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: Douglas James Wellings

Heard: September 27, 2011 in Toronto, Ontario
Reasons for Decision: October 18, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Frederick H. Webber	Chair
Guenther Kleberg	Industry Representative
Brigitte Geisler	Industry Representative

Appearances:

Shelly Feld	)	For the Mutual Fund Dealers Association of Canada
	)	
Douglas James Wellings	)	Did not appear
	)	

Allegations

1. By Notice of Hearing dated June 27, 2011, a Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada ("MFDA") was convened on September 27, 2011 in Toronto, Ontario, to consider the following allegations against Douglas James Wellings (the "Respondent"):

> **Allegation #1**: Commencing March 8, 2002 the Respondent continued to engage in personal financial dealings with client MF by failing to repay or otherwise account for approximately $35,000 the Respondent had borrowed from client MF in July 1997, contrary to MFDA Rules 2.1.4 and 2.1.1 (the Respondent did not become subject to the Jurisdiction of the MFDA until his employer, Interglobe Financial Services Corp. became a member of the MFDA on March 8, 2002; however it was alleged that the Respondent's personal financial dealings with client MF actually began in approximately July 1997).
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> **Allegation #2**: In January 2009, the Respondent failed to deal fairly, honestly and in good faith with client MF when he attempted to misappropriate $98,897.67 from client MF by selling her an annuity that he knew did not exist, contrary to MFDA Rule 2.1.1.
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> **Allegation #3**: Commencing in November 2009, the Respondent has failed to comply with requests by the MFDA to attend at the offices of the MFDA to give information about the matters under investigation, contrary to MFDA Rule 22.1 of MFDA By-law No. 1.

Appearances

2. This hearing was scheduled to commence at 10:00 a.m., but was delayed until 10:15 a.m. in order to give the Respondent an opportunity to appear. However, the Respondent did not appear. Counsel for the MFDA advised the Panel that the MFDA had informed the Respondent of this hearing in accordance with the order of August 11, 2011. The Respondent has not filed a Reply to the Notice of Hearing, did not appear at the set-date hearing of August 11, 2011 and did not appear at this hearing, notwithstanding receiving every reasonable opportunity to do so. Accordingly, this Panel proceeded with the hearing in the absence of the Respondent and

accepted the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing as proven, pursuant to Rules 7.3 and 8.4. Notwithstanding these Rules, the MFDA filed an affidavit of evidence in support of the allegations made in the Notice of Hearing, and verbal submissions were made by counsel for the MFDA.

Facts

3. To summarize, the evidence establishes that:

4. From May 23, 1997 to March 5, 2009 the Respondent was registered as a mutual fund salesperson with Interglobe Financial Services Corp. ("Interglobe"), and was an Approved Person subject to the jurisdiction of the MFDA from March 8, 2002 to March 5, 2009.

5. Since no later than March 2002, the Policies and Procedures of Interglobe required the Respondent to "always act in the best interest of the client,…conduct business in a fair and open manner,…provide full and timely disclosure to Interglobe,…ensure all transactions are appropriate for the client and their situation and that they are completed within industry regulations,…ensure that all transactions are in the client's best interest and be able to prove this with documented evidence,…disclose any potential conflict of interest to the client,… and refuse the business, depending on the nature of the conflict." Since no later than May 2008, the Policies and Procedures of Interglobe have identified borrowing from a client as an infraction warranting discipline that may result in termination of an Approved Person's registration for cause.

6. In 1997, the Respondent borrowed $35,000 from MF, a client of Interglobe, to pay a tax debt that he owed. The loan was not disclosed to Interglobe and the purpose of the loan was not disclosed to MF. According to MF, the loan was for a 10 year term and the Respondent promised to pay compound interest at the rate of 10% per year. MF was elderly, retired, widowed and an unsophisticated investor who relied on the Respondent for investment advice and trusted him implicitly.

7. Prior to the complaint by MF in 2009, no payments of interest or principal were made to MF by the Respondent. When MF requested repayment of the loan at the conclusion of the 10 year term in 2007, the Respondent borrowed her investment file under the pretext of reviewing

her investments. Before returning the file to her, the Respondent removed her copy of the loan document that the Respondent had drafted when the money was borrowed.

8. In January 2009, the Respondent offered MF an annuity with a principal value of $100,000 which he claimed would pay a special rate of return of 10% per year. He persuaded MF to sell segregated funds and to provide the proceeds to him in exchange for the annuity. The annuity did not actually exist. The Respondent's deceit came to light when he attempted to cash the cheque from MF in the amount of $98,897.67 and the bank refused to accept the cheque.

