISION AND REASONS
(Misconduct)**

Hearing Panel of the Central Regional Council:

W. A. Derry Millar

Guenther Kleberg

Colleen Waring

Chair

Industry Representative

Industry Representative

Appearances:

Paul Blasiak

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Counsel for the Mutual Fund Dealers
Association of Canada

Edward Jonathan Okopny

In Person

INTRODUCTION

1. By Notice of Hearing dated April 23, 2015, Staff of the Mutual Fund Dealers Association of Canada (“MFDA”) alleged that Edward Jonathan Okopny (“Respondent”) violated the By-laws, Rules or Policies of the MFDA set out below:

Allegation #1: On December 6, 2011, the Respondent processed two unauthorized redemptions in the accounts of client MM in the amounts of \$34,000 and \$6,000, thereby failing to deal fairly, honestly and in good faith with a client, and engaging in business conduct which is unbecoming or detrimental to the public interest, contrary to MFDA Rule 2.1.1.

Allegation #2: Between December 6, 2011 and March 29, 2012, the Respondent engaged in personal financial dealings with client MM by borrowing and failing to fully repay \$40,000 from client MM, thereby giving rise to a conflict or potential conflict of interest between the Respondent and client MM, which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of client MM, contrary to MFDA Rules 2.1.1 and 2.1.4.

Allegation #3: Between about June 2008 and March 29, 2012, the Respondent engaged in dual occupations, which were not disclosed to or approved by the Member, contrary to MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d))¹ and 2.1.1.

Allegation #4: Commencing in March 2013, the Respondent failed to provide documents and information requested by Staff and failed to attend an interview with Staff for the purpose of investigating the Respondent’s conduct, contrary to section 22.1 of MFDA By-law No. 1.

¹ On December 3, 2010, MFDA Rule 1.2.1(d) was renumbered as MFDA Rule 1.2.1(c).

2. The hearing was held on February 29, 2016. Staff called Lucy Alfenore, a staff investigator, as its witness. During the course of Ms. Alfenore's evidence, Exhibits 5 and 6 were introduced into evidence. While the Respondent did not deliver a Reply to the Notice of Hearing, he attended the hearing and gave evidence. He was not represented by counsel.

3. There was very little disagreement on the facts except with respect to Allegation #1.

II. FACTS

4. From January 25, 2005 to March 29, 2012, the Respondent was registered in Ontario as a mutual fund salesperson with State Farm Investor Services (Canada) Co. ("State Farm").

5. From 2009 to 2012, the Respondent serviced client MM's accounts at State Farm. During this period, client MM was also the Respondent's mother-in-law.

6. On or about February 28, 2013, PM, who is client MM's son, sent a complaint letter dated February 28, 2013 (the "PM Complaint Letter") to State Farm alleging, among other things, that the Respondent processed unauthorized mutual fund redemptions in client MM's accounts.

7. On or about March 5, 2013, this matter came to the attention of MFDA Staff ("Staff") when State Farm filed a report on the MFDA's Member Event Tracking System ("METS") concerning the PM Complaint Letter.

8. On January 31, 2014, Ms. Alfenore conducted an interview of client MM as part of her investigation into the Respondent's conduct. A copy of the transcript of the interview of client MM was part of Exhibit "5".

Allegation #1 – Unauthorized Redemptions

9. On December 6, 2011, the Respondent processed two redemptions in client MM's accounts in the amounts of \$34,000 and \$6,000, net of deferred sales charges (collectively, the "Redemptions").²

10. According to client MM's date of birth as specified on her "New Account Application" form, client MM was 82 years old at the time that the Redemptions were processed.

11. During her interview with Staff, client MM stated that she did not instruct the Respondent to process the Redemptions.

12. Further, client MM stated that:

- (a) she did not meet with the Respondent on December 6, 2011; and
- (b) prior to her interview with Staff, she had never seen the redemption forms, which she purportedly signed and which the Respondent used to process the Redemptions.

13. Client MM also stated that she did not become aware of the Redemptions until she received her mutual fund account statements, which was "at least a month" after the date on which the Redemptions were processed.

14. In addition, client MM stated that on or about December 1, 2011, she suffered a serious hand injury. As a result of the injury, client MM required a nurse to administer daily antibiotics to her for a period of 30 days. Client MM also stated that the pain from the injury was so severe that she was unable to "write a cheque" or "sign anything" and that if she "bent over, [she] would just be in agony."

² Client MM incurred deferred sales charges of approximately \$1,314 as a result of the Redemptions.

15. On December 8, 2011, the proceeds from the Redemptions were deposited in client MM's bank account at the Royal Bank of Canada (the "RBC Account").

16. In the PM Complaint Letter, PM stated that client MM contacted him after she received her mutual fund account statements in February 2012 and informed him that she "did not authorize [the Redemptions] and was shocked to see [her investments] had been cleared out." Upon hearing this, PM confronted the Respondent, at which time the Respondent "admitted taking the money and assured [PM] he had a big investment coming in shortly and [client MM] would be paid back in full with interest."

17. The Respondent testified that during September and October, 2011, his son had been seriously ill and had been hospitalized at the Hospital for Sick Children. He was back in the hospital in November, 2011. He and his wife were facing serious financial issues as the illness of his son had impaired his ability to work. The Respondent believed that MM was aware of the difficulties that he and his wife were having as she was communicating on a fairly regular basis with her daughter, the Respondent's wife.

