

Re Sukhai

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Omadaï (Amy) Sukhai

2024 CIRO 21

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Heard: January 16, 2024 in Toronto, Ontario (via videoconference)

Decision: January 16, 2024

Reasons for Decision: February 2, 2024

Hearing Panel:

Thomas J. Lockwood, K.C, Chair

Melody Potter, Industry Representative

Craig Woolford, Industry Representative

Appearances:

Paul Blasiak, Senior Enforcement Counsel

Omadaï (Amy) Sukhai, Respondent

REASONS FOR DECISION

I. INTRODUCTION

¶ 1 By Notice of Hearing, dated the 15th day of June 2023, the following Allegation was made against Omadaï (Amy) Sukhai (“Respondent”):

Allegation: Between June 2017 and November 2020, the Respondent borrowed monies from a client, which gave rise to a conflict or potential conflict of interest that the Respondent failed to disclose to the Dealer Member or otherwise ensure was addressed by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the Dealer Member’s policies and procedures and Mutual Fund Dealer Rules 2.1.4, 2.1.1, and 1.1.2 (as it relates to Rule 2.5.1)(formerly MFDA Rules 2.1.4, 2.1.1, 1.1.2 and 2.5.1).¹

¹ Staff alleged that, at the time of the misconduct, the Respondent contravened MFDA Rules 2.1.4, 2.1.1, and 1.1.2 (as it relates to Rule 2.5.1), which are now incorporated into Mutual Fund Dealer Rules 2.1.4, 2.1.1, 1.1.2, and 2.5.1 referred to in this proceeding. On June 30, 2021, amendments to MFDA Rule 2.1.4 came into effect, and on July 7, 2022, amendments to MFDA Rule 1.1.2 came into effect. As the conduct addressed in this proceeding pre-dated the amendments to these Rules, the version of MFDA Rule 2.1.4 that was in effect between February 27, 2006 and June 30, 2021 is applicable to this proceeding, and the version of MFDA Rule 1.1.2 that was in effect prior to July 7, 2022 is applicable to this proceeding.

¶ 2 On January 1, 2023, the Mutual Fund Dealers Association (“MFDA”) and the Investment Industry Regulatory Organization of Canada were consolidated into a single self-regulatory organization, called CIRO. CIRO adopted interim rules that, *inter alia*, incorporate the pre-amalgamation regulatory requirements contained in the by-laws, rules and policies of the MFDA.

¶ 3 On August 2, 2023, the Respondent served and filed a Reply to the Notice of Hearing.

¶ 4 The First Appearance took place before a Hearing Panel on August 30, 2023. At the First Appearance, the parties agreed to a scheduling Order with respect to Disclosure, Witness Statements and Witness Lists. The parties agreed that the Hearing on the Merits would take place, by videoconference, commencing on January 16, 2024. An Order was made to this effect.

¶ 5 On December 12, 2023, an Interim Appearance was held electronically by videoconference.

¶ 6 The Hearing on the Merits was conducted before the Hearing Panel electronically, by videoconference, on January 16, 2024. Both Counsel for Staff of CIRO and the Respondent attended the Hearing on the Merits.

¶ 7 Staff presented both documentary and *viva-voce* evidence with respect to Liability. Staff also made written and oral submissions with respect to Liability.

¶ 8 The Respondent did not present any evidence or make either written or oral submissions with respect to the Liability portion of the Hearing on the Merits.

¶ 9 After receiving the evidence and hearing the submissions on the Liability position of the Hearing on the Merits, the Hearing Panel retired to consider whether it was in a position to form a conclusion with respect to Liability.

¶ 10 After a careful and thorough review of all of the evidence presented to it, the Hearing Panel was, unanimously, of the view that the Allegation against the Respondent had been established by clear, convincing and cogent evidence on a balance of probabilities.

¶ 11 The Hearing Panel returned to the Hearing on the Merits and announced its Decision that the Allegation had been established.

¶ 12 The Hearing Panel then received both written and oral Submissions from Staff with respect to Penalty.

¶ 13 The Respondent did not present either written or oral Submissions on the issue of Penalty.

¶ 14 After hearing the submissions as to Penalty, the Hearing Panel retired to consider whether it was in a position to form a conclusion with respect to Penalty.

