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 24OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Alfredo Pino

Heard: October 23, 2018 in Toronto, Ontario
Decision and Reasons (Misconduct): November 26, 2018

DECISION AND REASONS (Misconduct)

Hearing Panel of the Central Regional Council:

Paul M. Moore, QC	Chair
Vlasios Kardaras	Industry Representative
Robert C. White	Industry Representative

Appearances:

H. C. Clement Wai	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Alfredo Pino	)	Respondent, in person and by telephone, in part

A. Introduction

The Allegations

1. This case involves three allegations by Staff against the Respondent.

2. First: Misappropriation. The Respondent's client, BC, paid approximately $280,000 to the Respondent. The Respondent deposited the monies in the bank account of Trova, a private company owned and controlled by him. Approximately $267,000 of the monies were never repaid. Staff claimed that the Respondent misappropriated the monies. The Respondent claimed that the monies were loaned by BC to Trova.

3. Second: Outside Business Activities. The Respondent did not disclose his activities with three Trova companies to, nor receive the approval of, his Member, Investors Group.

4. Third: Failure to Cooperate and Misleading the MFDA. The Respondent failed to cooperate with and misled the MFDA during its investigation.

Matters in Issue

5. There were no difficult factual matters in dispute concerning the allegations.

6. There was no dispute that the monies were paid by BC to Trova and were mostly not repaid.

7. The Respondent admitted in his Reply that he did not give prior disclosure to Investors Group of his activities with Trova.

8. The Respondent refused to be interviewed by the MFDA, withheld many documents from the MFDA, and misstated information to the MFDA. The Respondent's offers to co-operate with the MFDA came after the case against him had been commenced by the MFDA.

Procedural Matters

9. This case involved several procedural matters involving multiple adjournments, a traffic accident in which the Respondent was injured, the physical and cognitive ability of the Respondent to make full answer and defense to the allegations, whether a motion hearing should be in person, by teleconference, or in writing, the non-attendance of the Respondent at the hearing, and the last minute withdrawal of the Respondent's counsel.

10. These reasons address procedural matters first and then set out our decision on the merits and the reason for our decision.

Timeline of Events

11. The following is a timeline of key events relevant to the factual and procedural issues in this case.

<u>October 2012 to May 2013.</u>

- The events in the first allegation (misappropriation) occur.
- The Respondent fails to disclose to or to obtain the approval of Investors Group at any time with respect to his outside business activities with three Trova companies.

<u>February 2015.</u>

- The Respondent begins failing to cooperate with and to mislead the MFDA in its investigation of the Respondent.

<u>November 7, 2016.</u>

- The MFDA issues the Notice of Hearing.

<u>January 12, 2017.</u>

- First appearance by teleconference to discuss scheduling.

<u>February 23, 2017</u>.

- Second appearance by teleconference. Hearing scheduled for two days commencing June 19, 2017.

February 24, 2017.

- The Respondent files his Reply.

March 31, 2017.

- At the request of the Respondent, the hearing is rescheduled to July 24 and 25, 2017 because the Respondent advises that he will be out of the country on June 19 and 20.

May 1, 2017.

- The Respondent is injured in a rear-ended motor vehicle accident.

July 13, 2017.

- The Respondent requests an adjournment for six months or preferably one year.

July 21, 2017.

- Third appearance by teleconference. The hearing is adjourned at the request of the Respondent with dates to be set later.

September 27, 2017.

- Appearance by teleconference to consider submissions by the parties with respect to a motion to adjourn by the Respondent, scheduling and other procedural matters.
- The Respondent's motion to adjourn is scheduled for October 27, 2017.
- Subject to any further order on October 27, 2017, the panel orders that the hearing shall take place on December 4, 5 and 6, 2017 in Toronto.

October 27, 2017.

- At the request of the Respondent, the hearing is adjourned to April 10, 11, and 12, 2018 or, on future agreement, such earlier three days as the parties may agree and the panel may accept.
- On consent, the panel orders that the Respondent be prohibited from being registered with the MFDA in any capacity until this case is dealt with finally.

April 3, 2018.

- The Respondent informally requests an adjournment for a further period of six to eight months.

April 5, 2018.

- Notice of Motion for adjournment is filed for a return on April 10, 2018.

- The Respondent acknowledges the panel's prior determination that the motion hearing will be in person, but requests instead a teleconference hearing on a date before April 10, if possible.
- The panel directs that the motion for adjournment be heard in person in Toronto on April 10, it not being possible to schedule an earlier date.

April 10, 2018.

- The hearing is adjourned to October 22, 23, and 24, 2018.
- The dates are made peremptory.
- The panel insists that any new motion for further adjournment be made timely in accordance with the rules.
- The Respondent complains that Staff's pre-hearing disclosure obligations have not been fully complied with.
- The Respondent's counsel states that the Respondent has complied with his pre-hearing disclosure obligations.

October 9, 2018.

- The Respondent files a motion record for an adjournment of the hearing for a period of four to six months, with the motion returnable on October 22, 2018.
- He asks leave that the motion hearing be in writing or by teleconference and be heard earlier than October 22, and for an abridgement of the period required to bring the motion.

October 17, 2018.

- Staff files an affidavit of Mr. Gallimore, Staff investigator, in opposition to the motion.

October 18, 2018.

- The Respondent files an affidavit in reply to Mr. Gallimore's affidavit.

October 19, 2018.

- The panel determines that the motion will be heard in person at 10:00 a. m. on October, 22, 2018, and notifies the Secretary to advise the parties of this. This is done.
- Respondent's counsel withdraws as counsel for the Respondent in this matter.
- Mr. Gallimore files a supplemental affidavit.

October 22, 2018.

- The hearing of the motion begins at 10:00 a.m. in the absence of the Respondent and his counsel.

- The panel does not connect the Respondent when he tries to join the hearing by telephone.
- The panel denies the motion.
- The panel connects the Respondent by telephone and advises him of its decision.
- The panel invites the Respondent to attend in person.
- He advises the panel that he has made arrangements to travel the next day from Ottawa to attend the hearing on the merits in Toronto.
- The panel adjourns the hearing on the merits to 11:30 a.m. on October 23, 2018.

October 23, 2018.

- The Respondent attends the hearing at 11:30 a.m. without counsel.
- The hearing adjourns at 1:35 a.m. for lunch.
- The hearing resumes at 2:00 p.m. and Staff's next witness, BC, is connected to the hearing by telephone.
- Before BC is sworn, the Respondent announces that he is leaving the hearing because he is overwhelmed and cannot concentrate.
- The panel offers to recess the hearing until later in the day or until sometime the following day.
- The Respondent refuses the offer and leaves the hearing.
- The hearing resumes.
- Staff concludes its case.
- The hearing adjourns at 3:30 p.m.

B. Procedural Matters

Adjournment Order of July 21, 2017

12. In our adjournment order of July 21, 2017, we ordered that if any change in the Respondent's condition occurred the Respondent should notify Staff of it and should notify Staff of his employment status.

October 27, 2017 Motion

13. In our decision on the October 27, 2017 Motion hearing, issued on October 31, 2017, we stated (numbers refer to numbering in the reasons):

> Procedure
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> 1. The Respondent, Alfredo Pino, brought a motion to adjourn the hearing on the merits and that was heard on October 27, 2017 by teleconference.
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> Decision
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> 2. The panel decided that the hearing on the merits shall be adjourned from December 4, 5, and 6, 2017 to April 10, 11, and 12, 2018 or, on future agreement, such earlier three days as the parties agree and the panel may accept, or such other dates as the panel otherwise orders.
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> 3. The panel ordered that the Respondent be prohibited from being registered with the Mutual Fund Dealers Association of Canada ("MFDA") in any capacity until the case is dealt with finally.
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> Evidence
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> 4. Respondent's counsel entered as an exhibit various emails and reports, including reports by Dr. Atif Kabir on the medical condition of the Respondent. Dr. Kabir was not available for cross-examination by Staff of the MFDA ("Staff") or questioning by the panel. Nor was his evidence sworn.
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> 5. Staff submitted a written version of its submission, a profile of Dr. Kabir from the Kanata Physiotherapy website and a Doctor Profile of Dr. Kabir from the College of Physicians and Surgeons of Ontario, which were entered as an exhibit, and copies of cases Staff intended to refer to. In addition, sworn testimony was given orally by the Respondent in answer to a question by Staff.
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> Objection of counsel for Respondent

6. Counsel for the Respondent objected that Staff's written evidence, submission, and cases had been made available to him only moments before the hearing commenced and that he had not been given the opportunity to consider them. Staff argued that it was not obligated to provide these materials in advance of the hearing. We ruled against Respondent's counsel on the objection, observing that we had the whole day to conduct this motion hearing. The panel did not have the opportunity to consider the materials before the commencement of the hearing and considered what was presented orally from these materials at the hearing.