9. After the Respondent returned the cheque to MF, she became suspicious and reported the matter of the original unpaid loan to Interglobe. Interglobe suspended the Respondent, following which he resigned on March 5, 2009. In September, following the conclusion of its investigation, Interglobe paid $35,000 to MF to compensate her for the principal amount of the loan to the Respondent. The Respondent signed an agreement to repay the outstanding interest over time at a rate of $100 per month and purchased an insurance policy naming MF as the beneficiary.

10. Between November 24, 2009 and March 11, 2011, multiple requests were made to the Respondent to participate in an interview with MFDA Staff to answer questions concerning matters under investigation. The Respondent refused to attend an interview, contrary to s. 22.1 of MFDA By-law No. 1.

Jurisdiction

11. The Respondent ceased to be an approved Person in March 2009 when he resigned from Interglobe. Pursuant to s. 24.1.4, an Approved Person remains subject to the jurisdiction of the MFDA notwithstanding the fact that the individual ceases to be an Approved Person (the Respondent resigned on March 5, 2009). This was confirmed by the case of *Investment Dealers Association of Canada* v. *Taub*, 2009 ONCA 628. Furthermore, as in this case, where money was borrowed from clients prior to MFDA jurisdiction, but had not been repaid on the date when MFDA acquired jurisdiction over the Approved Person, cases cited to this Panel establish that the Approved Person is in contravention of the MFDA Rules if he failed to repay the money or otherwise address the conflict of interest by the exercise of responsible business judgment influenced only by the best interests of the client after the MFDA acquired jurisdiction over him.

[See *Raymond Brown-John*, [2005] MFDA Pacific Regional Council, File No. 200502, *James Woloshen*, [2011] MFDA Central Regional Council, File No. 201029 and *Earl Crackower*, [2005] MFDA Ontario Regional Council, File No. 200506.]

Misconduct

12. In accordance with Rules 7.3 and 8.4, this Panel accepted the facts alleged and conclusions drawn in the Notice of Hearing. Notwithstanding Rules 7.3 and 8.4, at the hearing MFDA counsel reviewed the facts and applicable law with the Panel and it is clear to the Panel that the allegations in the Notice of Hearing have been proven.

Penalties

MFDA Proposals

13. The MFDA proposed the following penalties:

(a) A permanent prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member of the MFDA, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
(b) A fine in the amount of $100,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
(c) Costs in the amount of $7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

Permanent Prohibition

14. The Panel agrees that a permanent prohibition as submitted by the MFDA is appropriate in this case and is supported by the cases reviewed with the Panel by MFDA counsel. The Respondent borrowed money from client MF which he failed to repay, contrary the MFDA Rules and his company policy, concealed the borrowing from Interglobe and attempted to hide its existence, attempted to obtain a further loan from client MF under false pretenses, and failed to cooperate in the MFDA investigation. The Panel concluded that the continual breach of the MFDA Rules and Interglobe's policies and procedures and the very serious nature of the

Respondent's misconduct suggest that the Respondent is not governable and as such is not fit to remain in the industry.

Fine and Costs

15. The MFDA sought a fine of $100,000 and costs of $7,500. Counsel for MFDA did not attempt to allocate the $100,000 fine among the three allegations.

16. MFDA counsel cited a number of cases which supported the principle that fines in cases such as this have traditionally been approximately equal to the amount that remains unpaid by the Approved Person. Fines in such amounts reflect the seriousness of the misconduct and ensure that the Respondent does not profit from his misconduct. These cases were provided to the Panel in the MFDA Book of Authorities and have been reviewed by the Panel. They are:

In the Matter of Arnold Tonnies, [2005], MFDA File No. 200503
In the Matter of Raymond Brown-John, [2005], MFDA File No. 200502
In the Matter of Glenn Murray Greyeyes, [2006], MFDA File No. 200510
In the Matter of Earl Crackower, [2005], MFDA File No. 200506
In the Matter of Stephan Headley, [2006], MFDA File No. 200509

17. The submissions of the MFDA and the cases cited above also referred to other principles which should guide hearing Panels in determining appropriate penalties:

(a) The primary goal of securities regulation is protection of the investor and capital markets;
(b) Sanctions are intended to be preventative, protective and prospective in nature in order to remove from the capital markets…those whose past conduct…indicates that their future conduct may be detrimental to the capital markets;
(c) The Panel should consider (i) protection of the investing public (ii) integrity of the securities markets (iii) specific and general deterrence (iv) protection of the MFDA's membership and (v) protection of the integrity of the MFDA's enforcement process;
(d) General deterrence is designed to keep an occurrence from happening; it discourages similar wrongdoing in others so as to re-affirm public confidence in the regulatory system.

