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

IN THE MATTER OF A SETTLEMENT HEARING
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Timothy Joseph Dunlop

Heard: June 14, 2017 in Toronto, Ontario
Decision: June 14, 2017
Reasons for Decision: August 1, 2017

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

John Lorn McDougall, Q.C.	Chair
Brigitte Geisler	Industry Representative
Wanda Traczewski	Industry Representative

Appearances:

Michelle Pong	)	Counsel for the Mutual Fund Dealers Association of Canada
Benson Forrest	)	Counsel for the Respondent
Timothy Joseph Dunlop	)	Respondent, In Person

INTRODUCTION

1. By Notice of Hearing dated November 21, 2016, the Mutual Fund Dealers Association of Canada (the "MFDA") alleged misconduct against Timothy Joseph Dunlop (the "Respondent").

2. The Notice of Hearing was for a first appearance to be held on January 12, 2017. On that date, the matter was set for hearing on the merits on June 14 and 15, 2017.

3. In the Notice of Hearing, the MFDA alleged the following violations of the By-laws, rules or policies of the MFDA:

> **Allegation #1:** In November 2007, the Respondent recommended and facilitated unsecured loans from client JS to a third party borrower in exchange for a fee from the borrower, thereby engaging in outside business activities which were not disclosed to and approved by the Member, and/or conduct giving rise to a conflict of interest that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the policies and procedures of the Member and MFDA Rules 2.1.1, 2.1.4, 1.2.1(d)[1], 2.5.1, and 1.1.2.
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> **Allegation #2:** Between December 2010 and March 2015, the Respondent failed to report a complaint by client JS to the Member, and engaged in complaint handling including compensating client JS without the prior written consent of the Member, contrary to the policies and procedures of the Member, and MFDA Rules 2.1.1, 2.1.4, 1.2.2(b), 2.11 and 1.1.2 and MFDA Policy Nos. 3 and 6.
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> **Allegation #3:** In May 2015, seven blank pre-signed account forms in respect of four clients were found in the Respondent's client files, which were obtained and maintained by the Respondent, contrary to MFDA Rule 2.1.1.

[1] Since November 2007 when the alleged conduct took place, MFDA Rules have been amended and renumbered. The conduct regulated by MFDA Rule 1.2.1(d) in November 2007 is now addressed in MFDA Rule 1.3 concerning outside activities.

4. By News Release dated May 24, 2017, the MFDA gave notice that a Settlement Hearing would take place on June 14, 2017 instead of a hearing on the merits.

5. By News Release dated June 16, 2017, the MFDA gave notice that a Settlement Hearing in this matter had been held on June 14, 2017, before this Panel.

6. We also considered a joint Motion by Staff and the Respondent to move the proceedings "in-camera". This Motion was brought pursuant to Rule 15.2(2) of the MFDA Rules of Procedure, which provides as follows:

> *"(2) A Hearing Panel may, on its own initiative or at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8".*

7. Rule 1.8(2) provides as follows:

> *"(2) A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public."*

8. We granted the Motion on the condition, which was agreeable to both Staff and the Respondent that, should the Hearing Panel accept the Settlement Agreement, we would provide Reasons for our decision which, along with the Record of the Settlement Hearing, would be available to the public.

9. After considering the Settlement Agreement, together with the submissions made by counsel for the MFDA and counsel for the Respondent, both of whom urged the Panel to accept the Settlement Agreement, the Panel retired to deliberate. The Hearing Panel subsequently

advised the MFDA that the Settlement Agreement had been unanimously accepted by the members of the Panel and that we would provide Reasons for our decision which, together with the Record of the Settlement Hearing, would be available to the public. This is consistent with Rule 15.2(3) of the MFDA Rules of Procedure. The Hearing Panel made an order to this effect dated June 16, 2017 and indicated that Reasons for Decision would follow in due course. These are those Reasons for Decision.

10. The portions of the Settlement Agreement which are relevant to these Reasons for Decision are as follows:

> **II. JOINT SETTLEMENT RECOMMENDATION**
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> 2. Staff conducted an investigation of the Respondent's activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to section 24.1 of MFDA By-law No. 1.
>
> 3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent agrees to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule "A".
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> 4. Staff and the Respondent agree that the terms of this Settlement Agreement, including the attached Schedule "A", will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.
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> **III. ACKNOWLEDGEMENT**
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> 5. Staff and the Respondent agree with the facts set out in Part IV herein for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondent or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceedings brought by

the MFDA (subject to Part IX) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is accepted by the Hearing Panel.