Submission of counsel for the Respondent

7. Respondent's counsel made the following submissions.

8. Kabir's evidence establishes that the Respondent currently is unable to fairly and adequately defend himself because of the medical trauma, including those from a concussion, that he has resulting from his car accident on May 1, 2017. Dr. Kabir's evidence is the only medical evidence before the panel.

9. The *Darrigo* case *(Law Society of Upper Canada v. Darrigo, 2016 LNOSONS 301)* and the *Igbinosun* case *(Law Society of Upper Canada v Igbinosun, 96 O.R. (3d))* referred to by Staff are distinguishable from the Respondent's situation considering the different medical concerns in *Darrigo* and the serious criminal allegations in *Igbinosun* and other factors.

10. A short adjournment will not be prejudicial to the public interest in having the hearing of this matter on its merits proceed expeditiously when balanced against the concerns of the Respondent.

11. The original time set aside for the hearing was two days. This was increased to three days (150%). There are a lot of materials and work that the Respondent must do to get ready for the hearing.

12. The Respondent is agreeable to an interim order prohibiting the Respondent from being registered in any capacity with the MFDA until this case is finally decided.

Submission of Staff

13. Staff made the following submissions.

14. The onus of establishing that the motion for adjournment should be granted is on the requester. The evidence should be clear and convincing and prove the case for an adjournment on a balance of probabilities that the Respondent at this time cannot adequately instruct counsel and defend himself. Here the Respondent has failed.

15. Kabir is a family doctor specializing in sports injuries and physiotherapy, not concussions. He is not an expert witness. The Respondent's physician has recommended other medical experts to examine the Respondent and to report on matters relevant to a decision on the Respondent's mental ability to instruct counsel and defend himself. This is further evidence that Dr. Kabir is not an expert witness about concussions or other matters relating to the Respondent's capability to defend himself.

16. It is not in dispute that the Respondent can physically participate in the hearing with some accommodation. It is only to accommodate a more leisurely pace with frequent breaks that the two days were increased to three. There is no new material.

17. This matter started five years ago. The Notice of Hearing was issued one year ago. Staff materials for the hearing were provided to the Respondent well before his accident and he has had ample opportunity to review it. The materials consist mostly of documents, which the Respondent was involved with, and the facts in the materials are mostly about the Respondent or things he was aware of. The two binders shown to Dr. Kabir are not formidable for the Respondent. There is no clear and convincing evidence that the Respondent is unable to adequately instruct his counsel or participate in the hearing on the merits.

18. The Respondent is not alleged to be suffering from amnesia. He is alleged to have some short-term memory loss, but most of the material and facts go way back to earlier events.

19. A key witness to Staff is 74 years old. The alleged misconduct took place in 2012. If this matter is delayed further there is a risk of losing this witness. The allegations are serious. The cases cited stress the public interest in avoiding delay. There already have been several

adjournments. One was based on the Respondent's claim that he would be out of the country. He never left the country. The Respondent and Dr. Kabir are both connected to the sports business. Staff would have liked to ask Dr. Kabir if he had any prior business connections to the Respondent.

20. Staff is agreeable to an interim order prohibiting the Respondent from being registered in any capacity with the MFDA until this case is finally decided.

Burden of proof

21. The Respondent has the burden of proving on clear and convincing evidence that on a balance of probabilities an adjournment should be granted. We applied this standard in making our decision.

Reasons for the decision

22. The medical evidence of Dr. Kabir was not controverted by other evidence. Although Dr. Kabir is a family doctor and not an expert in concussions and related matters, and although his evidence was not tested by cross-examination, we accepted that as a general practitioner specializing in dealing with sports injuries sufficient weight should be given to his evidence to balance the probabilities in the Respondent's favour that a short adjournment was appropriate under the circumstances at this time.

23. An adjournment until April 10, 11, and 12, 2018 will give him more time to instruct counsel and prepare his defense as his health permits and/or as it, hopefully, improves.

24. While the public interest arguments of Staff for proceeding without an adjournment are strong, we decided that in balancing them against the concerns of the Respondent, we should grant a short adjournment and that a risk to the public interest could be reduced in part with an order prohibiting the Respondent from being registered with the MFDA until the matter has been finally dealt with.

14. The October 27, 2017 Motion hearing was a teleconference hearing where it was difficult for the panel to follow who was speaking at various times. Counsel for the Respondent made a

claim of bias against the chair and attempted to refuse to allow the chair to provide an opportunity for Respondent's counsel to re-state his objections in an orderly manner with full opportunity to state the reasons for his position, arguing that it was too late for that, that the chair had already made his decision and shown his bias, and should recuse himself.

April 10, 2018 Motion

15. We insisted that the April 10, 2018 Motion be an in person hearing because, as we explained to the parties, we believed that for a contested motion with these parties that was necessary for decorum and to maintain order. This was in view of what had transpired at the teleconference hearing of October 27, 2017.

16. In our Reasons for Decision dated April 23, 2018 for the April 10, 2018 Motion, we stated (numbering from our reasons):

> 16. We examined the medical reports of the two doctors provided by Respondent's counsel. Neither doctor is an expert in concussions or cognitive ability. They were not under oath or available for questioning. Even so, we accepted the reports at face value.
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> 17. One stated that the Respondent told him that the Respondent was able to have meetings with his lawyer for up to 40 minutes. He also stated that "I am not specifically aware of what 'time and effort' would be required to prepare for this process" [the process of preparing for a three day hearing].
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> 18. In seeking one of the doctor's advice counsel for the Respondent stated, "To give you an idea of the amount of preparation work required, in 2017 I sent you a photo of the two binders of information the MFDA has disclosed to us in preparation for the hearing. This is only part of the evidence which Mr. Pino will have to participate in organizing and internalizing."
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> 19. Counsel did not mention that the issues of fact and law that will be dealt with at the hearing have been narrowed and specified by the pleadings (in the Notice of Hearing and the Respondent's Reply), that the Reply was prepared by the Respondent and his counsel before the accident happened, that Staff's disclosure documents have been and will be available long before the actual hearing, that Staff's evidence, including particulars and what will come from Staff's witnesses, have been made available to the Respondent long before the hearing, and that Staff will not be entitled to advance new evidence or introduce new issues that have not been properly disclosed in advance. In summary, he did not explain how our system is designed to require parties to disclose their case in advance and to prevent surprises or last minute scrambling.

20. Respondent's counsel advised that in his view the Respondent has made the disclosure to Staff of its case in advance of the hearing as required under our Rule 11. In other words, this is not something still to be prepared.

21. The Respondent has had more than an additional 5 months to further his preparation for the actual hearing.

22. He is represented by counsel.

23. He is physically able to attend the hearing.

24. Respondent's counsel argued that there were two aspects we needed to consider. One was the ability of the Respondent to prepare in advance for the hearing. But the other was that the Respondent needed to be able to instruct his counsel and follow the presentation of evidence as it unfolded at the hearing.

25. We concluded that, based on everything we were aware of and what we have indicated about the process above, and with breaks and recesses where appropriate and a leisurely pace, the Respondent would not be unduly prejudiced if we refused the adjournment request and proceeded with the hearing on the merits.

Our ruling

26. We felt that to a certain extent our hands were tied since we knew that Staff was acting in what it perceived as the public interest.

27. In addition, Counsel for the Respondent argued that it would be unusual for a panel not to grant an adjournment where Staff did not oppose the adjournment.

