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: Paolo Abate

Heard: October 29, 2014 in Toronto, Ontario
Decision and Reasons (Misconduct): March 12, 2015

DECISION AND REASONS
(MISCONDUCT)

Hearing Panel of the Central Regional Council:

Paul M. Moore Q.C.	Chair
Mike Elliott	Industry Representative
Robert C. White	Industry Representative

Appearances:

David Babin	)	For the Mutual Fund Dealers Association of Canada
Kevin Richard	)	For the Respondent

Glossary

1. Certain abbreviations, words, and initials are used in these Decision and Reasons (Misconduct) as described in the last section of this document.

Allegations

2. This matter was commenced by way of Notice of Hearing (the "NOH") dated April 10, 2014.

3. The NOH states on page 2:

> "NOTICE is further given that the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:
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> **Allegation #1.**: Between March 12, 2008 and May 1, 2012, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of the Member by selling, recommending, referring or facilitating the sale outside the Member of $2 million of shares of a private company owned or controlled in part by the Respondent to a foreign pension fund, contrary to MFDA Rules 1.1.1(a) and 2.1.1.
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> **Allegation #2.**: Between March 12, 2008 and May 1, 2012, the Respondent had and continued in another gainful occupation that was not disclosed to and approved by the Member by selling, recommending, referring or facilitating the sale of $2 million of shares of a private company owned or controlled in part by the Respondent to a foreign pension fund, contrary to MFDA Rules 1.2.1(d)[*now (c)*] and 2.1.1.
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> The NOH also states on page 2, under the heading "**PARTICULARS**":

"NOTICE is further given that the following is a summary of the facts alleged and intended to be relied upon by the MFDA at the hearing:"

and on page 7:

"**24.** By engaging in the conduct described above, the Respondent engaged in securities related business that was not carried on for the account and through the facilities of Brownstone or Quadrus, contrary to MFDA Rules 1.1.1(a) and 2.1.1."

and on page 8:

"**28.** To the extent any or all of the conduct described in Allegation #1 may not have constituted securities related business, then it constituted another gainful occupation engaged in by the Respondent which was not disclosed to and approved by either Brownstone or Quadrus contrary to MFDA Rules 1.2.1(d) and 2.1.1."

Evidence

4. The parties proposed and we agreed that evidence would be led in the following way.

5. Staff of the MFDA ("Staff") introduced an affidavit of Jessie Siu, an investigator with the Enforcement Department of the MFDA, with multiple exhibits attached. Ms. Siu re-affirmed her affidavit to us, and then was cross-examined by Respondent's counsel, and answered our questions.

6. Respondent's counsel introduced an affidavit of the Respondent with exhibits attached. The Respondent re-affirmed his affidavit to us, and then was cross-examined by Staff, and answered our questions.

7. Respondent's counsel introduced an affidavit of NT. NT re-affirmed his affidavit to us, and then was cross-examined by staff, and answered our questions.

Facts

8. We determine the following facts from the evidence or from statements in the NOH that were admitted by the Respondent in his Reply.

9. From August 15, 2006 to May 2, 2008, the Respondent was registered in Ontario as a mutual fund sales person with Brownstone, then a Member of the MFDA, and was an Approved Person.

10. From May 3, 2008 to May 14, 2008 (the "gap"), the Respondent was not registered in any capacity with the MFDA.

11. From May 15, 2008 to May 1, 2012, the Respondent was registered in Ontario as a mutual fund sales person with Quadrus, a Member of the MFDA, and was an Approved Person.

12. Cajubi is a pension fund providing benefits for the Paraguayan employees of Itaipu Binancional, the world's largest hydroelectric power plant, an entity jointly owned by the governments of Paraguay and Brazil.

13. Sometime in 2007, the Respondent was introduced to agents of Cajubi who had informed NT, the principal officer of FCCM, a limited market dealer in Ontario, that Cajubi was interested in acquiring exposure to Canadian investments. There were no discussions of a purchase of preference shares in a private company. The Respondent was introduced as someone having expertise in segregated funds.

14. The Respondent had previously provided some administrative services to FCCM, but all arrangements between the Respondent and FCCM were severed, at the request of Quadrus, prior to the time of negotiations between NT, as the operating officer of FCCM, and Cajubi for the issue and sale to Cajubi of the $2 million of preference shares.

15. Based on feedback from Cajubi and Cajubi's agent in Canada following meetings in 2007, NT developed the concept of Private Wealth in early 2008. In early March 2008, he proposed to Cajubi that Cajubi purchase preference shares in Private Wealth.

16. NT testified that he advised Cajubi that Private Wealth would look for alternative types of transactions from what they were already invested in and that some of these transactions could include transactions where JM, DB and NT had interests. He also testified that he advised Cajubi that Cajubi would not have input as to the use by Private Wealth of the proceeds of the preference shares, nor as to the investments selected. He advised that Private Wealth would undertake investments in entrepreneurial opportunities overseen by NT, JM and DB.

17. Shortly before March 12, 2008, NT agreed with Cajubi for the issue and sale of the $2 million of preference shares of Private Wealth, then yet to be incorporated.

18. Around this time, DB, JM and NT agreed that DB would no longer participate in Private Wealth. The Respondent was invited in to replace DB.

