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: John Richard Wolfenden**

Heard: June 21, 2017, in Toronto, Ontario
Decision and Reasons (Penalty): October 2, 2017

# DECISION AND REASONS
# (Penalty)

Hearing Panel of the Central Regional Council:

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| H. Michel Kelly, Q.C. | Chair |
| Linda J. Anderson | Industry Representative |
| Leo M. Hill | Industry Representative |

Appearances:

| | | |
|---|---|---|
| Paul Blasiak | ) | Counsel for the Mutual Fund Dealers |
| | ) | Association of Canada |
| | ) | |
| John Richard Wolfenden | ) | Respondent (by teleconference) |
| | ) | |
| | ) | |

1. The penalty hearing was conducted on June 21, 2017 at the MFDA Offices in Toronto. Paul Blasiak, Enforcement Counsel, representing Staff of the MFDA ("Staff"), appeared in person, and made submissions. John Wolfenden ("Respondent") participated by teleconference, and made oral submissions. Prior to the hearing, Staff served and filed written submissions, with a Book of Authorities, citing the following authorities:

a) *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557; [1994] SCJ No. 58, a decision of the Supreme Court of Canada;
b) *Nunweiler (Re)*, MFDA File No. 201030, Hearing Panel of the MFDA Pacific Regional Counsel, Reasons for Decision dated May 28, 2012;
c) MFDA Penalty Guidelines, September 20, 2006;
d) *Sarang (Re)*, MFDA File No. 201535, Hearing Panel of the MFDA Pacific Regional Council, Reasons for Decision dated March 21, 2016;
e) *Crackower (Re),* Reasons for Decision of the Hearing Panel of the MFDA Central Regional Council dated August 22, 2005, MFDA File No. 200506
f) *Lipovetsky (Re)*, MFDA File No. 201252, Hearing Panel MFDA Central Regional Council, Reasons for Decision dated July 25, 2013.

2. The Respondent delivered a comprehensive written Reply dated June 10, 2017, setting out in detail the factors that distinguish the fact situations in the above cases, pertinent to misconduct and penalty, from the facts accepted by the Panel in its decision rendered on January 5, 2017 ("Decision and Reasons (Misconduct)"), related to the Respondent's misconduct. The Respondent made oral submissions consistent with the thrust of his written submissions. His written and oral submissions emphasized the pivotal and mitigating factors, and he showed appropriate recognition and remorse, in hindsight, with respect to his unintended breach of industry standard. The Panel accepts the validity of his submissions, in that regard.

3. Staff of the MFDA are seeking the following penalties:

a) a prohibition of at least three (3) years on the Respondent's authority to conduct 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, and

b) a fine of at least $50,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1, and

c) costs in the amount of $5000 pursuant to s. 24.2 of MFDA By-law No. 1.

4. In its Decision and Reasons (Misconduct), the Panel found that the Respondent, contrary to MFDA Rules 2.1.1 and 2.1.4, had borrowed money from two (2) clients, MP and JM; had not been sufficiently forthright with FundEX in their initial investigation, with respect to that borrowing; and did not report to FundEX in a timely fashion a potential complaint by client MP, concerning that borrowing.

5. The pertinent facts accepted by the Panel and the resultant findings with respect to violation of industry rules were comprehensively reviewed by the Panel in its Decision and Reasons (Misconduct). In reaching its decision on an appropriate penalty, the Panel is satisfied that there are significant mitigating factors that influenced their decision on penalty.

6. The Panel was impressed by the Respondent, who found himself facing an obviously unwelcome accusation of professional impropriety, that he had not intended or understood when the borrowing took place. His stress, and fear of loss of professional reputation, arising from the MFDA prosecution, his effort to cooperate with FundEX (though initially, not perfect) and MFDA investigations, and his ultimate acceptance, with remorse, that his conduct did violate investment industry standard, is in our view persuasive to the Panel's confidence that the Respondent will not likely make the same mistake again. The Respondent was not involved in any previous disciplinary process.