IV. AGREED FACTS

Registration History

6. The Respondent has been registered in the mutual fund industry since at least 1994.

7. Between May 15, 2000 and September 25, 2015, the Respondent was registered in Ontario as a mutual fund salesperson/dealing representative[2] with IPC Investment Corporation ("IPC"), a Member of the MFDA. The Respondent was also a licensed insurance agent and mortgage broker.

8. The Respondent resigned from IPC on September 25, 2015.

9. At all material times, the Respondent conducted business in Midland, Ontario.

10. The Respondent is not currently registered in the securities industry in any capacity.

The Respondent Arranged for Client JS to Loan Monies to PH

11. At all material times, client JS was a client of IPC whose accounts were serviced by the Respondent.

12. In November 2007, the Respondent agreed to assist PH to obtain financing to complete a renovation project that PH had been hired to perform by DN (the "Renovation Project"). PH was the principal of 1674509 Ontario Inc., operating as Millennium Homes,

[2] On September 28, 2009 when National Instrument 31-103 came into force, the Respondent's registration category was changed from mutual fund salesperson to dealing representative.

which purported to be in the business of renovating homes. PH was not a mutual fund client of IPC.

13. At all material times, IPC required Approved Persons to disclose and obtain approval of any outside business activities.

14. In November 2007, the Respondent informed client JS that she could borrow $45,000 from her Home Equity Line of Credit ("HELOC") and lend the money to PH for the Renovation Project.

15. PH agreed to pay the Respondent a $1,000 fee for his role in arranging the loan with client JS.

16. Client JS agreed to loan $45,000 to PH.

17. On or about November 16, 2007, client JS withdrew $25,000 from her HELOC and loaned the monies to PH. At that time, client JS and PH signed a promissory note which stated, among other things, that the loan would be repaid within 45 days and client JS would receive interest of 15%, compounded monthly, on any outstanding balance after January 1, 2008. Client JS also received a letter of direction signed by PH and DN, which confirmed that DN had hired PH to perform the Renovation Project and directed DN to pay $25,000 directly to JS (instead of paying PH) upon completion of the Renovation Project.

18. On or about November 23, 2007, client JS withdrew $20,000 from her HELOC and loaned the monies to PH. At that time, client JS and PH signed a second promissory note which stated, among other things, that the loan would be repaid within 60 days and client JS would receive interest of 15%, compounded monthly, on any outstanding balance after 60 days.

19. The Respondent signed the two promissory notes and the letter of direction as "witness".

20. PH did not use the money that he borrowed from client JS to complete the Renovation Project for DN. Instead, PH used the money that he had borrowed from client JS to start another business.

21. PH did not repay the loans within the time periods set out in the promissory notes. Instead, PH began making monthly payments to client JS. Client JS received monthly payments from PH until 2010 when a cheque from PH was returned to client JS by the bank due to non-sufficient funds ("NSF") in PH's bank account. Client JS told the Respondent about the NSF cheque from PH and the Respondent advised client JS that he would speak to PH about it. A short time later, in or about December 2010, client JS received a cash payment from PH.

22. On or about January 27, 2011, a second cheque from PH was returned to client JS by the bank due to NSF. Client JS informed the Respondent of the second NSF cheque. The Respondent made several telephone calls to PH concerning the amounts owed to client JS.

23. Client JS received several small additional payments from PH, none of which exceeded $200. Thereafter, all payments from PH ceased. Client JS spoke to the Respondent again about the amounts owed to her and the Respondent contacted PH to try to address the amounts owed.

24. On October 28, 2011, PH was charged with 11 counts of fraud over $5,000 under the *Criminal Code,* R.S.C., 1985, c. C-46. In March 2012, PH was charged with 21 additional counts of fraud over $5,000. In August 2015, PH was sentenced to two years imprisonment for fraud.

25. Between August 2013 and November 2014, client JS received several additional payments of approximately $150 each from PH.

26. As described in greater detail below, in about March 2015, the Respondent received $400 from PH and then personally paid the $400 to client JS in respect of the monies owed to her for the Renovation Project.

27. Client JS was owed at least $45,000 plus interest in respect of the loans to PH.

28. The Respondent did not disclose his activities (including the compensation he received) with respect to facilitating the loans from client JS to PH, and the Member did not approve these activities. The Respondent states that he mistakenly believed that the activities fell under the auspices of the Financial Services Commission of Ontario ("FSCO") and did not need to be disclosed to the Member.

29. On or about June 24, 2008, the Respondent failed to disclose to the Member in his response to the member's annual compliance questionnaire that he received compensation from an outside business activity. Again, the Respondent states that he mistakenly believed that the receipt of such compensation fell under the auspices of FSCO and did not need to be disclosed to the Member.