18. The Respondent testified:

- (a) He called MM in early December, 2011. He asked her for financial help and MM indicated she would be willing to help the Respondent and his wife.
- (b) On December 6, 2011, he went to visit MM at which time she signed the paperwork for the Redemptions. At the time, MM had an injury to her hand caused by a cat bite.
- (c) On December 6, 2011, he and MM went to the Royal Bank in New Hamburg and MM transferred \$4,000 from her account to the Respondent's Royal Bank account electronically. MM used her bank card to access her account to carry out the transaction. The transaction was conducted by the manager of the branch.
- (d) The redemption paperwork was submitted to State Farm and the Redemptions processed to MM's account. The amount of the Redemptions was \$40,000 from MM's two State Farm accounts.

- (e) On December 9, 2011, he returned to New Hamburg picked up MM and went to the Royal Bank. They met with the bank manager to conduct the transaction. The \$40,000 was transferred from MM's account to his account electronically. MM again used her bank card to access her account to carry out the transaction.
- (f) On December 9, 2011, he provided MM with a handwritten letter indicating he anticipated being able to pay back the funds within six weeks.
- (g) He denied signing anything, including the redemption forms, on behalf of MM.
- (h) He thought that MM could afford to make the loan as he knew that on December 14, 2011, "she had a \$10,000 GIC maturing that would certainly give her some financial protection in the interim until I was able to pay her back." MM had told him this.

19. While initially the Respondent indicated that he returned to New Hamburg to meet with MM on December 8, 2011, he subsequently stated that it was December 9, 2011. Given that the Redemptions were deposited into MM's account on December 8, 2011, and the withdrawal of \$40,000 was made on December 9, 2011, it seems more likely that the second visit to the Royal Bank took place on December 9, 2011, rather than December 8, 2011.

Allegation #2 – Borrowing from a Client

20. During her interview with Staff, client MM stated that:

- (a) on December 9, 2011, the Respondent requested that she provide a personal loan to him;
- (b) she agreed to loan the Respondent whatever funds were available in the RBC Account; and
- (c) as she was not aware of the Redemptions, she believed that the balance of the RBC Account was approximately \$3,000 to \$4,000.

21. Immediately prior to the deposit of the Redemptions, the actual balance of the RBC Account was \$2,672.67.

22. Later on December 9, 2011, the Respondent attended at a Royal Bank of Canada branch location with client MM. At that time, \$40,000 was withdrawn from the RBC Account. Client MM provided a loan to the Respondent in the amount of the withdrawal. However, as she was unaware of the Redemptions (and of the fact that they had been deposited in the RBC Account), client MM understood that the amount of the loan was \$3,000 “or less”.

23. In a signed written statement to State Farm’s insurance affiliate dated June 26, 2013, the Respondent admitted that he received a loan from client MM in the amount of \$40,000, which he failed to fully repay. Specifically, the Respondent stated the following:

... I confirm that I received \$40,000 as a loan from [client MM] with the understanding that she would be repaid within 4-6 weeks, and if not, then she would be repaid 1% interest based on the original principal. To date, I have only repaid \$6,400 in June 2012, the remainder is still outstanding. These monies, received from [client MM], were used to pay down my family’s personal debt. ...

24. The Respondent’s repayment of \$6,400 was recorded in an undated note which was signed by the Respondent and client MM (the “Repayment Note”). Among other things, the Repayment Note stated that:

- (a) the repayment was in respect of the “December 2011 Loan” from client MM to the Respondent and CO (the daughter of client MM and the Respondent’s then-spouse);
- (b) \$6,400 had been paid to client MM;
- (c) the payment represented “\$4000 cash and 6% interest on the \$40,000 loan”; and
- (d) the “principle (*sic*) loan of \$40,000 plus service charges incurred, will be paid back as soon as expected funds are received by [the Respondent]”.

25. On July 19, 2012, client MM commenced a civil lawsuit against the Respondent and CO to recover, among other things, the monies she had loaned to the Respondent as described above.

26. On September 24, 2012, client MM obtained a default judgment from the Ontario Superior Court of Justice against the Respondent and CO (the “Default Judgment”).

27. In June 2013, a Notice of Garnishment was issued to State Farm in respect of the monies owed by the Respondent as a result of the Default Judgment. The Notice of Garnishment was fully paid and client MM recovered her money.

Allegation #3 – Undisclosed and Unapproved Dual Occupations

28. On May 24, 2005, the Respondent signed a “State Farm Securities Products Agreement”, which stated the following under the heading “Section 3.8 Outside Activities and Securities Disclosure Form”:

[State Farm] must approve and monitor any outside business or activities with which the [Respondent] may be, or become, engaged.

29. In addition, the 2011 State Farm Compliance Manual stated the following under the heading “Undisclosed Business Activities”:

Salespersons must inform [State Farm] of all business activities they engage in other than dealings with State Farm Mutual Automobile Insurance Company, its subsidiaries, and affiliates. The Outside Business Activities questionnaire must be completed and submitted within 5 business days and should include the following information:

- The name and nature of the business
- The title/position held
- The number of hours to be devoted to the business
- If the position is paid or volunteer
- Any conflict of interest that may arise

If there is a material change in any outside business activity, [State Farm] must be informed.