¶ 15 After a careful and thorough review of both the written and oral Submissions, the Hearing Panel was, unanimously, of the view that the following penalties should be imposed upon the Respondent:

- (a) The Respondent is permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any Dealer Member of CIRO commencing on the date of this Order, pursuant to Mutual Fund Dealer Rule 7.4.1.1(e);
- (b) The Respondent shall pay a fine in the amount of \$213,509 on the date of this Order, pursuant to Mutual Fund Dealer Rule 7.4.1.1(b);
- (c) The Respondent shall pay costs in the amount of \$10,000 on the date of this Order, pursuant to Mutual Fund Dealer Rule 7.4.2.

¶ 16 The Hearing Panel returned to the Hearing on the Merits and announced its Decision as to Penalty. At that time, we advised that Written Reasons would follow. These are those Reasons.

II. THE EVIDENCE

¶ 17 During the Hearing on the Merits, Staff presented the following evidence to the Hearing Panel:

- (a) The Affidavit of Stephen Davis, a Senior Investigator at CIRO. The Affidavit contained 15 Exhibits.
- (b) The oral testimony of Mr. Davis.
- (c) The oral testimony of Bernard Wayne Doucette (“Doucette”), who was identified as “Client A” in the Notice of Hearing.
- (d) The August 2, 2023 Reply of the Respondent, in which she stated:
“Confirming receipt of the Notice of Hearing on the above case. Also, I acknowledged (sic) and accept particulars 1- 22 of said Notice of Hearing.”

The Notice of Hearing contained 22 paragraphs of particulars.

¶ 18 Although present throughout the Hearing on the Merits, the Respondent did not cross-examine either Mr. Davis or Mr. Doucette.

¶ 19 The Respondent neither testified nor presented any evidence to the Hearing Panel at the Hearing on the Merits.

¶ 20 The accepted evidence before the Hearing Panel established the following:

- (a) Between May 2002 and June 2003, and between January 30, 2007 and May 27, 2021, the Respondent was registered in Ontario as a dealing representative with PFSL Investments Canada Ltd. (“Dealer Member”), a Dealer Member at CIRO (formerly a Member of the MFDA).
- (b) Effective May 27, 2021, the Dealer Member terminated the Respondent. She is not currently registered in the securities industry in any capacity.
- (c) At all material times, the policies and procedures of the Dealer Member prohibited its Approved Persons from borrowing monies from clients.
- (d) In particular, the Dealer Member’s policies and procedures stated:

The following situations are considered to be inconsistent with the conduct of business by [...] PFSL representatives and are therefore prohibited:

Borrowing money from clients

[...]

Borrowing from clients

The MFDA takes the position that "Borrowing from a client by a representative raises a significant and direct conflict that in almost all cases will be impossible to resolve in favor of the client."

[...] PFSL specifically prohibit[s] representatives from borrowing any amount of money from any new, existing or prospective clients of [...] PFSL, even if the client

is willing to lend the money, and regardless of the terms, amount or duration of the “loan”.

Representatives who are found to have borrowed money from clients expose themselves to disciplinary measures, up to and including termination [...]

- (e) In 2017, 2018, 2019 and 2020, the Respondent completed annual attestations to the Dealer Member in which she indicated, among other things, that she understood that she was prohibited from borrowing from a client.
- (f) In particular, the Respondent attested that:
 - “I understand that I must not and will not accept cash from a client, a recruit or a representative, nor be involved in any kind of borrowing/lending money arrangement with a client, a representative or a recruit.”
- (g) In 2012, Doucette became a client of the Dealer Member. At all material times, Doucette’s accounts at the Dealer Member were serviced by the Respondent.
- (h) In 2016, Doucette was 60 years of age and retired from his position as a warehouse employee.
- (i) On the basis of his age and the fact that he was retired, Doucette was a vulnerable client.
- (j) At all material times, the Respondent was aware that Doucette had a very low level of investment knowledge.
- (k) In July 2016, Doucette’s wife passed away.
- (l) At or around the time of Doucette’s retirement, based on the Respondent’s recommendation, Doucette opened a new Registered Retirement Savings Plan (“RRSP”) account at the Dealer Member and invested his retirement savings, totaling approximately \$311,000, into the newly opened RRSP account.
- (m) At the time, the Respondent was aware that Doucette relied on withdrawals from his investments to meet his financial needs in retirement.
- (n) Between June 2017 and November 2020, the Respondent borrowed a total of approximately \$138,509 from Doucette, consisting of 49 individual payments. A chart, detailing each of these loan payments, along with back-up documentation, was provided to the Hearing Panel in the Davis Affidavit.
- (o) In response to requests from the Respondent, Doucette redeemed Mutual Funds, that he held in his RRSP account at the Member Dealer, in order to lend proceeds of the redemptions to the Respondent.
- (p) The Respondent processed the redemptions on behalf of Doucette. The client incurred deferred sales charge (“DSC”) fees and withholding taxes on these redemptions.
- (q) The Respondent put some or all of the amounts that she received from Doucette into her personal bank accounts and used the monies to pay her personal expenses.
- (r) None of the loans that the Respondent obtained from Doucette were documented in writing. However, the Respondent verbally informed Doucette that she would:
 - (i) repay the borrowed amounts with interest of at least 12%; and