19. On March 12, 2008, Private Wealth was incorporated.

20. On that same day, March 12, 2008, the Respondent became the President, a Director, and a one-third owner of Private Wealth. The Respondent, NT and JM were the three Directors of Private Wealth and each was a one-third owner.

21. On March 17, 2008, the subscription agreement for the issue of the preference shares was signed by the parties and on that day Cajubi paid the $2 million subscription price to Private Wealth's lawyers to be held in escrow.

22. The subscription agreement for the $2 million preference shares stated that the proceeds from the issue would be used to acquire Canadian investments and assets in the insurance, financial, wealth management sectors and other special situations which were expected to generate cash flows and superior returns in excess of the broader market.

23. On April 7, 2008 the lawyers released the $2 million from escrow and Private Wealth received the money.

24. On May 7, 2008, the Respondent, as President of Private Wealth, signed a replacement share certificate for the $2 million of preference shares, which he delivered to NT.

25. The Respondent did not participate in the negotiation and sale of the $2 million of preference shares (leaving aside for now the contentious issue of the consequence of Respondent's signing of the replacement share certificate). This was done by NT as the principal officer of FCCM, a limited market dealer in Ontario.

26. All the documentation for the incorporation of Private Wealth, and the issue, sale and closing of the $2 million of preference shares were done by Private Wealth's lawyers. The lawyers also maintained the books and records of Private Wealth.

27. There was no evidence before us of any minutes or written resolutions of the Directors of Private Wealth.

28. The Respondent and NT had a long-standing friendship and acquaintance with each other. Throughout the time in question they shared the same office space.

29. Neither the shares of Private Wealth nor any of the investments made or purchased by Private Wealth were investments approved by Brownstone or Quadrus for sale by its Approved Persons, including the Respondent. None of the investments or transactions made by Private Wealth Group or the Respondent were carried on for the account or through the facilities of Brownstone or Quadrus.

30. There was no allegation or evidence to suggest that the issue and sale of the $2 million of preference shares was an illegal distribution or that necessary registrations were not made or that exemptions were not available or improperly relied upon by any person, or that there was any

improper conduct by FCCM, NT, JM, or Private Wealth. Indeed, there was no allegation that any person did anything improper or contrary to the rules of the MFDA except the Respondent by allegedly engaging in securities related business and/or not disclosing to the Member and obtaining approval for another gainful occupation of the Respondent's.

31. Cajubi brought a civil action against, among others, the Respondent and Private Wealth, claiming that Private Wealth was supposed to invest $2 million it had provided to Private Wealth to invest on its behalf. The investments, it claimed, were supposed to be conservative, in Canada, and consistent with the long term objectives and risk tolerance of a pension fund. The civil action has been settled and dismissed regarding claims and counter-claims among Cajubi, the Respondent and Private Wealth. The settlement was not entered in evidence and we were not advised of its provisions. We did not hear or receive any evidence from or on behalf of Cajubi regarding any matter.

32. The Respondent, together with NT and JM, determined what investments to make on behalf of Private Wealth with its proceeds from the sale of the $2 million of preference shares.

33. The Respondent never advised Brownstone or Quadrus or obtained their approval of his becoming or continuing as an officer, Director or agent of Private Wealth, or of his ownership interest in Private Wealth, or of the issue and sale of the $2 million of preference shares, or of his signing of the replacement share certificate, or of his acting for Private Wealth in making investments on its behalf, or of such investments and any interest he had in them. No such disclosure was made in documentation he signed for Quadrus stating that he had disclosed all positions he had as an officer, director or agent of others and all outside business activity.

34. Neither the sale of the preference shares nor any of the investments by Private Wealth were carried on the books of, for the account of, or through the facilities of Brownstone or later Quadrus.

35. On April 23, 2008, in advance of his registration with Quadrus, the Respondent signed an exclusive sales agreement with Quadrus pursuant to which the Respondent agreed to the following conditions:

> "Subject to the Dealer Policies and in compliance with Applicable Laws, I will not engage in any other business or employment or in any financial planning activities, other than such business or employment and financial planning activities as are related to my insurance sales activities, without the prior approval of the Dealer. Any such prior approval may include conditions relating to the method by which I carry on such activities, and I agree to abide by such conditions."

36. On May 12, 2008, in advance of his registration with Quadrus, the Respondent completed a Quadrus compliance checklist form on which he disclosed six companies with which he was involved, and one company, an exempt market dealer, with which he was no longer affiliated. The Respondent did not disclose his interest and involvement in Private Wealth, or his dealings with Cajubi, on Quadrus's compliance checklist form.

37. At all material times, MFDA Rule 1.1.1(a) and Quadrus's policies and procedures prohibited the Respondent from selling or advising on investments through any entity other than Quadrus. Chapter 11 of Quadrus' Policies and Procedures manual stated that "investment representatives are prohibited from personally engaging in the sale of any investments that would be considered securities under applicable legislation or selling or advising on such investments through any entity other than Quadrus."

38. During the course of Staff's investigation, the Respondent admitted that he participated in the selection of investments made by Private Wealth, that he met with a representative(s) of Cajubi to discuss the investments, and that during the course of his dealings with Cajubi, he held himself out as the President, Vice-President or a senior executive of Private Wealth.

39. Of the nine investments known to have been made by Private Wealth, the Respondent admitted during the course of Staff's investigation that he personally had a direct or indirect interest in four of the investments and that his partners, NT and JM, had a direct or indirect interest in a fifth investment.