30. In 2016, the Member paid $50,000 to settle with client JS and was indemnified $25,000 by the Respondent.

Failure to Comply with Reporting Requirements

31. Between about December 2010 and March 2015, client JS repeatedly complained to the Respondent about the amounts owed for the monies she loaned in respect of the Renovation Project. The Respondent did not report these complaints to the Member.

32. On several occasions, client JS advised the Respondent that she wanted to approach the police about PH. The Respondent expressed his opinion to client JS that if the police became involved, PH would be inclined to leave the jurisdiction and client JS would be unlikely to recover the monies she had loaned in respect of the Renovation Project.

33. The Respondent advised client JS that if she went to the police the publicity could negatively impact his reputation and career.

34. Client JS advised the Respondent that she intended to speak with her lawyer about PH and the monies owed to her. In response, the Respondent expressed concerns to client

JS about the cost of retaining counsel and whether this would be the best approach for getting her money back.

35. In March 2015, client JS advised the Respondent that she would not pursue formal police charges against PH if she received two monthly payments of $200 each in cash going forward.

36. The Respondent subsequently received two payments from PH of $200 each which he deposited into his bank account. The Respondent then transferred two payment of $200 each to client JS from his personal bank account. The Respondent engaged in this activity without the prior written consent of the Member.

37. The Respondent's treatment of the complaints by client JS could reasonably be perceived as giving rise to a conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client.

Blank Signed Account Forms

38. In July 2009, IPC conducted a review of the Respondent's branch office and found that the Respondent maintained blank pre-signed account forms in client files. IPC sent a warning letter to the Respondent dated August 14, 2009 advising the Respondent that he was not permitted to obtain pre-signed accounts forms and that any future violations of this nature would result in the impositions of fines or his termination.

39. In about May 2015, IPC conducted a review of the Respondent's client files in response to a complaint from client JS with regards to the events described above. During this review, IPC identified that the Respondent had obtained and maintained seven blank pre-signed account forms in respect of four clients. The accounts forms consisted of order entry forms, which the Respondent could use to place trades in client accounts.

V. CONTRAVENTIONS

40. The Respondent admits that in November 2007, the Respondent recommended and facilitated unsecured loans from client JS to a third party borrower in exchange for a fee from the borrower, thereby engaging in outside business activities which were not disclosed to and approved by the Member, and/or conduct that could reasonably be perceived as giving rise to a conflict of interest that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the policies and procedures of the Member and MFDA Rules 2.1.1, 2.1.4, 1.2.1(d)[3], 2.5.1, and 1.1.2.

41. The Respondent admits that between December 2010 and March 2015, the Respondent failed to report a complaint by client JS to the Member, and engaged in complaint handling without the prior written consent of the Member, contrary to the policies and procedures of the Member, and MFDA Rules 2.1.1, 2.1.4, 1.2.2(b), 2.11 and 1.1.2 and MFDA Policy Nos. 3 and 6.

42. The Respondent admits that in May 2015, seven blank pre-signed account forms in respect of four clients were found in the Respondent's client files, which were obtained and maintained by the Respondent, contrary to MFDA Rule 2.1.1.

VI. TERMS OF SETTLEMENT

43. The Respondent agrees to the following terms of settlement:

(a) The Respondent shall be imposed with a permanent prohibition on the authority of the Respondent to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member, pursuant to section 24.1.1(e) of MFDA By-law No. 1;

[3] Since November 2007 when the alleged conduct took place, MFDA Rules have been amended and renumbered. The conduct regulated by MFDA Rule 1.2.1(d) in November 20007 is now addressed in MFDA Rule 1.3 concerning outside activities.

(b) The Respondent shall pay costs in the amount of $5,000, pursuant to section 24.2 of MFDA By-law No. 1; and

(c) The Respondent will attend in person, on the date set for the Settlement Hearing.

VII. STAFF COMMITMENT

44. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the contraventions described in Part V of this Settlement Agreement, subject to the provisions of Part IX below. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any contraventions that are not set out in Part V of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the contraventions set out in Part V, whether known or unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

…

IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT

49. If this Settlement Agreement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to honour any of the Terms of Settlement set out herein, Staff reserves the right to bring proceedings under section 24.3 of the By-laws of the MFDA against the Respondent based on, but not limited to, the facts set out in Part IV of the Settlement Agreement, as well as the breach of the Settlement Agreement. If such additional enforcement action is taken, the Respondent agrees that the proceeding(s) may be heard and determined by a hearing panel comprised of all or some of the same members of the hearing panel that accepted the Settlement Agreement, if available.