28. We were not so sure of what we perceived to be the public interest as to ignore the position of Staff in this instance. Although there is a risk that the public interest could be harmed by delay in proceeding with a matter where the events giving rise to it took place more than five years ago, there is no risk, because of our earlier order, that the Respondent will continue in the business before the matter is resolved finally.

29. Accordingly, against what we believe was our better judgment, we granted an adjournment to October 22, 23, and 24. These dates are peremptory.

30. This will provide the Respondent and his counsel with an additional six months to prepare for the hearing.

> 31. If for some unforeseen reason another adjournment is requested, the request must be timely and in compliance with MFDA rules.

17. We made the dates of October 22, 23, and 24 peremptory to avoid a repeat of the disruption, costs and inconvenience to witnesses and others caused by last minute adjournments. This was of particular concern regarding Staff's key witness, BC.

18. We made it clear during the hearing that if for some unforeseen reason a further adjournment should be sought, at least 14 days notice must be given and the MFDA rules should be complied with.

October 22, 2018 Motion

19. On October, 9, 2018, the Respondent brought a motion to adjourn the hearing on the merits (the "October 22, 2018 Motion"), returnable on October 22, 2018, at 10:00 a.m. or at an earlier time or date if the panel so directed.

20. The October 22, 2018 Motion proposed that the motion be conducted in writing or by teleconference.

21. The October 22, 2018 Motion was for an adjournment of the hearing on the merits for a period of four to six months, an abridgement of the time to bring the motion, and leave to bring the motion in writing or by teleconference due to the short notice upon which the moving party's upcoming surgery would possibly be scheduled, and the time, cost and expense of travelling to and from Toronto for a motion hearing.

22. For the October 22, 2018 Motion, the panel waited for a promised response to the adjournment motion from Staff before determining the form of the motion hearing (in person, written or by teleconference). It wanted to know whether the motion would be on consent and not contentious, or opposed by Staff.

23. Late on October, 18, 2018, we received copies of an affidavit of Mr. Gallimore dated October 17, 2018 in support of Staff's position against the adjournment motion, and copies of an affidavit of the Respondent dated October 18, 2018 in reply to Mr. Gallimore's affidavit.

24. On October 19, 2018 we received a supplemental affidavit of Mr. Gallimore dated October 19, 2018 regarding correspondence from Respondent's counsel to the Ontario Securities Commission about activities concerning the Respondent.

25. By October 19, 2018 the panel realized that the motion would be contentious and not on consent, and determined that it would be heard in person at 10:00 a.m. on October 22, 2018. The panel instructed the Secretary to notify the parties of the panel's determination. This was done on October 19, 2018.

In Person

26. We determined that the October 22, 2018 Motion should be an in person hearing and not in writing or by teleconference for several reasons.

27. First, the adjournment would be contested. In view of the difficulty of having an orderly and decorous teleconference hearing with these parties in the past where contentious issues were addressed, we believed justice would be better served with an in person hearing.

28. Second, we could, and indeed did, consider all the written material the parties submitted for our consideration of the motion, as we would have for a written hearing.

29. Third, a hearing by teleconference on October 22, 2018 would mean that all the parties would not be present for the hearing on the merits to begin as scheduled if the motion was denied, thus necessitating an adjournment regardless of our denial of the motion.

30. We did not grant leave to abridge time requirements for bringing the motion and did not try to arrange for an earlier date to hear the motion. There were no convenient dates available and there was not sufficient time to do so.

31. It was precisely to avoid last minute adjournment requests, and the disruption to participants (Staff, witnesses and others) that this could entail that we had insisted that the October 22, 23, and 24 dates be treated by the parties as peremptory, and that any unforeseen reasons for adjournment be brought forth on a timely basis.

Grounds for the October 22, 2018 Motion

32. The main ground stated for the motion was that the Respondent would be medically unable to give full answer and defense to the allegations at issue, "as he is expected to have neurosurgery on or shortly before the scheduled hearing dates. The surgery date has not yet been confirmed."

33. The Respondent submitted as further grounds for the motion i) that BC would suffer no prejudice by virtue of an adjournment because she had been reimbursed by Investors Group for her alleged losses; and ii) that an adjournment would entail no prejudice or risk to the public because the Respondent has not been registered in any capacity with the MFDA since 2013, and has consented to a prohibition from being so registered until this proceeding has been dealt with finally.

Withdrawal of Counsel

34. On Friday, October 19, 2018, John MacDonell, counsel for the Respondent, sent the MFDA a letter (the "Withdrawal Letter") complaining that the panel had failed to consider or render a decision on hearing the Respondent's motion for adjournment prior to the scheduled hearing dates, nor had it considered or rendered a decision on the corresponding request for an abridgement of time to bring the motion.

35. The Withdrawal Letter also complained that the MFDA had failed to disclose the substance of the evidence the MFDA investigator would give at the hearing on the merits. This had been raised and addressed at the April 10, 2018 hearing.

36. The panel determined that it would be appropriate to again address this issue at the time of the hearing on the merits when it could determine whether the evidence given by Staff's investigator had been adequately pre-disclosed to the Respondent and then determine which evidence, if any, of the investigator should be disregarded so as not to prejudice the Respondent because of non-disclosure.

37. At the hearing on the merits, Staff's investigator testified as to his investigation and the documents and matters contained in the two volumes of the hearing documents submitted as evidence and the matters in his supporting affidavit dealing with the merits (but not the affidavits of October17 and 19 submitted in regard to the motion), all of which, we determined, had been adequately pre-disclosed to the Respondent.

38. In the Withdrawal Letter, the Respondent's counsel complained that at 4:30 p.m. on October 17, 2018, he received an email from the MFDA providing an affidavit by the MFDA investigator comprising approximately 270 pages including exhibits " 'in support of this disciplinary proceeding', i.e. not solely with respect to the pending motion. This raises an entirely new issue regarding an entity called Karatbars."

39. In fact the email consisted of an affidavit of 7 pages, and exhibits thereto of 134 pages, being copies of two transcripts for two previous adjournment motion hearings (on October 27, 2017 and April 10, 2018) in which counsel had been a participant, and 5 pages of emails.

40. In the Withdrawal Letter, counsel for the Respondent complained that the October 17, 2018 affidavit of Mr. Gallimore filed by Staff in opposition to granting the motion was an attempt to discredit the Respondent by portraying his involvement with Karatbars as a "scam" and "pyramid scheme". He stated, "This new issue thus apparently involves a matter of securities law with which

I have no experience, other than a single reading of a decision from the Quebec Financial Markets Administrative Tribunal, yesterday."

41. It is obvious to us that the October 17 affidavit of Mr. Gallimore addresses the ability of the Respondent to attend the hearing and defend himself, by referencing sales and promotional meetings and seminars and restaurant meetings that the Respondent has occupied his time with for the past year and the business he appears to have undertaken. To the extent it incidentally refers to the alleged substance of such business, it does not constitute evidence relevant to the issues raised in the Notice of Hearing, nor does it constitute an amendment to the Notice of Hearing.

42. The Withdrawal Letter states that Staff held all this information back until the last moment and that Staff has breached its duty of disclosure in raising an entirely new issue in an area of law in which counsel states he is not familiar.

43. However, as previously stated, the information was not relevant to the issues to be addressed in the hearing on the merits, but was relevant to the issues to be addressed at the October 22, 2018 Motion hearing.

44. The Withdrawal Letter concludes: "In the circumstances, I am notifying you pursuant to Rule 3.2(4) that I can no longer represent the Respondent and have ceased to do so as of the time of transmission of this letter."

45. The panel believed that the reasons the Respondent's counsel gave for his withdrawal were specious and that the withdrawal was done with the knowledge that he would be presenting the panel with a possible need to adjourn the hearing on its own initiative, as a requirement of natural justice.