30. On March 30, 2012 (one day following his resignation from State Farm), the Respondent submitted an Outside Business Activities Questionnaire to State Farm. In the questionnaire, the Respondent stated that he had been involved in an outside business activity with Globacorp Developments International (“Globacorp”). Apart from indicating that Globacorp was engaged in “Real Estate Development”, the Respondent did not provide further details regarding the nature of his duties.

31. On April 3, 2012, the Respondent sent an email to staff of State Farm containing the subject line: Addendum to Outside Business Interest form. In the email, the Respondent stated, among other things, that :

- (a) he was involved with Globacorp between June 2008 to April 2011;
- (b) Globacorp was engaged in land development in Panama;
- (c) his title at Globacorp was that of “Manger (*sic*) – Sales Development (Eastern Canada)”;
- (d) he had travelled to Panama to take part in Globacorp’s business dealings in that country.

32. In his signed written statement dated June 26, 2013, the Respondent stated that between June 2008 and June 2011, he held the positions of “Director of Corporate Development” and “Director of Sales Eastern Canada” with Globacorp and Globadigm Group (“Globadigm”). The Respondent stated that Globacorp/Globadigm was in the business of “land development” and that he was involved “with the attempted marketing of [Globacorp/Globadigm] to real estate brokers.”

33. The Respondent had represented Globacorp in business dealings with Keller Williams Realty Inc. (“KW”)³. Specifically, an internal KW email dated May 21, 2010, indicated that the Respondent, on behalf of Globacorp, contacted Kellie Ramsay of KW in order to:

- (a) discuss a “commercial real estate deal ... located in Panama”; and

³ KW is an international real estate franchise based in the United States.

- (b) offer to sell to KW numerous “KW Internet addresses outside of the United States”, which had been purchased by Globacorp.

34. In addition, in the PM Complaint Letter, PM stated that the Respondent was involved in business activity in Panama, which was unrelated to his duties at State Farm. Specifically, PM stated:

While supposedly representing State Farm, [the Respondent] was regularly taking trips ranging from 7-14 days to Panama to cultivate an investment. [The Respondent] actually approached me one day and tried to get me to invest in the “teak business”. I respectfully declined. I inquired if this was a conflict of interest with his State Farm business, and he said that it was not. I found that difficult to believe.

35. At no time during the period of his registration with State Farm, did the Respondent seek, or obtain approval from, State Farm to engage in any business activities on behalf of Globacorp or Globadigm, or to engage in any other dual occupations.

36. Further, during a compliance audit conducted by State Farm in November 2009, the Respondent answered “no” to the following question:

Other than as ... a salesperson for [State Farm] is the [Respondent] involved in ANY outside business activities? [*Emphasis in original*]

37. At the hearing, the Respondent acknowledged his involvement with Globacorp and Globadigm Group; however, he testified because he had no contract with either entity; was not paid by either entity; and the development was in Panama, he did not consider it to be any form of employment or outside venture.

38. He testified that when he started to travel to Panama “I notified State Farm. LG, who was the agency representative that my agency dealt with, was made aware prior to my first trip to Panama. And that my plan would be to travel there on a fairly regular basis with the intent of learning about land development through my friend.”⁴

39. An email dated February 26, 2016, from his friend, JSC, the Senior Director of Globacorp Developments International to MFDA Staff was marked as Exhibit 6. In the email, JSC stated that:

- (a) The Respondent owed him funds exceeding CDN \$16,500 loaned to the Respondent on or about November 10, 2011, which was fully repaid to JSC, with interest by the Respondent on or about December 16, 2011;
- (b) The Respondent worked with Globacorp Developments International, a member of the Globadigm Group, as Director of Corporate Development and in a sales capacity from May, 2008, to March, 2012; and
- (c) The Respondent indicated to Globacorp Developments International that he had obtained approval from my the required the parties, within State Farm, to work with Globacorp Developments International.

Allegation #4 – Failure to Cooperate

40. On March 25, 2013, Sarah Vandervoort, a Case Assessment Officer in the MFDA Enforcement Department, sent a letter by registered and regular mail to the Respondent requesting that he provide Staff with information and documents regarding several METS reports submitted to the MFDA by State Farm. In particular, Ms. Vandervoort’s letter requested that the Respondent respond by April 15, 2013 with respect to the following:

- (a) the complaint received by State Farm from PM;
- (b) the Respondent’s dual occupations; and
- (c) the garnishment order received by State Farm from the Canada Revenue Agency.

⁴ The friend’s initials are JSC.

41. On May 14, 2013, having not received a response from the Respondent, Ms. Vandervoort sent a second letter by registered and regular mail to the Respondent requesting that he provide Staff with the information and documents by May 28, 2013.

42. On May 16, 2013, the Respondent telephoned Ms. Vandervoort and stated that he had received, and was in the process of responding to, both of her letters.

43. On May 29, 2013, the Respondent again telephoned Ms. Vandervoort and requested that the deadline for his response to the letters be extended. Ms. Vandervoort granted the Respondent an extension to June 5, 2013. The Respondent did not respond to Ms. Vandervoort's letters by June 5, 2013.