7. The facts peculiar to this case, satisfy the Panel that the Respondent did not appreciate, when the loans were executed, that he was violating MFDA Rules or FundEX directives. He was aware of the MFDA prohibition of conduct involving a potential conflict of interest with a client, but when confronted by the MFDA decision to commence the disciplinary proceeding, he

reviewed the MFDA Rules and was satisfied that they did not specifically prohibit borrowing from a client. We find that he did not perceive or identify a potential conflict when he accepted the loans. He has subsequently recognized that a potential conflict of interest was present and that he unintentionally violated the MFDA prohibition against potential conflict of interest, and FundEX rules strictly prohibiting that borrowing. The Panel accepts the Respondent's assertion, on balance of probabilities, that at the time the loans were made, he did not realize that FundEX rules specifically prohibited borrowing from clients.

8. The Respondent had an immediate need for money, to close the purchase of a cottage when the intended mortgagee made a last-minute exit. His good friend and client, MP, offered to lend him $20,000 and he accepted the offer. He then contacted client JM who had 25-years' experience as a mortgage investor and JM agreed to lend him $80,000. The money from the clients did not come from their FundEX accounts, and were not funds that the said clients intended to invest with FundEX. The $20,000 loan from MP was secured by a promissory note, with a fixed term of one year (at which time principal and interest was due), executed by both the Respondent and his wife. When the note became due, MP requested a one-year extension, and the Respondent agreed. However during the second-year term MP asked for an early pay-off, and when the Respondent asked him if he would consider sticking to the two-year agreement, MP shortly thereafter, became angry and did not respond to the Respondent's efforts to contact him to facilitate the early payoff of the promissory note. The loan from JM was secured by a one-year mortgage on the cottage, payable in monthly installments of principal and interest, and JM was represented by legal counsel throughout. The mortgage to JM was renewed by mutual agreement until June 2014, and was prepaid, early, and in full, by the Respondent. It was never in default. The JM loan was 40% of the land value and was therefore quite secure. The loan from MP was repaid before any formal complaint was made by MP to FundEX or the MFDA. The Panel accepted the Respondent's testimony that, when the principal was paid, MP stated that he was not seeking interest.

9. Staff asserts that the borrowing described above was not "a stand-alone event", but involved two clients. The Panel is satisfied that the borrowing was, in effect, one event. It was not indicative of a deliberate pattern of ongoing misconduct.

10. Staff asserts that the renewal of the repayment terms of the loans constituted a continuing, understood, violation of the impropriety of borrowing from clients. The Panel does not see it quite that way, in the particular facts of this case. The Panel, however, did find that when MP's conduct, after the February 2012 exchange with the Respondent, suggested that MP was dissatisfied with the Respondent's position on the timing of repayment, the Respondent should have immediately brought that discontent to the notice of the Member. He failed to do so. The client JM, an experienced mortgage investor, represented throughout by legal counsel, received monthly payments of principal and interest, and his mortgage was renewed by mutual agreement. There was no evidence before the Panel as to who requested the renewal. The money obtained by the Respondent did not come from the MP or JM accounts at FundEX, nor were they funds destined for a FundEX account.

11. MP did not co-operate with FundEX. JM had no complaint and expressed to MFDA satisfaction with his deal, and complimented the Respondent on his integrity.

12. Staff asserts that the Respondent's denial, during the early investigation by the Member, that he had borrowed from clients MP and JM constituted a severe aggravating factor on the issue of appropriate penalty. The Panel accepts that principle.[1] However, the Panel views the evidence in the specific context of what had happened. The Respondent, respecting the moral rectitude of industry protocol, and the importance to him of protecting his professional reputation and that of the industry, and believing that he had not knowingly violated industry standards in connection with the loans, made an ill-advised evidentiary decision. He examined his copy of the promissory note, signed three years earlier, and saw that only his wife's signature was on it. He thus advised FundEX staff that he was not the borrower, hoping that this position was worthy of technical evidentiary validity. When in due course he was shown another copy of the promissory note that contained his signature, he admitted that he was a recipient of the loan. He testified that he did not reveal the loan from JM until he had received JM's consent, believing that JM's affairs were subject to legislated privacy directive, in the absence of consent from JM. The Respondent's disclosure of the mortgage loan was made to FundEX within approximately 6