46. At the end of the hearing on the merits, we heard from a member of the public that she was counsel to Investors Group in the civil litigation between the Respondent and Investors Group relating to the alleged misappropriation from BC and that she did not believe that the Respondent's counsel had withdrawn as the Respondent's counsel in such litigation. We understand that the civil

suit between the Respondent and Investors Group is proceeding with discoveries scheduled in the next month. While we had not factored it into our consideration of whether counsel's reasons for withdrawal were specious, it did not surprise us to learn that counsel's withdrawal was limited to ceasing to represent the Respondent in the matter before us.

Denial of the October 22, 2018 Motion

47. We denied the October 22, 2018 Motion.

Reasons

48. The panel denied the October 22, 2018 Motion for the following reasons.

49. Allowing possible scheduling of elective surgery to preempt the peremptory dates of October 22, 23, and 24 was not appropriate. The Respondent should schedule around the dates.

50. The public interest demands that allegations of serious securities misconduct, such as that set out in the Notice of Hearing (misappropriation, outside business activity, and failure to cooperate) should be heard and determined expeditiously. Staff provided us with a copy of a decision of an Investment Dealers Association (now IIROC) panel : Allen (re), [2001] I.D.A.C.D. No.8, para.11which stated:

> "These are serious allegations, reflecting, if proven, practices contrary to the interests of the public. In our view, in order to achieve the objects of the Constitution cited above, it is necessary that these matters be inquired into by the District Council with dispatch. A lengthy delay- and we are talking about many months, if not years- is potentially harmful and must, therefore be avoided, The O.S.C., in Robinson, took the same point of view: 'The public expects and requires that this Commission will move expeditiously to deal with market participants who are alleged to have engaged in conduct which is abusive of the capital markets. The need to deal expeditiously with allegations of misconduct is of particular concern in a case such as this where the allegations against the Respondents, if proved, are serious."

51. We noted Staff's concerns that the events in issue in this hearing occurred six years ago.

52. Staff's principal witness, BC, could be lost to Staff if there was another adjournment.

53. It is of pressing public interest that Staff be permitted to present its case with the best witnesses while they are willing and capable of testifying.

54. This matter has been delayed by the Respondent on many occasions.

55. On March 1, 2017, the Respondent advised that he would be out of the country from June 16 to July 7 and the hearing was rescheduled to July 24 and 24, 2017. The Respondent later admitted that he was not out of the country from June 16 to July 7.

56. We reviewed the recent statements by Dr. Kabir in his letter of October 4 forming part of the materials submitted in the motion record for the October 22, 2018 Motion. He stated regarding the Respondent's medical condition that it would be "difficult for him to remain focused for a 3 day hearing."

57. Dr. Kabir's view more than six months ago was that the Respondent could concentrate for periods of 40 minutes or so.

58. In connection with previous adjournment motions, Staff requested to interview Dr. Kabir but this never happened. Although the Respondent's counsel offered in the past to have the Respondent examined by a doctor selected by Staff, Staff did not do so because of limited MFDA resources and time constraints.

59. In our view, nothing had changed for the worse in the Respondent's medical condition since our decision to grant an adjournment at the April 10, 2018 Motion hearing.

60. In fact, the business activities the Respondent has been carrying on at least since March 2018 demonstrate that he can concentrate for much longer periods of time than 40 minutes.

61. The Respondent has had Staff's pre-hearing disclosure and documentation available from well before the time of his accident. He has filed a Reply. Respondent's counsel long ago confirmed to us that he believed that the Respondent has complied with his pre-hearing disclosure obligations. This indicates that preparation has been well underway. The Respondent has been given much additional time for further preparation as a result of many adjournments. He has had yet another six months since the last adjournment for him and his counsel to prepare for the hearing.

62. The Respondent has been quite mobile for a long time. He attended in person the April 10, 2018 Motion and was able to attend the hearing on the merits on October 23, 2018.

63. The materials set out as exhibits to Mr. Gallimore's affidavit of October 17, 2018 indicate that the Respondent has been quite active with sales meetings, running seminars and promoting Karatbars. The materials in exhibit E to the affidavit also show that the Respondent was very involved with Karatbars and was operating at an intensive level.

64. In Mr. Gallimore's affidavit of October 17, 2018 he stated,

> "On June 21, 2018, LT forwarded to Staff an email dated May 25, 2018 that the Respondent had sent to prospects regarding an investment in cryptocurrency. The Respondent initially sent the email to a friend of LT's. LT sent Staff the copy he had received from his friend. The email indicates that the Respondent was involved in a new venture with Karatbars International related to the conversion of money into gold and gold-backed cryptocurrency. The email was sent from karatkouple@gmail.com. The email was signed off by Alfie, Gold Director Elite 3, Karatbars International.
>
> "Staff reviewed the Karatbars International website and downloaded a PDF document entitled Karatbars Compensation Plan Explanation (the Compensation Plan"). The document details the compensation plan for associates and affiliates. The document indicates that an affiliate receives compensation, or other payments, based on a points system related to personal sales, and sales from associates recruited by the affiliate. The Compensation Plan also details the commission and bonuses expected to be earned by the different levels of the organization. In order to be considered a Gold Director Elite an affiliate must make at least 300 sales per month and also be responsible for at least two or

three other affiliates. Furthermore, a Gold Director Elite 3 may also receive a bonus of 6 %."

65. According to Karatbars promotional material, an affiliate with "Gold Director Elite 3" status is in the highest compensation category with over 300 sales a month. Staff advised us that by its calculation the Respondent, as a Gold Director Elite 3 would be earning at least $3,000 per week in commissions.

66. In his affidavit of October 18, 2018 the Respondents admitted that he is an affiliate of Karatbars.

67. He also stated, "With regard to the allegations of LT, they relate to a time period in June 2018, after the most recent adjournment motion. I did resume some light activity regarding Karatbars, mostly on my home computer, at or around that time."

68. The Respondent has not been truthful about his inability to concentrate or to defend himself at the hearing or the extent of his business activity.

69. The Respondent in his affidavit of October 18, 2018 referred to much of the testimony in Mr. Gallimore's affidavit as hearsay and double hearsay. However, our rules of procedure allow us to rely on hearsay evidence and on affidavit evidence and unsworn evidence and other documents as long as we believe it is reasonable in the circumstances to do so, and as long as we conclude that doing so would not be unfair to the parties in the circumstances. We noted the Respondent's denial of the truth of the hearsay evidence. But we also noted what his counsel said to the Ontario Securities Commission in his letter of October 4, 2018 to the Commission, and the Respondent's identifying himself in the signature line of a promotional email from him as a "Gold Director Elite 3, Karatbars International."

70. The Respondent was not cross-examined on his affidavit and never appeared in person to testify at the motion hearing where he would have been subject to questioning by Staff.

71. We determined that it was fair and reasonable to rely on hearsay and documentary evidence in Mr. Gallimore's affidavit under the circumstances and in view of the limited purpose (i.e. not whether the facts about Karatbar are true, but rather about the condition and ability of the Respondent to defend himself and participate in the hearing and the degree and extent of his activity during the time since March, 2018 that he has been seeking adjournments and delay).

72. We concluded that the Respondent has been quite active with business and is physically and cognitively capable of participating in the hearing and defending himself against the allegations.

73. He has not been truthful in portraying his mental and cognitive ability to participate in his defense or regarding his abilities to work.

74. He has been inappropriately manipulative (successfully on previous adjournments) and continues to be regarding the prosecution of the case against him.

75. In Igbinosun (Law society of Upper Canada v. Igbinosun 96 O.R. (3rd) 138), the Court of Appeal provided a non-exhaustive list of procedural and substantive considerations that have been considered in deciding whether to grant or refuse an adjournment:

> "Factors which may support the denial of an adjournment may include a lack of compliance with prior court orders, previous adjournments that have been granted to the applicant, previous peremptory hearing dates, the desirability of having the matter decided and a finding that the applicant is seeking to manipulate the system by orchestrating delay. Factors which may favour the granting of an adjournment include the fact that the consequences of the hearing are serious, that the applicant would be prejudiced if the request were not granted, and a finding that the applicant was honestly seeking to exercise his right to counsel and had been represented in the proceedings up until the time of the adjournment request. In weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date and the length of the requested adjournment should also be considered."