40. The Respondent stated in his Reply that such investments were made with the full knowledge and approval of Cajubi

Factual matters in issue relevant to our decision on the merits and our findings of fact thereon

41. The following were contentious factual matters relevant to our decision on the merits.

42. When did the Respondent first learn of the interest of Cajubi in subscribing for the $2 million of preference shares? The Respondent at first testified that it was on March 17, 2008 and then stated about 5 minutes later that he was wrong, and that he did not know anything about Cajubi's involvement before NT told him on May 7, 2008. The Respondent testified that "I did not know about the transaction until the time it happened. In March 2008, NT approached me and advised that while FCF Private Wealth was originally going to be set up with NT,JM and DB, DB was no longer going to be involved. NT proposed and I agreed to be a 1/3 shareholder (common shares) of FCF Private Wealth. I now know that FCF Private Wealth was incorporated on March 12, 2008 so to the best of my recollection, the discussion with NT would have been around this date."

43. The Respondent testified that "I became aware that Cajubi had purchased $2 million preference shares in PW after they had done so, when NT told me. I was not involved in the proposal made to Cajubi and did not see the subscription agreement until sometime after it was signed." NT testified that "up until about the second week of March, I had not discussed anything about [Private Wealth] with [the Respondent]." However, he stated categorically that the Respondent was not involved in the negotiation and sale of the preference shares to Cajubi.

44. Did the Respondent approve the issue and sale of the shares to Cajubi? The Respondent testified he did not remember any directors meeting and that the first he heard about the sale was on May 7, 2008 when NT told him and asked him to sign the share certificate.

45. Did the Respondent benefit from his involvement with Private Wealth? The Respondent was not paid remuneration as President, or Director, or for his part in determining what investments to make for Private Wealth. He did expect to profit from any surplus remaining from income and/or capital gains generated from Private Wealth's investments after preference dividends were paid and once the preference shares were redeemed.

46. We find that the Respondent was sophisticated, having been involved with other companies, and considering his experience and education. We had no reason, in spite of his denial or poor memory and NT's fuzzy memory, to assume that he would not have done what others in his position would have done: inquire as to what he was getting into as President, a Director, and one-third owner of a special purpose corporation. He must have made inquiries. Furthermore, he was somewhat familiar with Cajubi. NT shared office space with him. There was no reason not to let him know about Cajubi and the shares and the role he would be expected to play in deciding what investments Private Wealth would make with the $2 million.

47. We find as fact that the Respondent learned about the proposed issue and sale of the shares to Cajubi on or shortly before March 12, 2008 when he became President, a Director, and a one-third owner of Private Wealth.

48. At the same time, we conclude that the Respondent took no part in negotiating the deal with Cajubi. This was done by NT in his capacity with FCCM, the limited market dealer, and based on the assumption that private Wealth would be formed once Cajubi agreed to a deal.

49. For a corporation to allot and issue shares there must have been a meeting of the directors or a unanimous resolution in writing of the directors allotting the shares and approving their issue. This matter was supervised by the company's lawyers. There must have been a meeting that the Respondent attended or a resolution that he signed approving the issue and sale of the shares. We find as a fact that the Respondent approved the issue and sale of the shares as a Director of Private Wealth.

50. We also find as a fact that the Respondent expected to benefit from his activities as President, a Director, a one-third owner, and as one of the three persons who together decided what investments should be purchased by Private Wealth with the $2 million of proceeds from the sale of the preference shares.

Issues

51. The following were the issues we had to decide.

Jurisdiction

- Must we decide this matter based on the narrow wording of the allegations set out on page 2 of the NOH as Allegation #1 and Allegation #2; or may we also consider the allegations, although not so called, in paragraph 24 of the NOH, and the allegations, although not so called, in paragraph 28 of the NOH?

Securities related business

- Were any of the following acts "securities related business":

    - any act of the Respondent as a Director of Private Wealth?
    - the signing of the replacement share certificate and delivering it to NT?
    - participating with the other two directors of Private Wealth in determining what investments Private Wealth should make with the $2 million proceeds from the share issue?

Related sub-issues

- Was signing the share certificate, or approving the issue of the preference shares as a Director, an act in furtherance of a trade?

- If it was, was the act in furtherance *ipso facto* securities related business?

- If it was, did it occur during the registration gap when the Respondent was not subject to the MFDA rules?

Another gainful occupation

- Was acting as President, a Director, and a person participating in investment decisions for Private Wealth another gainful occupation?

Submissions of Respondent

52. Respondent's counsel submitted that the panel had to decide this matter on the narrow wording of Allegation **#1** alone and Allegation **#2** alone. These allegations were bounded by the qualification in the clause in each allegation: "by selling, recommending, referring or facilitating the sale…of $2 million of shares of a private company…"

53. Respondent's counsel observed that the MFDA had no jurisdiction over activities of the respondent during the registration gap.

54. Furthermore, he observed, the activities of the Respondent did not amount to securities related business. It is not enough for Staff to baldly submit that the definition of "securities related business" has been satisfied. Staff has failed, he submitted, to show how the conduct of the Respondent amounted to business or activity that directly or indirectly constituted trading or advising by the Respondent.

55. The only action, he argued, that conceivably could be an act in furtherance of a trade was signing the share certificate. This occurred during the registration gap.