- (ii) repay the DSC fees and withholding taxes that he had incurred when the redemption transactions were processed from his RRSP account in order to lend proceeds of the redemptions to the Respondent;
- (s) The Respondent did not disclose to the Dealer Member that she had borrowed monies from a client.
- (t) Commencing in or about December 2020, Doucette repeatedly requested that the Respondent repay the monies that she had borrowed from him. He informed the Respondent that he needed the money that he had loaned to her in order to pay his taxes, his mortgage and his bills, and because an account that he held was overdrawn. The Davis Affidavit attached copies of the numerous text messages between Doucette and the Respondent when he made the requests.
- (u) The Respondent has not repaid any of the monies that she borrowed from Doucette. Neither has she paid any interest on the amounts borrowed or repaid to Doucette the DSC fees or withholding taxes incurred by him on the various redemptions.
- (v) Doucette testified that he was forced to sell his condominium as he needed money to pay his taxes and other bills. He further testified that, had the Respondent repaid the loans, he would not have had to sell the condominium which he had lived in for many years.

III. THE LAW

¶ 21 Rule 2.1.1 prescribes the standard of conduct applicable to registrants in the mutual fund industry. The Rule requires that each Member and Approved Person: deal fairly, honestly, and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

¶ 22 At all material times, Rule 2.1.4 required Members and Approved Persons to be aware of the possibility of conflicts of interest arising in connection with dealings with clients. In the event that such a conflict or potential conflict of interest arose, Rule 2.1.4 placed a mandatory obligation on the Approved Person to immediately disclose the conflict to the Member, and imposed a corresponding obligation on the Approved Person and the Member to ensure that the conflict was addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

¶ 23 Numerous Hearing Panels have held that where an Approved Person borrows money from a client, the Approved Person has breached the standard of conduct set out in Rule 2.1.1, and has entered into a conflict of interest with the client within the meaning of Rule 2.1.4.

Sarang (Re), [2016] Hearing Panel of the Pacific Regional Council, MFDA File No. 201535, Panel Decision dated March 21, 2016.

Nunweiler (Re), [2012] Hearing Panel of the Pacific Regional Council, MFDA File No. 201030, Panel Decision dated May 28, 2012.

Davidson (Re), [2021] Hearing Panel of the Central Regional Council, MFDA File No. 202018, Panel Decision dated June 29, 2021.

Phillips (Re), [2020] Hearing Panel of the Atlantic Regional Council, MFDA File No. 2018117, Panel Decision dated March 16, 2020.

Yalkezian (Re), [2022] Hearing Panel of the Central Regional Council, MFDA File No. 202164, Panel Decision dated March 3, 2022.

¶ 24 As stated in MFDA Staff Notice #MSN-0047, dated October 3, 2005, with regard to borrowing from clients:

“Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client [...] MFDA staff are unaware of any circumstances where Members or Approved Persons proposing to enter into any such arrangements would be able to demonstrate that the conflict has been properly dealt with.”

¶ 25 Borrowing from clients creates a conflict of interest that is:

“so profound that [an Approved Person] could not conceivably exercise responsible business judgment influenced only by [the client’s] best interests. This was the classic situation in which the conflict could only be resolved by an absolute prohibition on obtaining monies from [the client], whether their relationship is described as a partnership or as one of lender- borrower, while [the Approved Person] was her mutual fund advisor.”

Phillips (Re), *supra*, at para. 16.

Brauns (Re), [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201203, Panel Decision (Misconduct) dated October 15, 2013, at para. 58.

¶ 26 Rule 2.5.1 requires Dealer Members to establish, implement and maintain policies and procedures to ensure compliance with the By-laws and Rules and applicable securities legislation.