76. We were advised by Staff that the delays and uncertainty have been quite stressful for BC, its key witness who lives in Ottawa, is over 75 years of age, and rather fragile. She has been readied

for testifying on several occasions in the past. Staff advised that she finds arranging times and dates and facing changes and postponements stressful. She no longer has a financial interest in the matters in issue, having been reimbursed by Investors Group and having assigned her claims against the Respondent to it. She no longer is represented by legal counsel.

77. There was real concern that any further delay could result in BC not being available or effective as a witness. Under our rules Staff does not have the ability to compel a witness to attend or cooperate. This most recent occasion of possible delay has been very disruptive for this witness.

78. We viewed the attempted scheduling for the peremptory dates of elective surgery for the Respondent, or allowing for the possibility of it, and raising this on October 9, 2018, and the failure of the Respondent to attend in person the October 22, 2018 Motion hearing as inappropriate moves by the Respondent to further delay this matter.

79. We viewed the last minute withdrawal of his counsel on October 19, 2018 for specious reasons as unwarranted with the objective of achieving further delay.

80. In a letter from the Respondent's counsel to the Ontario Securities Commission dated October 4, 2018, his counsel stated, "Regarding (b), Mr. Pino has had his account for roughly three years. He was not active from May 1st, 2017, to March 2018 due to serious injuries sustained…Mr. Pino has appeared at sales conferences and private sales meetings in which he explains what he knows about Karatbars. Regarding (d), if someone buys gold or gold products using Mr. Pino's affiliate link, Mr. Pino receives a commission."

81. This letter was sent by the Respondent's counsel to the Ontario Securities Commission on October 4, 2018, the same day that he received a letter dated October 4, 2018 from Dr. Kabir saying that the Respondent "currently still does not have the capacity or ability to be able to devote time and effort required to prepare for the hearing…" and that the Respondent's condition "will definitely make it difficult for him to remain focused for a 3 day hearing."

82. Notwithstanding the Respondent's counsel's knowledge of the Respondent's business activities and that he had been active since March 2018 (as evidenced in his letter to the Commission), the Respondent's counsel sent Dr. Kabir's letter of October 4, 2018 on to us in the Respondent's Motion Record of October 9, 2018.

83. In our order of July 21, 2017 granting the Respondent's request for an adjournment, we ordered that the Respondent will advise Staff of the MFDA if his condition changes in any material way and that he will advise Staff on the status of his employment.

84. Staff advised us that the Respondent has not advised Staff of his change in condition of not being able to conduct any business nor of his new employment or work status.

85. The Respondent is in violation of our order of July 21, 2018 and has not been truthful about his physical and cognitive abilities on past adjournment motions.

86. He was not coming to us with clean hands.

87. Finally, the Respondent has not discharged his burden of demonstrating on a balance of probabilities that i) his health prevents him from making full answer and defense to the allegations against him or that continuing with the proceeding against him at this time would cause him to suffer serious harm and ii) that the Respondent's personal interest in adjourning the proceeding outweighs the public's interest in proceeding with the hearing on the merits.

Adjournment to October 23, 2018

88. Notwithstanding our determination not to have the October 22, 2018 Motion hearing in writing or by teleconference, neither the Respondent nor his counsel attended the hearing on the motion at 10:00 a.m. on October 22, 2018. However, the Respondent contacted the Secretary and tried to phone into the hearing at 10:00 a.m.

89. The panel refused to allow the Respondent to connect by telephone and turn the hearing into a teleconference hearing.

90. Once we had made our decision to deny the October 22, 2018 Motion, we contacted the Respondent by telephone and advised him of the decision.

91. We advised him that the hearing on the merits was about to proceed and asked him if he would like to attend in person. He said he would but that he could not get to the hearing from Ottawa until 11:30 a.m. on October 23, 2018.

92. We adjourned the commencement of the hearing on the merits to 11:30 a.m. on October 23, 2018.

Attendance of the Respondent

93. The Respondent attended in person at the beginning of the hearing on the merits at 11:30 a.m. on October 23, 2018.

94. He advised us that he chose to be in attendance without counsel and that he had been medically cleared by his doctors to be in attendance.

95. We decided to proceed with the hearing although the Respondent was in attendance without counsel.

Not a denial of natural justice

96. After a careful consideration of the Court of Appeal decision in Igbinosun and the cases referred to in it, and all the circumstances of our case, we determined that it would not be a denial of natural justice under the circumstances to proceed with the hearing as scheduled for several reasons.

97. The Respondent was not acting with clean hands. He has not been telling the truth about his physical and cognitive capacities or about his business activity. He has not kept Staff informed of changes in his condition as ordered by this panel at the October 27, 2017 Motion hearing. The Respondent was attempting to manipulate the system once again.

98. His counsel's reasons for his last minute withdrawal were specious.

99. The hearing dates of October 22, 23 and 24 were set aside for this hearing as peremptory. The Respondent had been warned that they were peremptory.

100. No dates were available for an adjourned hearing after them in the near future.

101. There have been multiple last minute adjournments which have been quite upsetting and disruptive to Staff's key witness. The witness, BC, might be lost to Staff if we adjourned the hearing until the Respondent found another counsel to represent him.

102. The misconduct alleged occurred six years ago. While the requirement for procedural fairness to a respondent must be paramount in any adjournment consideration, a panel should also be mindful of the need for proceeding expeditiously expressed in the quote from Allen (Re) reproduced above.

103. The Respondent has had a long time, from well before his car accident on May 1, 2017, and after it, to familiarize himself with the allegations in the Notice of Hearing and the evidence that Staff disclosed to him well before his car accident that it will be relying on. There is nothing new or recent. He has had ample opportunity to know the case against him and to prepare to answer it.

104. The Respondent's counsel's assertion in the Withdrawal Letter that Staff has raised in Mr. Gallimore's October 17, 2018 affidavit an entirely new issue which the Respondent will have to defend, namely that the Respondent has been involved with Karatbars as a "scam" and "pyramid scheme", is not correct. While the evidence in the affidavit is relevant to the Respondent's physical

and mental abilities and capacities and the level of his business activities, there is nothing new in the affidavit relevant to the allegations in the Notice of Hearing. The affidavit does not amend the Notice of Hearing or introduce new issues which the Respondent need address in the hearing on the merits.

105. Contrary to the Respondent's assertions, he is and has been for some time physically and cognitively capable and competent to prepare for his defense and to participate in the hearing.

106. For reasons set out above, we did not believe that the Respondent would be unduly prejudiced if the hearing proceeded without his counsel.

107. The point had been reached where any further delay would be unduly prejudicial to the public interest.

Hearing on the Merits

108. After opening formalities and scheduling for the remaining day and one-half for the hearing, Staff made an opening statement of approximately 3 minutes and the Respondent made an opening statement of approximately 5 minutes.

109. Staff adduced documentary evidence and testimony through its first witness, Mr. Gallimore, who testified for an hour more or less. He was then cross-examined by the Respondent and questioned by the panel for approximately 15 minutes.

110. Staff confirmed that its remaining witness, BC, was ready to testify by telephone at 2:00 p.m.

111. The hearing recessed at 1:35 p.m. for lunch.

112. At the recommencement of the hearing at 2:00 p.m., BC was connected to the hearing by telephone. Before she was sworn, the Respondent advised that he would be leaving the hearing because he was overwhelmed and could not concentrate.

113. We offered to recess the hearing until later in the day, or to sometime the next day to accommodate the Respondent.

114. The Respondent refused the offer and stated that he would be leaving the hearing and would not be returning.

115. We believed that the Respondent left the hearing with the hope that we would have to adjourn the hearing.

116. We did not believe that he was unable to continue, at least after a recess as offered.

117. The Respondent then left and the hearing continued.

118. BC was then sworn and testified for approximately 20 minutes.

119. Staff made its closing argument for approximately 20 minutes and stated that it had concluded its case on the merits.

120. The panel advised that it would adjourn the hearing to deliberate and that it would issue its decision and reasons on the merits in due course.