18. The MFDA Penalty Guidelines refer to a number of factors that a hearing Panel should consider in determining the appropriate penalty.

19. This Panel agrees with these principles and has referred to the MFDA Penalty Guidelines. Since this Panel has already determined that the Respondent should be permanently prohibited from future participation in the industry, the principle of general deterrence is of particular importance in determining the appropriate fine. This Panel feels that the fine should reflect the serious nature of the Respondent's misconduct. The Respondent knew the $35,000 borrowing was contrary to the MFDA Rules and his employer's policies, was not disclosed to his employer, and involved taking advantage of a vulnerable client. The Respondent attempted to conceal the borrowing and no attempt was made by the Respondent to repay the loan (it is also appears to the Panel that very little, if any of the interest was paid by the Respondent). The attempted sale of a non-existent annuity for almost $100,000 was egregious conduct and was only prevented by the fortuitous intervention of the bank. The Respondent failed to comply with requests by the MFDA to give information about the matters under investigation as required by the Rules, thus obstructing the ability of the MFDA to uncover further possible misconduct.

20. The MFDA Penalty Guidelines suggest minimum fines of $10,000 for personal financial dealings, $25,000 for forgery/fraud/theft/misappropriation/misapplication and $50,000 for failure to cooperate. The MFDA suggested a fine of $100,000 for all three allegations. Having regard to the serious nature of the Respondent's conduct and the need to emphasize the principle of deterrence to others, this Panel feels that the $100,000 fine suggested by MFDA is inadequate.

21. The cases referred to above appear to approximately relate the amount of the fine for borrowing from clients to the amount remaining unrepaid. We are not convinced that this relationship provides adequate deterrence as it theoretically simply restores the financial position of the transgressor to what it should have been had the loans been repaid.[1] This Panel feels that such an amount should be a minimum where, as here, deterrence must be considered. We also note that the essence of the allegation is the "borrowing", not the amount remaining unpaid.

22. Furthermore, the repayment by Interglobe of the $35,000 to the client does not mitigate

[1] We appreciate that clients may choose to take civil actions to recover their funds thereby subjecting the transgressor to additional financial obligations. In cases where the firms have compensated the clients, the transgressors may also be liable to action from the firms for recovery of the funds.

the Respondent's conduct. In addition, the Respondent acknowledged owing MF interest of $40,748 as of December 16, 2009 and promised to pay $100 per month toward this debt. The interest was not made a part of the first allegation and no information was provided to the Panel regarding payment of the interest. The interest was not taken into account by the Panel in determining the appropriate fine. Having regard to all of these factors, the Panel concluded that an appropriate fine in regard to the first allegation is $50,000.

23. The second allegation regarding the attempt to sell a non-existent annuity for almost $100,000 is considered by this Panel to be more egregious conduct than the original borrowing. The fact that the client did not lose any money is considered irrelevant by the Panel since any loss was prevented only by the intervention of the client's bank. This Panel concluded that the absence of loss by the client does not mitigate the Respondent's conduct in these circumstances, and has determined that an appropriate fine in regard to the second allegation is $135,000.

24. The failure by the Respondent to give information to the MFDA regarding matters under investigation hindered the ability of the MFDA to uncover other possible misconduct, such as inappropriate investments, which undermines the integrity and effectiveness of the self-regulatory process. The Penalty Guidelines suggest a minimum fine of $50,000 which this Panel decided is appropriate given the other fines.

25. Consequently, the monetary penalty applied by the Panel in these matters is fines in the total amount of $235,000.

26. The MFDA sought costs in the amount of $7,500 and the Panel feels this amount is appropriate.

Order

27. It is hereby ordered that the following penalties and costs are imposed on the Respondent:

(a) a permanent prohibition from conducting any securities related business in any capacity while in the employ of or associated with any MFDA Member pursuant to s.24.1.1(e) of MFDA By-law No. 1;

(b) a fine in the amount of $235,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

(c) costs in the amount of $7,500 pursuant to s. 24.2 of MFDA By-law No. 1.

DATED this 18th day of October, 2011.

"Frederick Webber"
Frederick H. Webber,
Chair

"Guenther Kleberg"
Guenther Kleberg,
Industry Representative

"Brigitte Geisler"
Brigitte Geisler,
Industry Representative

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