¶ 27 Rule 1.1.2 requires each Approved Person who participates in any securities related business in respect of a Dealer Member, to comply with the By-laws and Rules as they relate to the Member or Approved Person.

¶ 28 Hearing Panels have held that an Approved Person’s failure to comply with the Dealer Member’s policies and procedures is conduct which is contrary to Rules 2.5.1 and 1.1.2, and also the standard of conduct set out in Rule 2.1.1.

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

O’Connor (Re), [2018] Hearing Panel of the Prairie Regional Council, MFDA File No. 201756, Panel Decision dated October 31, 2018, at paras. 139-144.

Phillips (Re), *supra*, at paras. 18-21 and 25.

¶ 29 As indicated above, in paragraph 10, after a thorough review of all of the evidence, the Hearing Panel was, unanimously, of the view that the Allegation had been established.

IV. PENALTY

(a) Principles

¶ 30 Investor protection is the primary goal of securities regulation.

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

¶ 31 Hearing Panels have identified a number of factors which should be considered when determining whether the penalty sought to be imposed is appropriate. These include:

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

Headley [Re], 2006, Hearing Panel of the Central Regional Council, MFDA File No. 200509, Reasons for Decision dated February 21, 2006 at para. 85.

¶ 32 The Hearing Panel may also refer to the MFDA's Sanction Guidelines, which came into effect on November 15, 2018 and continue to apply to proceedings conducted by Hearing Panels of CIRO. The Guidelines are not mandatory or binding on the Hearing Panel, but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of MFDA and CIRO Hearing Panels, are also reflected and described in the Guidelines.

(b) Considerations in the Present Case

(i) Seriousness of the Misconduct

¶ 33 The Respondent's conduct was of an extremely serious nature. Over a period of more than three years, she borrowed money from a vulnerable client on at least 49 separate occasions. The borrowings totalled approximately \$138,509.

¶ 34 This pattern of misconduct was deliberate and repeated.

¶ 35 She took advantage of a client who was a senior, retired, struggling to pay his bills and who had a very low level of investment knowledge.

¶ 36 Despite repeated requests from the client, she, up to the date of the Hearing on the Merits, had not repaid any of the borrowed amounts, resulting in the client having to sell his condominium in order to pay his bills.

¶ 37 Her conduct was and is despicable and undermines the reputation and integrity of the securities industry. There is no place for her in this industry.

(ii) The Respondent's Past Conduct Including Prior Sanctions.

¶ 38 The Respondent has not previously been the subject of either CIRO or MFDA disciplinary

proceedings. However, given the seriousness and the prolonged nature of the misconduct, we have given little weight to this heading.

(iii) The Respondent's Experience in the Capital Markets

¶ 39 The Respondent was first registered with the Dealer Member in May of 2002. She was an experienced dealing representative who should have been well aware of her obligation to deal fairly, honestly and in good faith with clients. She knew that she was prohibited from borrowing from clients. At no time did she report her borrowings to the Dealer Member.

(iv) The Respondent's Recognition of the Seriousness of the Misconduct

¶ 40 In her Reply, the Respondent did admit all of the facts and the Allegation in the Notice of Hearing. However, the first loan was made to the Respondent in June of 2017. Despite the passage of more than 6 ½ years, the Respondent has not repaid any amounts to Doucette. Consequently, she has made no effort to make amends for her serious misconduct.

(v) Benefits Received by the Respondent and Client Harm

¶ 41 During a period of over three years, the Respondent received at least 49 separate loans from the client totalling approximately \$138,509. None of this has been repaid. Consequently, she has retained this benefit.

¶ 42 The client harm is enormous. Not only did the client pay the Respondent the \$138,509, he also, in response to the Respondent's requests, redeemed mutual funds which he held in his RRSP account at the Dealer Member, thereby incurring DSC fees and withholding taxes on these redemptions. Although the Respondent promised to repay the DSC fees and withholding taxes, along with the 12% interest on the borrowed funds, she failed to do so.

¶ 43 As outlined above, the Respondent's actions caused significant financial distress to the client culminating in him having to sell his condominium in order to pay his taxes and bills.

(vi) The Risk to Investors and the Capital Markets

¶ 44 In our view, the Respondent poses a serious risk to other investors and the market at large if she is allowed to return to the industry. Her conduct was serious, egregious and deliberate. It resulted in significant client harm, which persists to this date. In our view, a permanent prohibition is necessary to protect investors.