121. Whereupon the panel adjourned the hearing just before 3:30 p.m.

C. Hearing on the Merits

Notice of Hearing

122. By Notice of Hearing ("Notice of Hearing") dated November 7, 2016 staff ("Staff") of the MFDA alleged that:

> **Allegation #1**: From October 2012 to May 2013, Alfred Pino ("Respondent") misappropriated approximately $276,897.19 from client BC, and failed to repay or otherwise account for $263,786.37 of those monies, thereby failing to deal fairly, honestly and in good faith with client BC, contrary to MFDA Rule 2.1.1.
>
> **Allegation #2**: Commencing in February 2015, the Respondent engaged in outside business activities with respect to three companies that were not disclosed to or approved by the Member, contrary to MFDA Rules 1.2.1(c) (now MFDA Rule 1.3) and 2.1.1.
>
> **Allegation #3**: Commencing in February 2015, the Respondent failed to cooperate with an investigation conducted by Staff of the MFDA, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Particulars

123. The Notice of Hearing set out the following particulars, in part:

> *Registration History*
>
> 1. Between September 1997 and May 2013, the Respondent was registered in Ontario as a mutual fund salesperson with Investors Group Financial Services Inc. ("Investors Group"), a Member of the MFDA. Between November 2005 and May 2013, the Respondent was also registered as a mutual fund salesperson in Quebec.
>
> 2. On May 16, 2013, Investors Group terminated the Respondent.
>
> 3. At all material times, the Respondent conducted business at a branch located in Ottawa, Ontario (the "Branch").
>
> 4. The Respondent has not been registered in the securities industry in any capacity since May 16, 2013.

Trova Companies

5. On September 23, 2011, the Respondent incorporated a federal company called 7982577 Canada Inc. The Respondent was the sole incorporating officer. 7982577 Canada Inc. operated under the name of Trova Capital and was at all material times wholly under the Respondent's control.

6. On September 27, 2011, Trova Capital Corporation ("Trova Capital") was registered as a Florida Profit Corporation. The Respondent was the Treasurer of Trova Capital.

7. On September 30, 2011, Trova Real Estate Properties LLC ("Trova Real Estate") was registered as a Florida Limited Liability Company. The Respondent signed as a director of Trova Real Estate on the corporation's registration documents.

8. Trova Capital and Trova Real Estate were established for the purpose of acquiring undervalued American real estate for possible resale or rental.

Allegation #1: Misappropriating Monies From Client BC

9. In 2002, client BC became a client of Investors Group. The Respondent was the mutual fund salesperson responsible for servicing her accounts at Investors Group.

10. Client BC was an unsophisticated investor. She was born in 1943. Client BC retired in 2008. Her husband passed away in July 2010. By virtue of her circumstances, client BC was a vulnerable client.

11. Between October 1, 2012 and May 16, 2013, the Respondent solicited and obtained approximately $280,487.36 from client BC under false pretenses and misappropriated the money by depositing it in corporate bank accounts that he controlled. The Respondent subsequently failed to repay or otherwise account for $267,377.54 of the monies that he obtained from client BC.

12. Specifically, commencing on October 1, 2012, the Respondent engaged in a repeated pattern of conduct, whereby he would: (a) drive to the home of client BC for the purpose of providing investment advice; (b) drive client BC to her bank in his vehicle; (c) instruct client BC to enter the bank to obtain bank drafts in amounts that he proposed payable to entities that he recommended for the purpose of making investments while the Respondent waited for client BC in his vehicle; (d) provide client BC with a false explanation with respect to the nature and purpose of the investment; and (e) deposit the bank draft in the bank account of a corporate entity that the Respondent controlled. As a consequence of this conduct, the Respondent was able to use the money that he had solicited and obtained from client BC as he saw fit for his benefit.

13. The Respondent did not provide client BC with any records, receipts or statements documenting the amounts of money that she provided to the Respondent or how the money would be invested.

14. The Respondent falsely represented to client BC that the money was being invested in annuities that would pay client BC a rate of return of 6.5% per year.

15. By means of the pattern of conduct described above, the Respondent solicited and obtained bank drafts from client BC that were payable to Trova Capital or Trova Real Estate in the amounts and on the dates listed below: Date Amount October 1, 2012 $ 50,000.00 October 5, 2012 $ 16,000.00 October 20, 2012 $100,000.00 November 2, 2012 $ 10,000.00 January 25, 2013 $ 11,896.19 February 19, 2013 $ 34,000.00 April 15, 2013 $ 40,000.00 May 16, 2013 $ 15,000.00 Total $276,896.19.

16. Some of the amounts that the Respondent solicited from client BC were obtained from savings accumulated by BC and other amounts were borrowed from a line of credit or from an investment loan that was secured against her home.

17. The Respondent deposited the bank drafts that he obtained from client BC into a bank account he had opened on October 2, 2012 (i.e., the day after he first obtained a bank draft from client BC) at a TD Canada Trust branch in Manotick, Ontario (the "Trova Account"). The Respondent opened the bank account in the name of 7982577 Canada Inc., which he indicated was carrying on business as Trova Real Estate. The Respondent identified himself as the "President" of the corporation and established himself as the sole signing officer in respect of the Trova Account.

Loan Agreement between Client BC and 7982577 Canada Inc.

18. On or about May 27, 2013, the Respondent arranged for client BC to sign a loan agreement that identified client BC as the lender of $250,000 to 7982577 Canada Inc. According to the terms of the agreement, 7982577 Canada Inc. intended to repay $250,000 to client BC plus interest payable at a rate of 3% per annum commencing on June 1, 2013.

19. If this loan agreement was intended to document the money solicited and obtained by the Respondent from client BC, then the loan agreement misrepresented the amount that she had provided to the Respondent and the nature and purpose of the investment that the Respondent explained to client BC. By the date of the loan agreement, client BC had already advanced approximately $276,896.36 for investment on her behalf by the Respondent and client BC had no intention to loan monies to, or invest in, 7982577 Canada Inc.

20. Client BC signed the loan document as the Respondent requested but she was not provided with an explanation of the purpose or content of the document, and she did not receive any independent professional advice before signing it.

21. Between November 27, 2013 and February 21, 2014, three drafts payable to client BC were deposited into a bank account of client BC. Specifically, bank drafts were deposited on the dates and in the amounts set out below: Date Amount November 27, 2013 $ 5,000.00 December 31, 2013 $ 5,000.00 February 21, 2014 $ 3,109.82 Total $ 13,109.82

22. No investment statements, documents or other disclosure were provided to client BC to explain the nature and purpose of the payments listed above.

23. As described above, from October 2012 to June 2013, the Respondent solicited, obtained and misappropriated approximately $280,487.36 from client BC and failed to repay or otherwise account for $263,786.37, thereby failing to deal fairly, honestly and in good faith with client BC, contrary to MFDA Rule 2.1.1.

Allegation #2: Outside Business Activities

24. At all material times, Investors Group maintained policies and procedures which required its Approved Persons to refrain from engaging in outside business activities unless the Approved Person had disclosed and obtained prior approval from the Member authorizing engagement in contemplated outside business activities.

25. The Respondent did not, at any time, disclose to Investors Group his involvement with 7982577 Canada Inc., Trova Capital or Trova Real Estate, and Investors Group did not authorize or approve his involvement in business activities associated with those companies.

26. By participating in the conduct described above, the Respondent engaged in conduct contrary to MFDA Rules 1.2.1(c) (now MFDA Rule 1.3), and 2.1.1.

Allegation #3: Failure to Cooperate and Misleading Staff

27. On February 10, 2015, Staff sent a letter to the Respondent's counsel requesting the following information and documents: (a) a list of all business and personal bank accounts in which the Respondent had a beneficial interest; (b) copies of all bank account statements for the period September 1, 2011 to May 31, 2013 for any bank account in which the Respondent had a beneficial interest; (c) copies of all bank account statements for the period September 1, 2011 to May 31, 2013 for bank accounts of Trova Real Estate Properties LLC; and (d) copies of all bank statements for the period September 1, 2011 to May 31, 2013 for bank accounts of Trova Capital Corp.