56. Furthermore, he submitted, an act in furtherance must be determined contextually. Since the Respondent had no part in the negotiation and sale of the shares, this isolated mechanical

corporate act did not amount to trading, as it would have if categorized incorrectly as an act in furtherance.

57. Finally, he submitted, the Respondent honestly believed he did not have to disclose to his Member his activities with Private Wealth as another gainful occupation because he was not being paid for them.

Submissions of Staff

58. Staff submitted that the case to be met by a respondent is set out in its entirety in the notice of hearing. While the MFDA's form of notice of hearing has traditionally consisted of two parts, the charging paragraphs followed by a "particulars" section, there is no requirement for this format. With regard to the substantive allegations against a respondent, MFDA By-law No.1 requires only that a "Notice of Hearing" contain "a summary of the facts alleged and intended to be relied upon by the Corporation and the conclusions drawn by the Corporation based on the alleged facts." A notice of hearing that satisfies those requirements is not only compliant with the requirements of the By-law but also with the principles of natural justice.

59. Staff further submitted that the "particulars" describe and inform the charging paragraphs and *vice-versa*. Read together and viewed in their entirety, they comprise the "Notice of Hearing" which provides a respondent with notice of the case to be met.

60. Staff submitted that in this regard paragraphs **24** and **28** of the NOH are significant.

61. Furthermore, in Staff's submission, the time period referenced in Allegations **#1** and **#2** is March 12, 2008 to May 1, 2012, and not just the time during which the sale of the preference shares occurred. Thus all the conduct of the Respondent outlined in the particulars is relevant to determining whether or not the Respondent contravened MFDA Rules 1.1.1(a), 1.2.1(d) and 2.1.1.

62. In summary, Staff submitted that the NOH was compliant with the requirements of the MFDA and the rules of natural justice by providing notice of the case to be met, an opportunity to defend, and no surprises.

63. Staff submitted that signing the share certificate was an act in furtherance of the sale of the preference shares, and therefore trading. And trading in shares is securities related business.

64. Staff also submitted that acting as a Director to approve the sale of the shares, or acquiescing in the sale when it should have been approved if it was not, also amounted to an act in furtherance of the trade, and therefore trading, which is securities related business.

65. Staff submitted that the subsequent investing of the proceeds of the sale of the shares in investments, some of which were securities (mortgages, promissory notes), also amounted to acts in furtherance of a trade when the entire context of the Respondent's conduct from beginning to end is considered. As such this subsequent conduct was securities related business.

66. Staff submitted that to constitute "another gainful occupation" within the MFDA Rules, no remuneration was required. Besides, the there was evidence that the Respondent contemplated a benefit from his involvement. Accordingly, his activities with Private Wealth constituted another gainful occupation.

67. Finally, Staff submitted that with regard to the Respondent's claim that he did not believe he had an obligation to advise his Member of his activities and to obtain its consent was not a valid defense, because there is no *mens rea* or "intention" requirement with respect to MFDA requirements.

Decision

68. The test we have applied in determining the facts in issue and in making our decision on whether Staff has proved its allegations is a balance of probabilities based on clear, convincing and cogent evidence.

69. In considering the merits of the case against the Respondent, we determine that:

- the allegation in Allegation **#1** of the NOH considered alone is unproved.
- the allegation in paragraph **#24** of the NOH is unproved.
- the allegation in Allegation **#2** of the NOH considered alone is unproved.
- the allegation in paragraph **#28** of the NOH is proved.

Reasons

Jurisdiction

70. It is well-settled that a notice of hearing in the securities regulatory context is not subject to the same strict interpretation as may be appropriate in a criminal context:

> "[I]t would be inappropriate, given our public interest jurisdiction to treat the Notice of Hearing and Statement of Allegations as a criminal information or indictment. Moreover, in a hearing of this nature, particulars cannot bind counsel for Staff to formal proof thereof, as in a criminal case." *Re YBM Magnex International Inc. 23 OSCB 1171 at pp 1172.* See also, *Bartel v. Manitoba Securities Commission), 2003 MBCA 30, at paras. 35-38* and *Taylor v. Ontario (Securities Commission), 2013 ONSC 6495 (Div. Ct.) at para. 67-69.*
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> "In cases of this type, no one would suggest that an allegation of professional misconduct need have that degree of precision that is required in a criminal prosecution. But the charge must allege conduct which if proved could amount to professional misconduct and it must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself." *Re Golomb and College of Physicians and Surgeons of Ontario, (1976), 12 O.R. (2d) 73 at p 82.*See also *Ironside (Re), 2006 ABASC 1930 at para. 513.*
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> "Respondents must be given sufficient information broadly to understand the allegation against them. The particulars must be sufficient to allow them fairly to respond to the allegations." *Re Foresight Capital Corp., 2006 LNBCSC 50 at para 8.* See also, *Hennig (Re), 2006 ABASC 363 at paras.742-744*

71. However, this does not mean that this panel has jurisdiction to impose a penalty for a conclusion by the panel of a contravention of any provision of an MFDA by-law, rule, or policy based on an alleged fact that has been proved, if the particular provision and Staff's conclusion (i.e. accusation or allegation) of contravention of it is not set out in the NOH.

72. In IIROC proceedings, panels have held that the actual wording of the allegations define the meaning of the allegations made and define the nature of the case that a respondent must meet. *Myatovic, Re 2012 IIROC 47 at para 130; Catonguay, Re, 2012 IIROC 76 at para 36; Blackmont Capital Inc et al, Re, 2011 BCSCCOM 490 at para 24*.