44. On June 11, 2013, Ms. Vandervoort sent another letter by registered and regular mail to the Respondent requesting that he provide Staff with the information and documents by June 19, 2013. In her letter, Ms. Vandervoort advised the Respondent that the matter would be escalated to the MFDA's Investigations group should the Respondent fail to provide the information and documents to the MFDA by June 19, 2013. The Respondent did not respond to Ms. Vandervoort's letter by June 19, 2013.

45. On July 9, 2013, Ms. Alfenore assumed carriage of the MFDA's investigation of the Respondent's conduct. On the same date, Ms. Vandervoort sent a letter by registered and regular mail to the Respondent advising him that the matter had been escalated to the MFDA's Investigations group.

46. On January 24, 2014, Ms. Alfenore telephoned the Respondent and left a voice message requesting that the Respondent contact her to discuss the investigation of his conduct. The Respondent did not respond to Ms. Alfenore's voice message.

47. On February 5, 2014, Ms. Alfenore spoke with CO (the Respondent's former spouse) by telephone and CO informed her that the Respondent was residing at *****, Markham, Ontario, *** ** (the "New Address").

48. On February 7, 2014, Ms. Alfenore sent a letter by registered and regular mail to the Respondent at the New Address requesting that the Respondent contact her by February 21, 2014 in order to arrange a date for an interview. Ms. Alfenore also arranged for the letter to be personally served on the Respondent by a process server. The process server was unable to personally serve the Respondent with the letter but posted the letter on the door of the house at the New Address. The Respondent did not respond to Ms. Alfenore's letter by February 21, 2014.

49. On March 3, 2014, Ms. Alfenore telephoned the Respondent and left a voice message advising the Respondent of her letter dated February 7, 2014 and requesting that the Respondent contact her in order to arrange a date for an interview. The Respondent did not respond to Ms. Alfenore's voice message.

50. On April 4, 2014, Ms. Alfenore sent a letter by regular mail to the Respondent at the New Address requesting that the Respondent contact her and attend at an interview on April 30, 2014. Ms. Alfenore arranged for the letter to be personally served on the Respondent by a process server. The process server was unable to personally serve the Respondent with the letter but delivered the letter to the Respondent's mother who was present at the New Address.

51. On April 9, 2014, Ms. Alfenore left a voice message for the Respondent advising him of her letter dated April 4, 2014 and the April 30, 2014 interview date, and requesting that he contact her. The Respondent did not respond to the voice message.

52. The Respondent did not, at any time, attend an interview. Prior to the issuance of the Notice of Hearing, the Respondent did not contact Staff, in any way, since May 29, 2013.

53. Due to the Respondent's failure to cooperate with Staff's investigation, Staff has been unable to investigate the full nature and extent of, among other things: the Respondent's activities with respect to the monies he borrowed from client MM, including whether he pressured or coerced client MM to withdraw the funds; and the Respondent's activities with respect to the dual occupations.

54. At the hearing, the Respondent admitted that he had failed to cooperate with MFDA Staff. He testified "I wasn't in a good place. I think dealing with some health challenges with my son for quite some time, and quite frankly he was my priority and everything else that fell to the wayside. It wasn't the right thing to do. I have no better explanation other than when I parted ways with State Farm, I felt I was done with all of this, and I just didn't make the necessary time to address it properly."

III. MFDA RULES

55. MFDA Rule 1.2.1 sets out the required individual qualifications of salespersons and in Rule 1.2.1(c) provides for "Dual Occupations". The rule states that "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."

56. MFDA Rule 1.1.2 provides:

1.1.2 Compliance by Approved Persons. Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.

57. MFDA Rule 2.1.1 sets out the standard of conduct to be met by Members and Approved Persons. It states:

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.

58. MFDA Rule 2.1.4 deals with “Conflicts of Interest. The Rule states:

2.1.4 Conflicts of Interest

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

59. By-law No. 1, s. 21 states:

21. POWER TO CONDUCT EXAMINATIONS AND INVESTIGATIONS

The Corporation shall make such examinations of and investigations into the conduct, business or affairs of any Member, Approved Person of a Member or any other person under the jurisdiction of the Corporation pursuant to the By-laws and/or the Rules as it considers necessary or desirable in connection with any matter relating to compliance by such person with:

21.1 the By-laws, Rules or Policies of the Corporation;

21.2 any securities legislation applicable to such person including any rulings, policies, regulations or directives of any securities commission; or
21.3 the by-laws, rules, regulations and policies of any self-regulatory organization.

60. By-law No. 1, s. 22 provides:

22. INVESTIGATORY POWERS

22.1 For the purpose of any examination or investigation pursuant to this By-law, a Member, Approved Person of a Member or other person under the jurisdiction of the Corporation pursuant to the By-laws or the Rules may be required by the Corporation:

- (a) to submit a report in writing with regard to any matter involved in any such investigation;
- (b) to produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and to attend and give information respecting any such matters;
- (c) to make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the Corporation;

and the Member or person shall be obliged to submit such report, to permit such inspection, provide such copies and to attend, accordingly. Any Member or person subject to an investigation conducted pursuant to this By-law may be invited to make submission by statement in writing, by producing for inspection books, records and accounts and by attending before the persons conducting the investigation. The person conducting the investigation may, in his or her discretion, require that any statement given by any Member or person in the course of an investigation be recorded by means of an electronic recording device or otherwise and may require that any statement be given under oath.