28. On April 21, 2015, the Respondent's counsel provided Staff with some of the requested information and documentation but the material produced by the Respondent was incomplete and insufficiently responsive to Staff's inquiries. In particular, the Respondent did not provide Staff with copies of bank statements for the Trova Account.

29. On May 8, 2015, Staff received a sworn Affidavit of the Respondent which listed the accounts in which the Respondent had a beneficial interest during the specified period. The Affidavit omitted reference to the Trova Account into which the 9 bank drafts that the Respondent had obtained from client BC were deposited.

30. On May 12, 2015, Staff sent an email to the Respondent's counsel requesting an explanation for the omission of the Trova Account which should have been included in the list produced to Staff by the Respondent.

31. On May 20, 2015, Staff received a letter from the Respondent's counsel in which she claimed that in October 2011, the Respondent ceased to have any interest in the Trova Account.

32. In light of the fact that the Respondent had continued to be the sole signing officer on the Trova Account after October 2011 and had deposited the nine bank drafts that he had obtained from client BC into the Trova Account after October 2011, the Respondent's assertion that after October 2011, he ceased to have an interest in the Trova Account is false and misleading.

33. From May 26, 2015 to December 2, 2015, Staff and the Respondent's counsel exchanged correspondence for the purpose of trying to arrange for the production of outstanding documentation relevant to Staff's investigation and to schedule an interview between Staff and the Respondent.

34. On November 9, 2015, the Respondent's counsel informed Staff that the Respondent and his counsel were available and willing to attend an interview on December 7, 2015.

35. By letter dated November 25, 2015, Staff wrote to the Respondent's counsel to confirm that an interview between Staff and the Respondent had been scheduled to take place on December 7, 2015 as the Respondent had proposed. In the November 25, 2015 letter, Staff stated that pursuant to s. 22.1 of MFDA By-law No. 1, the Respondent was required to attend the scheduled interview with Staff.

36. By e-mail dated December 2, 2015, the Respondent's counsel informed Staff that "the Respondent will not be attending any MFDA interview."

37. By e-mail dated December 3, 2015, Staff repeated its assertion to the Respondent's counsel that the Respondent was required to attend the interview pursuant to section 22.1 of MFDA By-law No. 1 and warned that failure to attend could result in disciplinary action taken by Staff.

38. The Respondent did not attend the interview that was scheduled to take place on December 7, 2015 and failed to provide outstanding documents and information that had been requested by Staff for the purpose of completing its investigation of the Respondent's conduct.

39. As described above, the Respondent has failed to cooperate with Staff's investigation into his conduct by: (a) making statements to Staff which were false or misleading; (b) failing to

provide documents requested by Staff; and (c) failing to attend an interview to give information; contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Reply

124. On February 24, 2017 the Respondent filed a Reply in which he denied the allegations set out in the Notice of Hearing and replied to the particulars.

125. He admitted, in some cases with qualifications which were not determinative of the issues in this matter, the particulars set out in paragraphs 1 to 9 of the particulars.

126. He denied that client BC was unsophisticated, stating that she was a well-informed and sophisticated client, with a Know Your Client profile stating her to be a moderate to aggressive investor who had been investing and purchasing insurance products for multiple years.

127. He denied that he had solicited funds from client BC but stated that she paid the funds to Trova Real Estate pursuant to an interest bearing loan that was first suggested by BC, with a loan agreement fully understood and freely entered into by BC, with no false pretenses or misappropriation whatsoever.

128. He stated that the loan agreement was BC's initiative. He stated that he spent many hours discussing and explaining every aspect of the loan agreement to her.

129. He admitted that he had visited BC at her home on numerous occasions and on one occasion had driven her to the bank but asserted that she was in full control of what she did at the bank.

130. He stated that he did provide client BC with records, documentation of funds provided by BC to Trova Real Estate and a repayment schedule.

131. The Respondent admitted the amounts ($276,896.19) and dates (October 1, 2012 to January 25, 2013) of payment received from BC as set out in paragraph 15 of the particulars, and stated that there was an additional $3,591.17 provided by BC on June 20, 2013.

132. He admitted that the loan agreement was entered into on June 20, 2013 for a loan amount of $280,000 with interest at 3%, commencing July 1, 2013, repayable on demand.

133. The Respondent stated that he did in fact disclose to Investors Group his involvement with the stated companies but admitted that he did not do so prior to his involvement.

134. The Respondent denied personal knowledge of matters referred to in paragraphs 27 to 38 of the particulars, including correspondence of and from his counsel and Staff, the Respondent's affidavit, and allegations referred to in such paragraphs.

Issues

135. We needed to decide whether or not Staff had proved the allegations against the Respondent on a balance of probabilities. Our decision had to be based on facts which we found based on cogent, clear and convincing evidence.

136. The main factual question in issue was whether the admitted payments by BC to the Respondent were monies misappropriated by the Respondent or monies loaned to the Respondent and never repaid.

137. The main question of mixed fact and law in issue was whether the Respondent could cure his non-cooperation with and misleading of the Staff alleged in allegation #3, by cooperating with Staff after the issue of the Notice of Hearing, and if so, did he cure the misconduct?

Evidence

138. We heard from two witnesses produced by Staff.

139. Mr. Gallimore, Staff investigator, provided affidavits describing his investigation and several documents. In addition he testified concerning his investigation and two volumes of

hearing documents entered in evidence consisting of copies of cheques and bank drafts, bank and other account statements, and correspondence, emails and other pertinent documents, including a transcript of an interview with BC, and a copy of the loan agreement between BC (the "Lender") and 7982577 Canada Inc. (Operating as Trova Real Estate Canada) (the "Borrower"), and other documents relevant to the facts and information in the particulars set out in the Notice of Hearing. The loan agreement was dated May 27, 2013 (not June 20, 2013 as stated by the Respondent in his Reply) and was for $250,000 (not $280,000 [being the amount that the Respondent actually received from BC] as stated in the Reply).

140. We also heard from BC who testified by telephone from Ottawa. Although she was questioned by the panel, she was not cross-examined by the Respondent, who left the hearing immediately before BC testified.

141. The Respondent made an opening statement. We advised him that we accepted his opening statement as his view of what the case was all about, but warned him that if he wished us to accept any of his remarks as evidence, he would have to be sworn in due course and testify as a witness and be subject to cross-examination by Staff.

142. The Respondent replied that there were a number of documents that he had recently filed with the court in his on-going civil litigation with Investors Group and that he would need more time to get them ready to present to us as evidence. Staff advised that Staff had not received anything from the Respondent in terms of additional document disclosure or any information from the Respondent since July 2017 other than the materials filed for adjournment motions.

143. The Respondent's assertion that he had a number of documents to present to the panel as evidence, which Staff advised had not been provided to Staff by way of pre-hearing disclosure, suggested to us that either he had deliberately held back such documents from Staff (in view of his counsel's assertion to us in the April 10, 2018 Motion hearing that the Respondent had complied with his pre-hearing disclosure obligations) or that he was yet again not being truthful, this time about having additional relevant documents.

144. The Respondent did not adduce in evidence any documents to substantiate his assertions in his Reply and did not testify or produce witnesses. Nor did he cross-examine BC concerning her testimony.

145. In connection with the October 22, 2018 Motion, we considered the affidavits, correspondence and emails of the Respondent and his counsel, and those from Staff, filed in connection with the motion, but we did not consider them or anything referred to in them as relevant to the allegations in the Notice of Hearing or the case the Respondent needed to meet in the hearing on the merits of this matter.

146. Immediately after the conclusion of the October 22, 2018 Motion hearing, it was uncertain whether the Respondent would attend the hearing on the merits. Staff indicated that if the Respondent did not attend it would ask the panel to accept as proven the facts and allegations in the Notice of Hearing as it was entitled to do under the rules. The panel advised Staff that it would not proceed on that basis and that Staff would have to adduce evidence in a full and thorough evidentiary hearing in which the panel could balance the interests of the Respondent in a complete and fair hearing.

The Witnesses

147. Staff produced two witnesses: Mr. Gallimore, MFDA investigator in this matter, and BC, the client of the Respondent's from whom monies were allegedly misappropriated.