Blackmont

73. The Respondent relies on the decisions of *Blackmont* and *Myatovic* for the proposition that the wording of a charging paragraph alone defines the boundaries of allegations against a respondent and the case to be met. However, both *Blackmont* and *Myatovic* are distinguishable and inapplicable in this regard to the present case.

74. In *Blackmont*, the British Columbia Securities Commission (the "BCSC") overturned the decision of an IIROC hearing panel on the basis that Count 1 of IIROC Staff's Notice of Hearing, as worded, did not plead a contravention of Rule 29.6. The BCSC held as follows:

> 22. There is an obvious discrepancy between the language in Count 1 of the notice of hearing and the language in Rule 29.6. The allegation in the notice of hearing is that the respondents' failure to disclose to the banks the details and existence of the commission-sharing arrangement with Civelli was a contravention of Rules 29.6 and 29.1. Yet, as far as Rule 29.6 is concerned, that rule says nothing about disclosure. It requires nothing other than the obtaining of consent.
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> 23. The allegation in Count 1 therefore is not and cannot be an allegation that Blackmont and Duke contravened Rule 29.6 – Rule 29.6 contains no disclosure requirement. Count 1 does not allege any other misconduct that could be a contravention of Rule 29.6, and the particulars in the notice of hearing cite only the alleged failure to disclose as required under section 53 of the Securities Rules as a basis for the contravention of Rule 29.6. Therefore, the only allegation in

> Count 1 is that the respondents' failure to disclose the existence and details of the commission-sharing arrangement to the banks was a contravention of Rule 29.1.
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> 24. A notice of hearing is the foundation of hearings before IIROC panels and this Commission. It identifies the alleged misconduct that the respondent has to meet. It establishes the issues to be determined at the hearing. It follows that a panel does not have jurisdiction to determine matters not alleged in the notice of hearing. (Particulars need not be in the notice of hearing, but must relate to an allegation that is in the notice.)
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> 25. It follows that the IIROC hearing panel did not have the jurisdiction to make a finding that the respondents contravened Rule 29.6 because the notice of hearing did not allege misconduct that would constitute a contravention of that Rule. The panel therefore erred in law in finding that the respondents contravened Rule 29.6.

75. The Respondent relies on paragraph 24 of *Blackmont* to advance the narrow proposition that Staff is strictly bound by the wording of its charging paragraphs (apparently to the exclusion of all other content in the Notice of Hearing).

76. The Respondent's submission must fail on two grounds. First, the Respondent is attempting to apply the reasoning in *Blackmont* out of context to a different set of circumstances than were before the BCSC. Second, and in any event, the Respondent has misinterpreted the BCSC's reasoning in *Blackmont*. As set out below, the BCSC's decision in *Blackmont* in fact *supports* the argument that the allegations against a respondent are to be determined on the basis of the totality of the notice of hearing: the charging paragraphs and the particulars, read together.

77. In *Blackmont*, the BCSC determined that Staff's allegations against the respondent, even if proven, would not have amounted to misconduct by virtue of the operative language of IIROC Rule 29.6. IIROC Rule 29.6 required only that the respondent obtain consent to the arrangements in question; it did not impose any obligation on the respondent to disclose the arrangements. After reviewing the entirety of the Notice of Hearing, the BCSC concluded that the allegations against the respondent were confined to the respondent's failure to disclose the arrangements. In effect, since no breach of IIROC Rule 29.6 had been alleged, the BCSC determined that the IIROC hearing panel had no jurisdiction to make a finding that the respondent had contravened IIROC Rule 29.6 "as a matter of law".

78. In paragraph 24 of *Blackmont* the BCSC confirmed that it is the notice of hearing as a whole, not the "count" or the charging paragraphs viewed in isolation, which "identifies the alleged misconduct that the respondent has to meet. It [the notice of hearing] establishes the issues to be determined at the hearing".

79. Paragraph 23 of the *Blackmont* decision demonstrates that the BCSC considered both the "count" and the particulars in determining whether the notice of hearing contained a proper allegation against the respondent. It is only after reviewing the particulars in the notice of hearing and finding that they did not furnish any additional information that the BCSC concluded that the allegation against the respondent could not be sustained as a matter of law. The reasoning of the BCSC makes plain that it based its analysis on the "notice of hearing" in its entirety, not the charging paragraph in isolation.

Myatovic

80. In *Myatovic*, an IIROC hearing panel found that the respondent had not engaged in unauthorized trading contrary to Dealer Member Rule 29.1. The hearing panel dismissed the allegation on the basis that the evidence clearly demonstrated that the trading in the account at issue had been authorized. The hearing panel observed that the respondent's actions may have contravened a different IIROC requirement, Dealer Member Rule 200.1(i)(3), but declined to make such a finding because that particular rule had not been pleaded in the Notice of Hearing.

81. *Myatovic* is distinguishable from the present case in that the neither the Respondent nor MFDA Staff are attempting to assert that the Respondent has contravened any MFDA Rules that have not been pleaded in the Notice of Hearing. Staff's case is and has at all times been based on alleged contraventions of MFDA Rules 1.1.1(a), 1.2.1(d) [now renumbered as (c)] and 2.1.1.