*1. Nunweiler (Re)*, *Sarang (Re),* and *Crackower (Re)* noted in paragraph 1, above.

weeks after commencement of the FundEX investigation, after the Respondent had obtained JM's consent. However, as the Panel found in its Decision and Reasons (Misconduct), clearly, the Respondent was knowingly not forthright with FundEX and the penalty must recognize the severity of that default, but viewed in its full mitigating factual context.

13. MFDA Staff further submits that the renewals of the loans, subsequent to June 2011, constituted a prolongation of the conflicts of interest with the clients. That proposition has validity to the issue of penalty, if and only if, the Panel found that at the times of renewal, the Respondent knew, on balance of probability, that the loans constituted a conflict of interest with the clients, and that the renewals prolonged that violation. The Panel is not prepared, on the evidence, to make that finding.

14. MFDA Staff, in their written submissions on penalty stated that their proposed penalties "are appropriate based on previous decisions made in similar circumstances, as set out in the chart below" :

| **Case** | **Facts** | **Outcome** |
|---|---|---|
| *Lipovetsky (Re)*, [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201252, Panel Decision dated July 25, 2013, Staff s Book of Authorities on Penalty, Tab 8. | • The Respondent borrowed a total of $20,000 from two clients.<br>• The Respondent repaid the loans.<br>• The Respondent failed to cooperate with Staff s investigation. | • Permanent prohibition<br>• $30,000 fine for personal financial dealings<br>• $50,000 fine for failure to cooperate<br>• Costs of $7,500 |
| *Nunweiler (Re)*, supra, Staff s Book of Authorities on Penalty, Tab 4. | • The Respondent borrowed a total of approx. $56,300 from at least two clients.<br>• The Respondent repaid the $6,300 loan owing to one of the clients.<br>• On a Member questionnaire, the Respondent misled the Member by falsely stating that he had never borrowed money from clients.<br>• The Respondent failed to cooperate with Staff s investigation. | • Permanent prohibition<br>• $100,000 fine for personal financial dealings<br>• $50,000 fine for misleading the Member<br>• $100,000 fine for failure to cooperate<br>• Costs of $15,000 |

| Case | Facts | Outcome |
|---|---|---|
| *Toussaint (Re)*, [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201039, Panel Decision dated September 26, 2011, Staff s Book of Authorities on Penalty, Tab 9. | • The Respondent borrowed a total of $20,000 from two clients.<br>• The Respondent failed to repay $5,300 in principal and interest to one of the clients.<br>• The Respondent entered into an Agreed Statement of Facts with Staff. | • Permanent prohibition<br>• $10,000 fine<br>• Costs of $2,500 |
| *Sarang (Re)*, supra, Staff s Book of Authorities on Penalty, Tab 6. | • The Respondent borrowed $29,015 from a client or arranged for the client to loan $29,015 to a third party.<br>• The Respondent repaid the loan.<br>• The Respondent engaged in an undisclosed outside business activity (he was a shareholder and director of a corporation).<br>• On an annual Member compliance certification, the Respondent misled the Member by falsely stating that he had not had personal financial dealings with clients and did not engage in an outside business activity.<br>• The Respondent entered into a Settlement Agreement with Staff. | • Permanent prohibition<br>• $7,500 fine<br>• Costs of $2,500 |

15. The Panel has noted relevant distinctions between the within case, and the cases cited in the above chart, as follows:

a) *Lipovetsky (Re)*:

i. The Respondent *Lipovetsky (Re)* did not serve a Reply or appear at the Hearing. The borrowed money came from the clients' FundEX accounts;

ii. The Respondent *Lipovetsky (Re)* did not co-operate with the MFDA investigation, and showed no remorse for his actions. Mr. Wolfenden, after his initial denial that he borrowed from clients, became forthright and co-operated fully with MFDA, attending for an all-day interview, and providing requested documentation, including bank records showing that

he was at all times financially able to pay off the loans. He participated in the Hearing. As well, he has displayed remorse.

b) *Nunweiler (Re)*:

i. Mr. Nunweiler borrowed money from at least 5 clients, and denied, to MFDA and the Member, his borrowing. He failed to co-operate with the MFDA investigation. He did not comply with a production Order released by the Hearing Panel. He resigned his membership at the Member prior to the onset of the investigation. He did not participate in the Hearing. He showed no remorse.