IV. SUBMISSIONS

A. MDFA Staff

61. Staff provided written submissions to the panel setting out in detail their position on the four allegations before us.

Allegation #1 – Unauthorized Redemptions

62. Staff alleges that the Respondent contravened MFDA Rule 2.1.1 by processing two unauthorized redemptions in the accounts of client MM.

63. Staff submits that MFDA Hearing Panels have held that processing trades in a client's account without the knowledge or approval of the client is a contravention of the standard of conduct set out in Rule 2.1.1.

64. Staff submits that trading without client authorization amounts to egregious misconduct if the purpose of the transaction is to deceive the client so that the Approved Person may benefit at the client's expense.

65. In the present case, Staff submits that the evidence establishes that the Respondent:

- (a) processed two unauthorized redemptions in client MM's accounts in the amounts of \$34,000 and \$6,000, net of deferred sales charges;
- (b) unbeknownst to client MM, arranged for the proceeds from the unauthorized redemptions to be deposited in client MM's RBC Account; and
- (c) arranged for client MM to provide him with a loan in the amount of nearly the full balance of the RBC Account, without informing client MM that the unauthorized redemptions were previously deposited in the RBC Account.

Allegation #2 – Borrowing from a Client

66. Staff alleges that the Respondent contravened MFDA Rules 2.1.4 and 2.1.1 by borrowing and failing to fully repay monies from client MM. Staff submits that MFDA Rule 2.1.4 articulates the requirement for Approved Persons to be aware of potential conflicts of interests between Approved Persons and clients; places a mandatory obligation on Approved Persons to immediately disclose such conflicts to the Member should they arise; and imposes a corresponding obligation on the Approved Person and the Member to ensure that such conflicts are addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

67. Staff submits that MFDA Hearing Panels have held that borrowing money from a client results in a conflict of interest under Rule 2.1.4.⁵

68. Staff submits that there would be few, if any, circumstances in which an Approved Person who borrowed funds from a client would be able to demonstrate that the inherent conflict had been addressed by the exercise of responsible business judgment influenced only by the best interests of the client. Staff submits that such conduct is aggravated when the client monies are used for the Respondent's personal use and/or are not repaid to the client.

69. Staff submits that MFDA Hearing Panels have also held that that when an Approved Person solicits and accepts money and fails to pay it back or otherwise account for it, the Approved Person engages in conduct that is contrary to MFDA Rule 2.1.1.⁶

70. Staff submits that the evidence establishes that the Respondent:

⁵ See: *Ryan (Re)*, [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201014, Panel Decision dated April 6, 2011 at para. 19; *Tonnies (Re)*, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Panel Decision dated June 27, 2005 at P. 14.

⁶ See: *Jones (Re)*, [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201008, Panel Decision dated February 7, 2011 at para. 19; *Puri (Re)*, [2007] Hearing Panel of the Pacific Regional Council, MFDA File No. 200715, Panel Decision dated October 22, 2007 at para. 33.

- (a) borrowed \$40,000 from client MM;
- (b) used the borrowed funds to pay his personal debts; and
- (c) apart from a \$6,400 repayment, failed to repay the balance of the loan.

Allegation #3 – Undisclosed and Unapproved Dual Occupations

71. Staff alleges that the Respondent contravened MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d)) and 2.1.1 by engaging in dual occupations, which were not disclosed to or approved by State Farm.

72. MFDA Rule 1.2.1(c) provides that an Approved Person may have and continue in another gainful occupation, provided that, among other things, the Member is aware and approves of the Approved Person engaging in such other occupation.

73. Staff submits that MFDA Hearing Panels have held that engaging in a gainful occupation outside the business of the Member without advising and obtaining the approval of the Member, contrary to Rule 1.2.1(c), is a serious offence, as:

The need for a Member to know what other occupations and businesses its employee might be engaged in is obvious. There are many reasons why a Member must know what its employees are doing. We will mention only two of what seem to us to be the most important reasons. The first is that a failure to know about an employee's other commercial activities impinges upon the Member's ability to properly supervise its employee. The second reason is that the Member could be exposed to litigation alleging that the AP's activity was within the scope of his/her employment with the Member.⁷

74. Staff submits that MFDA Hearing Panels have also held that such conduct is contrary to the standard of conduct required of industry participants, as set out in Rule 2.1.1.⁸

⁷ *Mawer (Re)*, [2014] Hearing Panel of the Prairie Regional Council, MFDA File No. 201331, Panel Decision (Misconduct) dated April 3, 2014 at para. 32, *Mawer (Re)*, [2014] Hearing Panel of the Prairie Regional Council, MFDA File No. 201331, Panel Decision (Misconduct) dated April 3, 2014 at para. 32.

⁸ *Mawer (Re)*, *supra*, Staff's Book of Authorities; *Popen (Re)*, [2012] Hearing Panel of the Central Regional Council, MFDA File No. 201136, Panel Decision dated September 24, 2012.