Section 20.1.1 of MFDA By-Law No. 1

82. Our jurisdiction is governed by the rules and By-law of the MFDA.

83. Section 20.1.1 of MFDA By-law No. 1 provides that before a hearing panel may impose any penalty, a respondent shall have been summoned before the panel, of which notice shall be given by way of a notice of hearing.

84. While the MFDA's form of notice of hearing has traditionally consisted of two parts, a statement of allegations followed by "particulars", there is no requirement for this format. With regard to the substantive allegations against a respondent, section 20.1.1 of MFDA By-law No. 1 requires only that a notice of hearing contain "a summary of the facts alleged and intended to be relied upon by the Corporation and the conclusions drawn by the Corporation based on the alleged facts". A notice of hearing which satisfies those requirements is not only compliant with the requirements of By-law No. 1, but also with the principles of natural justice and fairness.

85. We consider that the words "and the conclusions drawn by the Corporation based on the alleged facts," in section 20.1.1 of MFDA By-law No.1, require a conclusion of a contravention of a provision of a rule, policy or standard of conduct cited in the conclusion, for the panel to have jurisdiction to impose a penalty.

86. Accordingly, we must find that the alleged facts relied on by Staff and the conclusions drawn by Staff based on them are set out in the NOH. The conclusions are usually found in a statement of allegations which traditionally are enumerated up front in a notice of hearing. But they need not be, as long as the requirements of section 20.1.1 of MFDA By-law No. 1 and natural justice are met.

87. In the NOH, the conclusions of Staff as to the facts alleged are clearly stated in Allegation **#1**, in paragraph **#24**, in Allegation **#2**, and in paragraph **#28** of the NOH.

88. Paragraph **#24** brings forward the facts alleged in paragraphs 6 through 23 of the NOH as the basis of the conclusions as to the contraventions of MFDA Rules 1.1.1(a) and 2.1.1 stated in Allegation **#1** and in paragraph **#24**.

89. Paragraph **#28** brings forward the facts alleged in paragraphs 6 through 23 and 25 through 27 of the NOH as the basis of the conclusions as to the contraventions of MFDA Rules 1.2.1 (d) and 2.1.1 stated in Allegation **#2** and in paragraph **#28.**

90. Therefore, we conclude that the allegations in our matter are stated in the NOH in Allegation **#1**, in paragraph **#24**, in Allegation **#2**, and in paragraph **#28.**

91. In the NOH, the Respondent has been given sufficient information broadly to understand the conclusions of Staff as to the contraventions of the cited rules alleged by Staff based on the facts alleged. The Respondent has been given the opportunity to prepare for and to mount a full and adequate defense against Staff's conclusions, and has not faced any undue surprises in this regard. Accordingly, the NOH complies with the requirements of natural justice.

Rules referenced in Staff's conclusions

92. MFDA Rule 2.1.1 is referenced in Staff's conclusions in Allegations **#1** and **#2**, and in paragraphs **24** and **28** of the NOH. It provides:

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

93. MFDA Rule 1.1.1(a) is referenced in Staff's conclusions in Allegation **#1** and in paragraph **24** of the NOH. It provides:

1.1.1 Members. No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

a) all such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules, other than:

(i) such business as relates solely to trading in deposit instruments conducted by any Approved Person not on account of the Member; and

(ii) such business conducted by an Approved Person as an employee of a bank and in accordance with the Bank Act (Canada) and the regulations thereunder and applicable securities legislation.

94. MFDA Rule 1.2.1(d) [now renumbered as (c)] is referenced in Allegation **#2** and in paragraph **28** of the NOH. It provides:

(c) **Dual Occupations**. An Approved Person may have, and continue in, another gainful occupation, provided that:

(i) *Permitted by legislation*. The securities commission in the jurisdiction in which the Approved Person carries on or proposes to carry on business specifically permits him or her to devote less than his or her full time to the business of the Member for which he or she acts on behalf of;

(ii) *Not prohibited*. The securities commission in the jurisdiction in which the Approved Person carries on or proposes to carry on business does not prohibit an Approved Person from engaging in such gainful occupation;

(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;

(iv) *Member procedures*. Such Member establishes and maintains procedures to ensure continuous service to clients and to address potential conflicts of interest;

(v) *Conduct unbecoming*. Any such gainful occupation of the Approved Person must not be such as to bring the Corporation, its Members or the mutual fund industry into disrepute;

(vi) *Disclosure*. Clear disclosure is provided to clients that any activities related to such other gainful occupation are not business of the Member and are not the responsibility of the Member; and

(vii) *Financial planning*. Any Approved Person that engages in financial planning services otherwise than through or on behalf of a Member must:

A) *Regulations* - provide such services through another person that is either regulated by a governmental authority or statutory agency or subject to the rules and regulations of a widely-recognized professional association;
B) *Legislation* - comply with the requirements of any applicable legislation in connection with the services;
C) *Access* - ensure that, subject to any applicable legislation, the Member and the Corporation have access to financial plans prepared on behalf of the clients of the Member by its Approved Persons; and
D) *Proficiency* - have satisfied any applicable proficiency requirements by securities regulatory authorities having jurisdiction.

95. The following MFDA Rule was not referenced in the NOH as having been contravened:

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).

96. Accordingly, any improper conflicts of interest found as a fact on the part of the Respondent [and we make no such finding] might have been relevant to contraventions, if any, of MFDA Rules 1.2.1(d) and 2.1.1 as alleged in the NOH, but not to MFDA Rule 2.1.4 or any other Rule not cited in the allegations in the NOH.