(vii) Damage Caused to the Integrity of the Capital Market

¶ 45 The Respondent has caused significant damage to the integrity of the capital markets. The ability of mutual fund dealers to facilitate the participation of the public in the capital markets requires that investors trust mutual fund dealers with their money. Borrowing and failing to repay an amount as large as in the present case undermines this trust, harming the mutual fund industry and, more broadly, the capital markets.

(viii) Deterrence

¶ 46 Deterrence is intended to capture both specific deterrence of the wrongdoer, as well as general deterrence of other participants in the capital markets, in order to protect investors.

¶ 47 In our view, a permanent prohibition, along with an appropriate fine, will prevent the Respondent from causing any further harm to the mutual fund industry and will deter others in the capital markets from engaging in similar activity.

(ix) Quantum of Fine

¶ 48 Staff submitted that a fine "of at least \$213,509" is appropriate in the circumstances.

The Respondent received loans of approximately \$138,509, which she has not repaid. She has not paid the promised 12% interest on the monies borrowed. She has not repaid the DSC fees and taxes incurred by the client on the redemptions used to fund the loans.

¶ 49 As stated by the Hearing Panel in *Kowalsky (Re)*: “wrong-doers should not benefit from their wrong-doing and the benefit received by a respondent from its misconduct sets a bare minimum in determining the appropriate fine to be paid by the respondent.”

Kowalsky (Re), [2022] Hearing Panel of the Central Regional Council, MFDA File No. 202102, Panel Decision dated March 2, 2022, at para. 24.

¶ 50 As stated by the Ontario Securities Commission in the case of *Northern Securities (Re)*, 2014 LNONOSC 58:

“Imposing that fine, in addition to disgorgement, is necessary as a matter of general deterrence. There may be significant financial benefits that can be obtained as a result of a contravention of IIROC Rules. As a general principle, no registrant should be able to profit from the breach of IIROC Rules. It is not sufficient deterrence simply to pay to IIROC an amount equal to the profit obtained from the misconduct. IIROC Dealer Members and Approved Persons must recognize that there will be a substantial cost to misconduct. A substantial fine, in addition to disgorgement, is appropriate in these circumstances.”

¶ 51 The \$213,509 fine requested by Staff is mathematically arrived at by taking the \$138,509 loan total and adding a figure of \$75,000 for further deterrence. In our view, a fine in this amount will ensure that the Respondent does not benefit from her misconduct, while imposing an additional financial penalty to ensure that the fine is a true deterrent to those who may be inclined to engage in similar misconduct.

(x) Previous Decisions Made in Similar Circumstances

¶ 52 Staff provided the Hearing Panel with a detailed chart to show that the proposed penalties were consistent with the penalties imposed by Hearing Panels in similar circumstances.

¶ 53 The following cases were discussed:

Richard (Re), [2021] Hearing Panel of the Central Regional Council, MFDA File No. 202023, Panel Decision dated May 28, 2021,

Visneskie (Re), [2018] Hearing Panel of the Central Regional Council, MFDA File No. 201553, Panel Decision dated June 21, 2018,

Latour (Re), [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201561, Panel Decision dated December 19, 2016 (Penalty),

Bangyay (Re), [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201238, Panel Decision dated July 22, 2013,

Nunweiler (Re), *supra*,

Davidson (Re), [2021] Hearing Panel of the Central Regional Council, MFDA File No. 202018, Panel Decision dated June 29, 2021.

V. COSTS

¶ 54 Staff presented the Hearing Panel with a Bill of Costs in an amount of \$17,087.50. Staff requested an Order for costs in the amount of \$10,000. We found both the Bill of Costs and the request of Staff to be appropriate. We made a Cost Order in the amount of \$10,000.

¶ 55 CIRO is funded by fees assessed on the Dealer Members. By awarding these costs, we are seeking to transfer a portion of the financial burden of investigating and prosecuting the Respondent from the CIRO membership to the Respondent, who clearly and blatantly contravened her regulatory obligations.

Dated at Ontario, this 2 day of February, 2024

“Thomas Lockwood” _____

Thomas J. Lockwood, (Chair)

“Melody Potter” _____

Melody Potter, Industry Representative

“Craig Woolford” _____

Craig Woolford, Industry Representative

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