75. Staff submits that the evidence establishes that the Respondent:

- (a) held the positions of “Director of Corporate Development” and “Director of Sales Eastern Canada” with Globacorp Developments International (“Globacorp”) and Globadigm Group (“Globadigm”), companies which were in the business of land development;
- (b) marketed Globacorp and Globadigm to real estate brokers; on behalf of Globacorp, engaged in commercial real estate dealings (related to a project located in Panama) with a representative of Keller Williams Realty Inc. (“KW”);
- (c) on behalf of Globacorp, offered to sell “internet addresses” to KW; and
- (d) failed to disclose his involvement in Globacorp or Globadigm to State Farm.

76. In correspondence to State Farm, the Respondent claimed he did not receive compensation from Globacorp or Globadigm. Staff submits that “another gainful occupation” is not limited to instances where the Approved Person has been compensated for his activities. In *Dhindsa (Re)*⁹, the Hearing Panel made a finding of failing to disclose other gainful occupations despite the respondent in that case having “insisted he did not make any money from [the] activity.”

77. In *Mawer (Re)*¹⁰, the Hearing Panel held that the term “gainful occupation” is broad enough to include an occupation from which the Approved Person expects or hopes to derive some compensation, profit or other benefit.

78. Staff submits that it is reasonable to infer that the Respondent (at a minimum) hoped to derive a profit from his commercial real estate and other business dealings on behalf of Globacorp.

⁹ *Dhindsa (Re)*, [2012] Hearing Panel of the Pacific Regional Council, MFDA File No. 201119, Panel Decision dated May 15, 2012 at para. 5.

¹⁰ *Mawer (Re)*, *supra*, at paras. 34-35.

79. Staff submits that in correspondence to State Farm, the Respondent acknowledged that he had hoped that his position at Globacorp would result in future compensation or profit to him. Specifically, the Respondent stated:

Was there to be a point in the future where [the Respondent's activity on behalf of Globacorp] was to become an outside business interest? Yes, definitely, but we had not gotten to that stage yet.

80. Staff submits that the Respondent's activities on behalf of Globacorp constituted a gainful occupation.

Allegation #4 – Failure to Cooperate

81. Staff alleges that the Respondent contravened s. 22.1 of MFDA By-law No. 1 by failing to cooperate with Staff's investigation of his conduct.

82. Staff submits that pursuant to s. 21 of MFDA By-law No. 1, the MFDA has a duty to conduct examinations and investigations of a Member, an Approved Person, and any other person under its jurisdiction as it considers necessary or desirable in connection with any matter related to that Member's or person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA.

83. In carrying out its s. 21 duty, the MFDA is authorized to request and oblige a Member, Approved Person or any other person under its jurisdiction to:

- (a) submit a report in writing with regard to any matter involved in any investigation;
- (b) produce for investigation and provide copies of the books, records and accounts of such person relevant to the matters being investigated;
- (c) attend and give information respecting such matters; and
- (d) make any of the above information available through any directors, officers, employees, agents and other persons under the direction or control of the Member, Approved Person or other person under the jurisdiction of the MFDA.

84. Staff submits that the Member, Approved Person or other person under investigation is obliged to cooperate with the s. 21 requirements.

85. Staff submits that this obligation is consistent with the duties owed by all members of self-governing professions. In *Artinian v. College of Physicians and Surgeons of Ontario*¹¹, the Ontario Divisional Court stated that “fundamentally, every professional has an obligation to cooperate with his self-governing body”.

86. Staff submits that an Approved Person must provide Staff with information and documentation, and attend an interview with Staff when requested to do so. To hold otherwise would hinder the MFDA’s ability to investigate the conduct of registrants in the mutual fund industry and prevent the MFDA from fulfilling its regulatory mandate to protect the public.

87. Staff submits that the evidence establishes that the Respondent has refused to submit information and documents requested by Staff and has disregarded requests that he attend an interview with Staff.

88. Staff provided us with the chart set out below which summarizes Staff’s requests to the Respondent to submit information and documents and/or to attend an interview. We accept the chart as accurate based on our review of the evidence.

DATE	FROM	TO	RESPONSE
March 25, 2013	Staff (S. Vandervoort) – letter	The Respondent	No response.

¹¹ *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 704 (Div. Ct.), at para. 9.

DATE	FROM	TO	RESPONSE
May 14, 2013	Staff (S. Vandervoort) – letter	The Respondent	On May 16, 2013, the Respondent telephoned Staff and stated that he had received, and was in the process of responding to, both of Staff’s letters. On May 29, 2013, the Respondent again telephoned Staff and requested that the deadline for his response to the letters be extended. Staff extended the deadline from May 28, 2013 to June 5, 2013. The Respondent did not respond to Staff’s letters by June 5, 2013
June 11, 2013	Staff (S. Vandervoort) – letter	The Respondent	No response.
January 24, 2014	Staff (L. Alfenore) – voice message	The Respondent	No response.
February 7, 2014	Staff (L. Alfenore) – letter	The Respondent	No response.
March 3, 2014	Staff (L. Alfenore) – voice message	The Respondent	No response.
April 4, 2014	Staff (L. Alfenore) – letter	The Respondent	No response.
April 9, 2014	Staff (L. Alfenore) – voice message	The Respondent	No response.

B. Respondent’s Submissions

89. The Respondent did not file written submissions in response to the Staff’s Submissions. The Respondent made oral submissions at the conclusion of the evidence.