Mr. Gallimore

148. Mr. Gallimore gave evidence that established the accuracy of the factual statements set out in the particulars in the Notice of Hearing.

149. Mr. Gallimore was cross-examined by the Respondent. The Respondent appeared alert and physically and cognitively competent in his cross-examination of Mr. Gallimore.

150. Several of the questions asked by the Respondent implied information about BC. For example, he asked whether Mr. Gallimore knew how sophisticated BC was, or whether he had inquired about what kind of vehicle the Respondent allegedly drove BC to the bank in, according to her, or whether Mr. Gallimore was aware that BC's Know Your Client profile showed that she had at least moderate investment knowledge and was interested in moderately aggressive investments and had made leveraged investments.

BC

151. BC appeared nervous and somewhat frail. She said she was 75 years old. She had been a nurse and she retired when she was 65. She did not accumulate many savings before retirement. Any money she had she deposited with the bank. She had never invested monies with an investment dealer or other wealth management adviser nor make any investments prior to dealing with the Respondent. The Respondent was the first and only investment adviser she ever had.

152. She did not specifically remember filling out a Know Your Client form. Yet she remembered the Respondent telling her that her investment knowledge was moderate-aggressive. When she asked him why he thought that, he said she should not worry, that he would do what was best for her.

153. As far as the loan agreement was concerned, she seemed somewhat confused. She said she thought that under the loan agreement money was to be lent to her.

154. Regarding the money paid by her to the Respondent prior to her signing the loan agreement, she said she was told that she would earn 6.5% and that it was for a conservative safe investment that would provide her with income. She recalled that she thought she was handing over her money to the Respondent to be invested in an insurance product with Great West Life. That is why she wrote "GWL' on the re line of at least one of the cheques.

155. She said that the Respondent always drove her to the bank and that when she took the cheques she had written payable to the Respondent's company into the bank, the bank exchanged

them for bank drafts because, she was told, bank drafts would cost her less in transaction fees than cheques. She then gave the bank drafts to the Respondent.

156. She said that the Respondent's vehicle in which he drove her to the bank was black. She thought it may have been a SUV but said she did not know much about cars.

157. BC confirmed that she never received repayment of the monies from the Respondent, but that she had been reimbursed by Investors Group.

158. She said she never received from the Respondent receipts, statements, or other documentation for the monies. She stated that when she exchanged cheques for bank drafts at the bank and then turned over the bank drafts to the Respondent, he also took from her the receipts for the bank drafts provided by the bank and never gave her copies, although she asked the Respondent for them.

159. We believed BC and did not believe the Respondent's where his version of events set out in his Reply were in conflict with BC's testimony.

160. In particular, we found incredible the Respondent's assertion that all the monies advanced by BC months before the loan agreement was signed were advanced pursuant to that document and that BC had agreed that interest would accrue at only 3% and only from June 1, 2013 and not from the dates of advance, all while maintaining that BC was a sophisticated investor knowing what she was doing with hours of explanation from him.

Facts

161. We found as fact the following.

Misappropriation – allegation #1

162. The Respondent misappropriated at least $276,896.19 from BC, as alleged in allegation #1. The monies were misappropriated by the Respondent well before a loan agreement was entered into. BC did not know what she was signing when she entered into the loan agreement.

163. The monies were obtained under false pretenses that they would be invested for her in safe investments that would yield 6.5% per annum.

164. In fact, no investment was ever made with the monies for her benefit. The monies were deposited into a bank account of a company owned and controlled by the Respondent and monies were paid out of the account to or for the Respondent and/or his wife.

165. The monies from BC were not paid as loans to the Respondent or his company as asserted by the Respondent. There were no receipts for the payments suggesting they were loans to the Respondent or his company. The payments and the loan agreement cannot be reasonably connected.

166. Of the monies misappropriated by the Respondent, at least $263,000 were not repaid.

167. BC was an unsophisticated, vulnerable client with no investment knowledge or experience. Her Know Your Client form that showed that she had moderate investment knowledge and was interested in moderately aggressive investing was not accurate or true and was not completed by her with informed knowledge.

168. BC was taken advantage of by the Respondent.

Outside Business Activity – allegation #2

169. By his own admission, the Respondent did not disclose his involvement with the three Trova companies prior to his involvement with them.

170. A letter from Investors Group confirmed that the Respondent never disclosed his outside business activities regarding the Trova companies and never received Investors Group's approval for them.

Failure to Cooperate and Misleading Staff – allegation #3

171. The Respondent failed to cooperate with Staff and misled Staff.

172. This was established by testimony from Mr. Gallimore and various documents in the two hearing volumes (exhibit 15), including the string of email correspondence from Respondent's counsel with Staff, culminating in the email of December 2, 2015, in which the Respondent's counsel categorically stated "the Respondent will not be attending any MFDA interviews."

173. The Respondent failed to attend interviews requested by Staff or to provide bank account statements required by Staff.

174. The Respondent misled Staff about his involvement with 7982577 Canada Inc. and the company's bank account.

Decision

Misappropriation – allegation #1

175. MFDA Rule 2.1.1 requires that a registrant deal fairly, honestly and in good faith with clients. Misappropriating monies from a client, or borrowing monies from a client and never repaying them is conduct contrary to the rule.

176. From October 2012 to June 2013, the Respondent solicited, obtained and misappropriated at least $276,896.36 from client BC and failed to repay or otherwise account for $263,786.37, thereby failing to deal fairly, honestly and in good faith with client BC, contrary to MFDA Rule 2.1.1.

Outside business activity – allegation #2

177. Engaging in outside business activities by a registrant without prior disclosure to and approval of his Member is conduct contrary to MFDA Rules 1.2.1(c) [now MFDA Rule 1.3] and 2.1.1.

178. The Respondent did not, at any time, disclose to Investors Group his involvement with 7982577 Canada Inc., Trova Capital or Trova Real Estate, and Investors Group did not authorize or approve his involvement in business activities associated with those companies. Accordingly, the Respondent engaged in conduct contrary to MFDA Rules 1.2.1(c) [now MFDA Rule 1.3], and 2.1.1.

Failure to cooperate and misleading Staff

179. The referenced by-law and rule require a registrant to co-operate with the MFDA during its investigation of him, including answering questions, providing information and attending interviews. Failing to answer questions truthfully, or to provide requested information, or to attend interviews constitutes failure to cooperate with an investigation conducted by Staff of the MFDA, and is conduct contrary to section 22.1 of MFDA By-law No.1 and MFDA Rule 2.1.1.

180. Any offers to cooperate with Staff concerning matters in issue, if made by the Respondent and /or his counsel as alleged at some of the adjournment motion hearings or by the Respondent in his opening statement, if made and acted on after the issuance of the Notice of Hearing would not cure any failure to cooperate or any misleading of Staff occurring prior to the issuance of the Notice of Hearing and forming part of the basis of allegation #2. The allegation relates to failure to cooperate and misleading Staff during its investigation. Cooperating with Staff in providing pre-hearing disclosure or making admissions or entering into a statement of agreed fact for use at the hearing on the merits does not cure any pre- Notice of Hearing failure to cooperate.

181. The Respondent's assertion to Staff during Staff's investigation that after October 2011 he ceased to have an interest in the Trova Account was false and misleading. This is evidenced by the

fact that the Respondent had continued to be the sole signing officer on the Trova Account after October 2011 and had deposited the nine bank drafts that he had obtained from client BC into the Trova Account after October 2011, and had funds paid out of the account to him or his wife.

182. The Respondent has failed to cooperate with Staff's investigation into his conduct by: (a) making statements to Staff which were false or misleading; (b) failing to provide documents requested by Staff; and (c) failing to attend an interview to give information, contrary to section 22.1 of MFDA By-law No. 1 and MFDA Rule 2.1.1.

Finding

183. We find on a balance of probabilities, based on clear, cogent and convincing evidence that Staff has proved allegations #1, #2, and #3.

DATED this 26th day of November, 2018.

"Paul M. Moore"
Paul M. Moore, QC
Chair

"Vlasios Kardaras"
Vlasios Kardaras
Industry Representative

"Robert C. White"
Robert C. White
Industry Representative

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