*c) Toussaint (Re)*:

i. Mr. Toussaint continued to borrow money from clients after his first discovered borrowing was exposed, notwithstanding his promise to the Member that he would not repeat his misconduct. He did cooperate with the investigation, and did attend the Hearing. The Panel felt that a permanent prohibition from engaging in securities business was appropriate, given that the Respondent's continuing misconduct persuaded the conclusion that he was ungovernable. He did not oppose the permanent ban. By contrast Mr. Wolfenden's borrowing, although involving two clients, was in essence a single event, and JM's loan was fully secured by an appropriate mortgage, with lawyer involvement, and both loans were paid off in full prior to the arrival of the agreed- upon renewal dates. Mr. Wolfenden was prepared to pay interest to MP, but MP declined interest. The Wolfenden case was not, in the opinion of the Panel, a case that persuaded the conclusion that the Respondent was ungovernable.

d) *Sarang (Re)*:

i. Mr. Sarang entered into a settlement agreement with Staff that enunciated the penalty that was accepted by the Panel. Mr. Sarang, a Branch Manager of a Member of the MFDA ("WFG"), borrowed $29,015.17 from a client. That money was funded from the client's account with WFG. The money was invested in a business company in which Mr. Sarang was a shareholder and director. Mr. Sarang had not disclosed to the Member that outside business interest. Mr. Sarang mislead the Member by falsely answering the Members annual compliance certification related to personal dealings with clients, and engagement in gainful occupation outside the Member, contrary to MFDA Rule 1.2.1.(c). By contrast, the money borrowed by Mr. Wolfenden did not come from the clients' FundEX accounts, nor was it money intended by the lenders to be invested through FundEX.

16. The MFDA Book of Authorities, also contains the decision in the case of Earl Crackower, identified in paragraph 1 (e) above. In *Crackower*, the Respondent borrowed $3.4 million more of less from clients, which he failed to repay, did not co-operate with the investigation, and faced criminal prosecution. That case is not helpfully comparative to the within case.

**Principles Regarding Penalty**

17. The primary goal of investment industry rules is the protection of the client. The related important goals are, inter alia, as follows:

a) specific and general deterrence, related to breach of the Rules; and
b) the fostering of confidence in the integrity of the Canadian capital markets, the inviolability and virtue of the Rules, and the integrity of the enforcement process.

18. In the numerous decisions of MFDA Panels, addressing an Approved Person's borrowing from a client the Panels have found that such is a major breach of the Rules and virtually always leads to a suspension. The Submissions of Staff addressing the issue of appropriate penalty, contained the following words:

> "The above cases demonstrate that borrowing from clients is very serious misconduct which attracts significant penalties. All of the cases summarized in the chart resulted in permanent prohibitions, including those where the loans were repaid and the amount borrowed was significantly less than in the present case."