REASONS FOR DECISION

11. It is customary when explaining the process followed by a Hearing Panel to reach a conclusion on an appropriate penalty, or more accurately whether the penalty agreed to by the parties falls into an acceptable range, to list the considerations which may be taken into account.

12. MFDA hearing panels have taken into account the following considerations when determining whether a proposed settlement should be accepted:

(a) Whether acceptance of the settlement agreement would be in the public interest and whether the penalty imposed will protect investors;
(b) Whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
(c) Whether the settlement agreement addresses the issues of both specific and general deterrence;
(d) Whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future;
(e) Whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;
(f) Whether the settlement agreement will foster confidence in the integrity of the MFDA; and
(g) Whether the settlement agreement will foster confidence in the regulatory process itself.

In the Matter of Rodney Jacobson, [2007] MFDA Hearing Panel of the Prairie Regional Council, MFDA File No. 200712, Decision dated July 13, 2007 ("*Jacobson*") at p. 9.

In the Matter of Investors Group Financial Services, [2004] MFDA Hearing Panel of the Ontario Regional Council, MFDA File No. 200401, Reasons for Decision dated December 16, 2004 at pp. 2-3.

In the Matter of IQON Financial Inc. (Re), [2007] MFDA Hearing Panel of the Pacific Regional Council, MFDA File No. 200713, Decision and Reasons dated May 24, 2007 at p. 9, Staff's Book of Authorities, Tab 4.

13. The Hearing Panel agrees with Staff's submission that it should not interfere with a negotiated settlement as long as the penalties agreed to are "within the reasonable range of appropriateness" or as the Supreme Court of Canada put it in a recent case, *R. v. Anthony-Cook,* [2016] S.C.C. 43 para 42 "…where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system".

Jacobson at p. 10.

Clark (Re), [1999] I.D.A.C.D. No. 40 at p. 3.

Milewski (Re), [1999] I.D.A.C.D. No. 17 at p. 10.

14. The most severe non-monetary penalty that can be imposed is a permanent prohibition from conducting securities related business in any capacity while in the employ or associated with any MFDA Member. According to the MFDA Penalty Guidelines (the "MFDA Guidelines"), such a permanent prohibition is appropriate in "egregious cases". Egregious is defined in the Merriam-Webster Dictionary as "conspicuously bad".

15. The MFDA Guidelines are intended to assist hearing panels, Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings. As stated in the introduction to the MFDA Guidelines under the hearing "Purpose Of The MFDA Penalty Guidelines":

Range is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.

Extract from the MFDA Penalty Guidelines, Staff's Book of Authorities, Tab 12.

16. The Respondent has admitted to the three allegations made against him and, taken alone or together, that they constitute serious breaches of the Rules and policies and procedures of the Member. But to conclude that cumulatively the breaches constitute egregious behaviour is somewhat difficult when viewed in the factual context described above and even more so when his exemplary past history, cooperation with Staff, and contribution to compensation client JS are considered as well. All of this leads the Hearing Panel to have had concerns about the severity of the penalty agreed to and which concern was expressed during the hearing.

17. But in this case, perhaps somewhat uniquely, the Respondent has expressed through his counsel why he accepted and agreed to the prohibition order and instructed counsel to support it. That support continued throughout the hearing and was repeated at its very end when it must have been clear to the Respondent that the Hearing Panel was in some doubt about the severity of the penalty proposed. However, in his final submission Mr. Forrest, the Respondent's counsel, made it clear that his client continues to support the agreed penalties. He stated as follows:

> "Mr. Dunlop in this case has been forthright and honest in terms of what happened and accepts that he has committed the transgressions of the rules and is here and willing to accept the penalties that have been agreed upon and to move forward in his life.
>
> He's at a stage in his life now where he's content that he – to not participate in the MFDA business anymore, so he's content to accept that, pay the fine – or pardon me – the costs, the component of the agreed upon settlement – thank you."

18. It should not be forgotten that the public interest in settlement does not pre-empt the consideration of the interests of the accused. In this case, there is no doubt that Mr. Dunlop simply no longer wanted to be involved with the MFDA. He had made reparations to the client, cooperated with the investigation and wished to move on. Any reasonable person in possession of these facts could not think it was appropriate or fair to withhold acceptance of such a settlement.

CONCLUSION

19. The Hearing Panel agrees with Staff's submission that the proposed penalties are reasonable and proportionate having regard to the conduct of the Respondent and the circumstances of this case and that the settlement is in the public interest and it so finds.

Dated this 1st day of August, 2017.

"John Lorn McDougall"

John Lorn McDougall, Q.C.
Chair

"Brigitte Geisler"
Brigitte Geisler
Industry Representative

"Wanda Traczewski"
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