Allegation #1 – Unauthorized Redemptions

90. The Respondent submits that MM, his mother-in-law, was aware that he and her daughter, his wife, needed financial help and she agreed to provide that help. The Respondent submits that MM was aware that she was signing the Redemption forms on December 6, 2011.

91. The Respondent points to the statement of claim in the action commenced by MM against him and her daughter for repayment of not only the \$40,000 but the \$20,000 she lent to them earlier, in which she pleads that in December 2011, the Respondent withdrew from MM's account at the Royal Bank \$4,000 without her knowledge or approval and pleads that he sought to borrow on behalf of he and his wife an additional \$30,000. The Respondent submits that this statement does not appear in the complaint filed by PM nor in MM's interview transcript.

92. The Respondent points to other contradictions he alleges between the evidence of MM and his evidence or other documents in the record. He submits that the evidence points to the fact that on December 6, 2011, MM's hand was not bandaged; although, she had already been bitten by the cat and it was sore. On December 9, 2011, her hand was bandaged. The injury to her hand made her signature on the redemption forms appears as it does. He submits that if he had signed the Redemption forms as alleged the signature would "at least somewhat closely resemble the original signature that was held on file, which it did not."

93. The Respondent submits that on December 6, 2011, when he and MM attended at the Royal Bank and she transferred \$4,000 to him that transfer could not have taken place without her approval as she had to use her bank card to make the transfer. The same is true for the transfer of \$40,000 on December 9, 2011. He submits that the evidence of MM supports the submission that MM attended at the Royal Bank with him not only on December 6, 2011, but also on December 9, 2011.

Allegation #2 – Borrowing from a Client

94. The Respondent acknowledges that he borrowed the money from his mother-in-law, MM, but considered her as a member of his family and not as a client when he borrowed the money.

Allegation #3 – Undisclosed and Unapproved Dual Occupations

95. He testified because he had no contract with either entity; was not paid by either entity; and the development was in Panama, he did not consider it to be any form of employment or outside venture.

96. The Respondent submits that he had no contract with Globacorp and Globadigm and he was not paid by either entity. He further submits that as the development was in Panama, he did not consider it to be any form of employment or outside venture. He also submits that there was never any financial dealings with KW. As he put it in his submissions “it was solely regarding them looking at the project in Panama to perhaps market throughout North America, if and when such time it got to that stage, which to this date it is not.”

Allegation #4 – Failure to Cooperate

97. The Respondent acknowledged in his evidence that he failed to cooperate with MFDA Staff.

V. ANALYSIS AND DECISION

A. Introduction

98. The By-laws, Rules and Policies of the MFDA support its mandate to regulate the distribution side of the Canadian mutual fund industry in order to protect the investor public and strengthen public confidence in the Canadian mutual fund industry.

B. Allegation #1 – Unauthorized Redemptions

99. Allegation #1 is:

On December 6, 2011, the Respondent processed two unauthorized redemptions in the accounts of client MM in the amounts of \$34,000 and \$6,000, thereby failing to deal fairly, honestly and in good faith with a client, and engaging in business conduct which is unbecoming or detrimental to the public interest, contrary to MFDA Rule 2.1.1.

100. We have set out above the text of MFDA Rule 2.1.1, Standard of Conduct. We agree with Staff that an unauthorized redemption in the account of a client would be a violation of this Rule. However, in order to find a violation of this Rule, we need to be satisfied that the evidence on the balance of probabilities supports a finding that the Redemptions were unauthorized by MM. Are we satisfied that it is more probable that MM did not authorize the Redemptions than she did authorize the Redemptions?

101. The evidence in support of this allegation was provided through the transcript of a telephone interview of MM by MFDA Staff on January 31, 2014, over two years after the events in question.

102. The Respondent in his testimony acknowledged that he borrowed from his mother-in-law who is also his client. The Respondent testified that MM signed the Redemptions and he did not.

103. The Respondent submits that:

- (a) MM was aware that he and her daughter, his wife, needed financial help and she agreed to provide that help. The Respondent submits that MM was aware that she was signing the Redemption forms on December 6, 2011.
- (b) The Respondent points to the statement of claim in the action commenced by MM against him and her daughter for repayment of not only the \$40,000 but the \$20,000 lent to them earlier in which she pleads that in December 2011, the Respondent withdrew from MM's account at the Royal Bank \$4,000 without her knowledge or approval and pleads that he sought to borrow on behalf of he and his wife an additional \$30,000. The Respondent submits that this statement does not appear in the complaint filed by PM nor in MM's interview transcript.

- (c) The Respondent points to other contradictions he alleges between the evidence of MM and his evidence or other documents in the record. He submits that the evidence points to the fact that on December 6, 2011, MM's hand was not bandaged; although, she had already been bitten by the cat and it was sore. On December 9, 2011, her hand was bandaged. The injury to her hand made her signature on the redemption forms appears as it does. He submits that if he had signed the Redemption forms as alleged the signature would "at least somewhat closely resemble the original signature that was held on file, which it did not."
- (d) The Respondent submits that on December 6, 2011, when he and MM attended at the Royal Bank and she transferred \$4,000 to him that transfer could not have taken place without her approval as she had to use her bank card to make the transfer. The same is true for the transfer of \$40,000 on December 9, 2011. He submits that the evidence of MM supports the submission that MM attended at the Royal Bank with him not only on December 6, 2011, but also on December 9, 2011.