Securities related business

97. By-law No. 1 of the MFDA defines "securities related business" as "any business or activity (whether or not carried on for gain) engaged in, directly or indirectly, which constitutes trading or advising in securities for the purpose of applicable securities legislation…"

98. The Securities Act, R.S.O. 1990, c. S.5 is applicable securities legislation.

99. The act defines in section 1(1) "trade" and "trading" as including any sale or disposition of a security for valuable consideration … and "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance" thereof.

100. In *Winick (Re) (2013)*, *36 OSCB at para. 97* the Ontario Securities Commission stated that:

> "The Commission has adopted a contextual approach to determining whether non- registered individuals or companies have engaged in acts in furtherance of a trade. The contextual approach examines "the totality of the conduct and the setting in which the acts have occurred" and has as a primary consideration the effect the acts had on those to whom they were directed (*Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 ("***Momentas***") at para. 77).

101. In *First Federal Capital (Canada) Corp. (Re), 2004 LNONOSC 57,* the Ontario Securities Commission stated,

> In *Costello*, the Commission distinguished between actual trades that had happened and acts by Costello that might or might not be acts in furtherance of those actual trades. The Commission stated at paragraph 47:

> There is no bright line separating acts, solicitations and conduct directly and indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.
>
> The Commission used the term "actual trade" in *Costello* because the Commission was dealing with actual trades by other parties and actions by Mr. Costello that may or may not have been in furtherance of those actual trades. In the case at hand the activities of First Federal and Friesner, amounting to the offering of investment contracts, were acts in furtherance of entering into those investment contracts. There is a direct proximate connection between the offering and any trade that was anticipated as a result of those solicitations.

102. We considered all the cases Staff referred us to where an issue was whether a certain act or acts of a respondent or defendant (the "acts in question") were an act or acts in furtherance of a trade (the "actual trade"). In every case involving an actual trade, the circumstances involved some improper selling effort by the respondent or defendant, and by others such as the issuer, or the creator, or promoter or other seller of the securities that were actually traded. Often the circumstances involved distributions where a distribution exemption was claimed but not available, or where the purchasers were mislead, or where they were sold unsuitable securities. See, for example, in addition to *Winick* and *Momentas* and *First Federal Capital*: *Re Lett (2004), O.S.C.B. 3215; Re Allen (2005), 28 O.S.C.B. 8541;* and *Re Limelight Entertainment Inc. (2008), 31 O.S.C.B. 1727*.

103. The circumstances of our case, excluding the actions of the Respondent, are: an issuer making a private placement of shares through a registrant, namely, a limited market dealer, with no evidence that the securities regulatory regime was not complied with in any way by any person.

104. We do not accept the argument that the approval by a Director of an issuer of shares that are properly distributed in accordance with securities law is *ipso facto,* and without other compromising circumstances*,* an act in furtherance of the actual trades to subscribers of the issue. If the argument were accepted, then every Director of every issuer in such circumstances

would be trading in securities and required to be registered under securities law to do so. Not every corporate act prerequisite to the issue of shares by a corporation is, absent compromising circumstances, an "act in furtherance of a trade" as this term is used in the *Ontario Securities Act*.

105. Similarly, the signing, in accordance with corporate requirements, of a share certificate by an officer of a company issuing shares, absent compromising circumstances, is not *ipso facto,* an act in furtherance of trades of those shares.

106. In our case, even if the Respondent knew about, and had been in favour of, and approved, as a Director of Private Wealth, the issue and sale of the $2 million of preference shares to Cajubi, this, without more, is not enough for us to conclude that his actions constituted securities related business. He did not participate in any aspect of the sales effort for the issue and distribution of the $2 million of preference shares.

107. Accordingly, we determine that the approval, as a Director, by the Respondent, of the issue and sale of the shares to Cajubi was not an act in furtherance of a trade, and therefore, was not securities related business. Nor was the signing of the share certificate by the Respondent.

108. The issue and sale of the preference shares was completed before Private Wealth began to invest the proceeds of the issue. Subsequent acts of the Respondent in determining what investments Private Wealth should purchase were subsequent to and not in furtherance of the issue and sale of the preference shares.

109. The investments purchased included securities. The definition of "trade" and "trading" in the *Ontario Securities Act* relates to action on the sell side, not the buy side, of a transaction. Therefore the actions of the Respondent in determining what securities to acquire for Private Wealth were not acts in furtherance of a trade in such securities.

110. We were not presented with cases and argument that might help us to decide whether such actions constituted securities related business because they amounted to advising under applicable securities law.

111. There was little evidence as to how involved Cajubi was, after its purchase of the preference shares, in deciding what the investments of Private Wealth would be. If we could conclude, based on clear and cogent evidence, that Cajubi was being advised by the Respondent on what the investments of Private Wealth should be and that Cajubi had a deciding role in whether those investments were to be made, we might have determined that the Respondent was advising Cajubi, and not just acting for Private Wealth, in which case such advising would be securities related business.

112. However, the investments were made by Private Wealth for the indirect benefit of all its shareholders, and not just for the benefit of the preference shareholder, Cajubi. Although we considered the possibility that such actions were advising, we are inclined to the view that in the circumstances of our case, such actions were operational activities for Private Wealth and not the advising of others (such as Cajubi). In view of the absence of clear, convincing and cogent evidence that would permit us to find, on a balance of probabilities, that such actions amounted to advising, we declined to do so.