**DECISION**

19. In the within case, the Panel is satisfied that the Respondent did not realize at the time that he accepted the loan offer of MP, and sought the loan from JM, that the loans had anything to do with his FundEXservices or professional duty to these clients, or that a potential conflict in that regard entered the picture. Consequently, when FundEX responded to JM's complaint, and the Respondent denied that he was the borrower, the absence of his signature on the promissory note was seen by him as a fortuitous event that could preserve his justified innocence (i.e. justified innocence in his perception). That, of course, was a wrong knee-jerk decision. Complete honesty, and relevant disclosure at all times by an Approved Person with the Member is vital to the integrity of the investment industry, and the protection of the clients. The Respondent, in hindsight, realized that that was an unfortunate mistake, and weeks later, when FundEX showed him another copy of the promissory note that contained his signature, he conceded that he was the borrower. At that time, as well, he corrected his earlier assertion to FundEX that he had never borrowed from a client, when he revealed the mortgage loan from JM. It is quite possible that if the Respondent had not revealed to FundEX the JM mortgage loan, neither FundEX nor MFDA, would ever have known about it. MP did not co-operate with FundEX or MFDA, so the Panel cannot assume that MP would have known of the JM loan, and would have disclosed same.

20. When the FundEX Compliance Policies & Procedures and MFDA Rules, related to the loans, came to his attention following notice of the MFDA decision to commence the

disciplinary process, the Respondent studied the MFDA Rules, and was satisfied that those Rules did not specifically prohibit borrowing from a client. Motivated by the desire to vindicate his professional profile, and feeling that neither client lost money, or was at any time exposed to the possibility of loss, and given the fact that the loans did not come from the clients' accounts at FundEX, and given that he did not at the relevant time recognize a potential conflict of interest, the Respondent vigorously defended the allegations presented by MFDA. In due course he voiced acceptance of the decision of the Panel and expressed remorse.

21. The Panel wishes to make it clear that our decision should not be viewed as support for the proposition that, if an Approved Person believes that he/she is innocent with respect to an allegation or investigation of misconduct, being untruthful to the Member or MFDA, is justified, and will not attract significant sanction. Quite the contrary. Truthful disclosure is vital to the integrity of the investment industry. Avoidance of potential conflict of interest is equally vital.

22. The Panel wishes to make it clear that our decision on penalty should not be viewed as support for the proposition that, if an Approved Person was not aware of an industry rule, or a Member's directive, that prohibited certain conduct at the time that the said conduct took place, the Approved Person is relieved of the finding of breach and/or the imposition of penalty. The Panel's decision, on the merits, released on January 7, 2017, made that clear. It is of course the duty of all members and approved persons to keep informed of, and abide by, the Rules and directives of the MFDA and the Member. Failure to keep informed in that regard is a serious violation. However, distinct from the cases cited by MFDA staff in its Submissions on Penalty, the Panel has accepted that the Respondent's breach was not informed and deliberate, and that that factor is relevant to the penalty.

23. The Respondent was terminated by FundEX in October 2013, and has not been able to engage in the investment industry since then, and has suffered resultant measurable financial loss, as a result. He is 71 years of age. The Panel is satisfied that, in the circumstances of this case, the Respondent has already effectively suffered a suspension of 4 years. Even had this suspension not occurred, the Panel is satisfied that the Respondent's conduct constitutes the rare case where suspension is not persuaded.

24. Further, the Panel recognized that the Respondent suffered severe emotional distress in observing some factual allegations, made public by the Notice of Hearing, that were not, in due course substantiated in the evidence called at the Hearing, and resulted in the Respondent's vigorous defence to the allegations enunciated in the Notice of Hearing.

25. In addressing the appropriate penalty, the Panel considered the MFDA Penalty Guidelines Parts I and II [2] addressing whether or not suspension is appropriate, and the recommended minimum fine for conflict of interest. Those guidelines are not mandatory, but are informative. Regarding suspension, the Panel finds that the Respondent's conduct does not fall squarely within the criteria set out in the MFDA Penalty Guidelines

26. The Panel has decided that in the particular circumstances of this case, the appropriate penalty is as follows:

a) A fine in the amount of $5000.00 with respect to all allegations herein; and
b) Costs of the amount of $5000.00.

**DATED** this 2nd day of October, 2017.

"H. Michel Kelly"

H. Michel Kelly, QC
Chair

"Linda J. Anderson"

Linda J. Anderson
Industry Representative

"Leo M. Hill"

Leo M. Hill
Industry Representative

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[2] MFDA Book of Authorities(Penalty) tab 5 pages 5 of 27 and 9 of 27