104. There was no opportunity for the Respondent to cross-examine MM on her evidence and there was no opportunity for the panel to observe her. It is clear from reading the transcript which was marked as part of Exhibit 5 that MM was confused about some of the events of December, 2011. Given her age and the passage of time between December, 2011, and the interview on January 31, 2014, we are not surprised by this. However, in the face of the Respondent's denials in relation to the signing of the Redemptions, the balance is not tipped in favour of the position taken by Staff.

105. We are not persuaded that based on the evidence before us that Staff have made out on a balance of probabilities this allegation.

106. As a result, we find that Allegation #1 has not been established.

C. Allegation #2 – Borrowing from a Client

107. Allegation #2 is:

Between December 6, 2011 and March 29, 2012, the Respondent engaged in personal financial dealings with client MM by borrowing and failing to fully repay \$40,000 from client MM, thereby giving rise to a conflict or potential conflict of interest between the Respondent and client MM, which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of client MM, contrary to MFDA Rules 2.1.1 and 2.1.4.

108. Staff relies as well on Rule 2.1.1 (Standard of Conduct) which is set out above.

109. We agree with Staff that the Respondent contravened MFDA Rules 2.1.1 and 2.1.4 by borrowing money from and failing to fully repay client MM.

110. At the hearing, the Respondent admitted that he borrowed \$4,000 from client MM on December 6, 2011, and \$40,000 on December 9, 2011. He testified that “I certainly did borrow these funds or from client MM with the intent of repaying far sooner than I was able to.” It makes no difference that MM was his mother-in-law as well as his client. For the purposes of his duties and responsibilities as an Approved Person, MM was his client.

111. We note that although the Respondent did not repay the monies to client MM directly, except for the \$6,400 which represented the \$4,000 loan and \$2,400 and interest, he did pay the balance of \$40,000 plus the earlier \$20,000 loan indirectly by way of State Farm remitting the funds owed by the Respondent in response to the notice of garnishee issued by MM.

112. The panel finds that Allegation #2 has been established.

D. Allegation #3 – Undisclosed and Unapproved Dual Occupations

113. Allegation #3 is:

Between about June 2008 and March 29, 2012, the Respondent engaged in dual occupations, which were not disclosed to or approved by the Member, contrary to MFDA Rules 1.2.1(c) (formerly MFDA Rule 1.2.1(d))¹² and 2.1.1.

114. MFDA Rules 1.2.1(c) (Dual Occupations) and 2.1.1 read:

1.2.1(c)(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.

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.

115. The Respondent admits that he had a relationship with Globacorp and Globadigm; however, he submits that because he had no contract with either entity; was not paid by either entity; and the development was in Panama, he did not consider it to be any form of employment or outside venture. It is clear on the evidence that he wanted to learn about the land development business. He engaged with KW with respect to the business. We do not accept that the Respondent did not expect at some point to earn something from the time he was spending and travel expenses he was incurring in relation to the land development business in Panama for Globacorp and Globadigm.

¹² On December 3, 2010, MFDA Rule 1.2.1(d) was renumbered as MFDA Rule 1.2.1(c).

116. In our view, he had a responsibility to disclose his relationship to State Farm and based on the documents in evidence before us he failed to do so. While he said in his testimony that he told LG of State Farm of his relationship, he did not disclose the relationship on the forms he was required to complete. In our view, in order for the Member to be properly apprised by an Approved Person and to be in a position to provide its approval, an Approved Person must follow the procedures laid down by the Member which the Respondent did not do.

117. It is instructive that on March 30, 2012, the day after the Respondent resigned from his position with State Farm, he completed and submitted to State Farm an “Outside the Business Activities - Questionnaire” in which he disclosed his relationship to Globacorp.

118. The panel finds that Allegation #3 has been established.

E. Allegation #4 – Failure to Cooperate

119. Allegation #4 is:

Commencing in March 2013, the Respondent failed to provide documents and information requested by Staff and failed to attend an interview with Staff for the purpose of investigating the Respondent’s conduct, contrary to section 22.1 of MFDA By-law No. 1.

120. The Respondent admits that he did not cooperate with Staff. The evidence makes it clear that the Respondent did not cooperate with Staff.

121. We agree with Staff that the failure to cooperate hinders the MFDA’s ability to investigate the conduct of registrants in the mutual fund industry and prevents the MFDA from fulfilling its regulatory mandate to protect the public.

122. The panel finds that Allegation #3 has been established.

VI. CONCLUSION

123. We find that the Staff of the MFDA have established on the evidence before us that the Respondent has committed violations of the MFDA Rules as set out in the Allegations #2, 3 and 4 made against the Respondent.

124. As a result of these findings of misconduct, we need to address the issue of penalty. We direct that the Registrar proceed to set a date for hearing of submissions with respect to the appropriate penalty.

125. A number of the submissions of the Respondent were submissions that go to penalty as opposed to liability. The Respondent may make those submissions at the penalty hearing.

DATED this 21st day of April, 2016.

“W. A. Derry Millar”

W. A. Derry Millar
Chair

“Guenther Kleberg”

Guenther Kleberg
Industry Representative

“Colleen Waring”

Colleen Waring
Industry Representative