113. Accordingly, we concluded that such actions by the Respondent, not being acts in furtherance of a trade, and not being advising, were not securities related business.

Another gainful occupation

114. MFDA Rule 1.2.1(d) [now renumbered as (c)] requires Members to establish policies and procedures that address notification and approval of outside business activities, as well as subsequent compliance with MFDA Rules and By-laws as these relate to the activities. Approved Persons have a corresponding obligation to comply with these policies and procedures.

115. Quadrus' Policy and Procedures Manual, revised as of November 8, 2008, provides, in part, as follows:

> **"Outside Business Activities**
>
> **Policy**
>
> There are instances where investment representatives may wish to become involved in secondary or part-time business pursuits outside of Quadrus or its related life insurance companies.
>
> There are strict requirements that govern involvement in such activities. Chief among these are:
>
> (i) the investment representative makes Quadrus aware of such activity…
> (ii) Quadrus is advised of the proposed activity and approves it…."

116. Quadrus' Agreement of Approved Person and Code of Business Conduct required the Respondent to be bound by and conversant with the rules of the MFDA. Additionally, Quadrus' Policies and Procedures Manual, and its Outside Business Activity questionnaire form (which was completed by the Respondent on several occasions), clearly provided that before an Approved Person engaged in any type of OBA, whether for financial gain or otherwise, he was required to advise Quadrus of the proposed OBA, and await Quadrus' approval before proceeding.

117. The term "gainful occupation" under Rule 1.2.1(d) is not limited to an occupation where an Approved Person is earning an income at the time of disclosure. MFDA hearing panels have held that at its very least, the meaning which must be given to 'gainful occupation' is that the Approved Person expects or at least hopes to derive some compensation, profit or other benefit from it. *In the Matter of Bruce Ian Mawer, [2014] MFDA Prairie Regional Council, MFDA File No. 201331, Hearing Panel Decision (Misconduct), dated April 3, 2014 at para 35*.

118. NT explained the business reason why NT, JM and the Respondent participated in the Private Wealth. They expected to benefit from their involvement with Private Wealth from the income it generated in excess of the amounts payable as dividends on the preference shares and

capital gains on the underlying investments in excess of the redemption proceed payable on the redemption of the preference shares.

119. We find that the Respondent's activities on behalf of Private Wealth as President, a Director, a one-third owner and as one of the three persons making investment decisions for Private Wealth constitute "another gainful occupation" of the Respondent's as an employee or agent of Private Wealth within the meaning of that term in Rule 2.1.1(d).

120. The Respondent has admitted that he did not notify Quadrus of this other gainful occupation or any of his activities and positions he had with Private Wealth. Quadrus was not aware of and did not approve the Respondent engaging in this other gainful occupation.

121. If the Respondent was unaware of his disclosure obligation and the necessity for his Member's approval under MFDA Rule 1.2.1(d) [now renumbered as (c)], or under Quadrus' policies and procedures, that is no defense to the contravention. He was required, and agreed, to be familiar with and adhere to them. See *In the Matter of Sandra Levine, [2013] MFDA Central Regional Council, MFDA File No, 201224, Hearing Panel Decision (Misconduct), dated April 9, 2013, at para. 6.*

122. Failure of the Respondent to comply with Quadrus' policies and procedures regarding another gainful occupation and providing incorrect information to Quadrus in this regard by omitting to disclose that he was an officer and Director of Private Wealth were also contrary to MFDA Rule 2.1.1(b). See in this regard *In the Matter of Michael Franco, [2011] Hearing Panel of the Prairie Regional Council, MFDA (Misconduct) dated May 6, 2011 at para. 43*.

123. Consequently, the Respondent contravened MFDA Rules 1.2.1(d) and 2.1.1.

Penalty Hearing

124. The penalty hearing will be arranged through the Office of the MFDA Corporate Secretary in due course.

Terms used in this Decision and Reasons (Misconduct)

125. In this document:

a) "BCSC" refers to the British Columbia Securities Commission.
b) "Brownstone" refers to Brownstone Investment Planning Inc., a Member of the MFDA at the relevant time.
c) "Cajubi" refers to Caja Paraguaya de Jubiliacioness Y Pensiones De Itaippu Binacional.
d) "FCCM" refers to First Canadian Capital Markets Limited.
e) "IIROC" refers to the Investment Industry Regulatory Organization of Canada.
f) "MFDA" refers to the Mutual Fund Dealers Association of Canada.
g) "NOH" refers to the notice of hearing in this matter.
h) "OBA" refers to outside business activity in Quadrus' Policy and Procedures Manual.
i) "preference shares" refers to the $2 million of preference shares of Private Wealth sold to Cajubi.
j) "Private Wealth" refers to First Canadian Private Wealth Group Inc. which apparently changed its name to FC Financial Private Wealth Group, Inc.
k) "Quadrus" refers to Quadrus Investment Services Ltd., a Member of the MFDA.
l) "Respondent" refers to Paolo Abate.

DATED this 12th day of March, 2015.

"Paul M. Moore"

Paul M. Moore Q.C.
Chair

"Mike Elliott"

Mike Elliott
Industry Representative

"Robert C. White"

Robert C. White
Industry Representative

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