

Decision and Reasons (Misconduct)

File No. 201516



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: September 27, 2016, in Toronto, Ontario
Decision and Reasons (Misconduct): January 5, 2017

**DECISION AND REASONS
(Misconduct)**

Hearing Panel of the Central Regional Council:

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)	In Person
)	
)	

Procedural Background:

1. On June 18, 2015, The Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Hearing¹ pursuant to sections 20 and 24 of MFDA By-law No.1, in respect of a disciplinary proceeding commenced against John Richard Wolfenden (the "Respondent"). The Notice of Hearing was served upon the Respondent on July 15, 2015. On August 3, 2015, the Respondent served and filed a Reply² to the Notice of Hearing. At the first appearance, conducted by teleconference, on August 25, 2015, the Hearing date was set for May 3, 2016 and May 4, 2016. Further teleconferences, as detailed in the Panel's Order dated August 18, 2016, were held to address the Respondent's requests for adjournment of the Hearing date, and the Hearing was ultimately scheduled to take place on September 27 and 28, 2016 in the hearing room at the MFDA offices in Toronto, Ontario. The Hearing proceeded on September 27, 2016, for one day.

ALLEGATIONS:

2. In the Notice of Hearing, the MFDA alleges the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between June 2010 and October 2013, the Respondent borrowed \$20,000 from client MP and \$80,000 from client JM, thereby engaging in personal financial dealings with clients which gave rise to a conflict or potential conflict of interest between the Respondent and the clients that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.1 and 2.1.4.

Allegation #2: The Respondent failed to report to the Member within two (2) business days or at all, client MP's complaint received on May 15, 2013 regarding the Respondent's failure to repay the monies he borrowed from client MP which constituted a complaint

¹ Exhibit 1

² Exhibit 3

in respect of personal financial dealings with a client, contrary to MFDA Policy No. 6, subsection 4.1(b)(v).

Allegation #3: Between August 8, 2013 and September 17, 2013, the Respondent misled the Member with respect to his personal financial dealings with client MP and client JM, thereby interfering with the Member's ability to conduct a reasonable supervisory investigation of the Respondent's activities and failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

Particulars alleged by MFDA in the Notice of Hearing:

Registration History

1. The Respondent has been registered in the securities industry at various times since 1999.
2. From June 12, 2006 to October 1, 2013, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with FundEX Investments Inc. ("FundEX"), a Member of the MFDA.
3. On October 1, 2013, FundEX terminated the Respondent as a result of the events described herein. The Respondent is not currently registered in the securities industry in any capacity.
4. At all material times, the Respondent conducted business in the Sarnia, Ontario area.

Allegation #1 – Borrowing from Clients

5. At all material times, FundEX's policies and procedures prohibited its Approved Persons, including the Respondent, from borrowing from clients.

6. In 2010, the Respondent and his spouse, BW, purchased a cottage for \$215,000 (the "Cottage"). In order to help pay for the Cottage, the Respondent borrowed a total of \$100,000 from client MP and client JM.

Client MP

7. From 2006 to 2013, the Respondent serviced client MP's account at FundEX.

8. In June 2010, the Respondent requested that client MP provide a personal loan to BW and him so that they could purchase the Cottage.

9. On June 22, 2010, client MP loaned \$20,000 to the Respondent (the "MP Loan"). The MP Loan was recorded in a promissory note which was signed by the Respondent, BW, and client MP (the "Promissory Note"). Among other things, the Promissory Note stated that:

- a) the Respondent and BW promised to pay client MP a principal sum of \$20,000 plus interest at a rate of 5% per annum calculated annually not in advance; and
- b) the principal and interest were due to be paid in full on or before June 30, 2011.

10. The Respondent did not repay any amount of the MP Loan by June 30, 2011.

11. In November 2011, instead of repaying the monies owed to client MP, the Respondent purchased a tract of land adjacent to the Cottage for \$40,000.

12. In February 2012, client MP telephoned the Respondent and requested that the Respondent repay the MP Loan. The Respondent told client MP that he was unable to repay him at that time but that he would repay him in June 2012. The Respondent did not repay any amount of the MP Loan by June 2012.

13. On May 15, 2013, client MP telephoned the Respondent and demanded that the Respondent repay the MP Loan by no later than May 22, 2013 (the “Demand for Repayment”). During the telephone call, client MP conveyed to the Respondent his frustration at not yet having been repaid the monies he had loaned to the Respondent.

14. On May 31, 2013, the Respondent took out a bank draft in BW’s name in the amount of \$20,000 and repaid the principal sum of the MP Loan to client MP. The Respondent did not pay any interest that was due on the MP Loan.

Client JM

15. From 2006 to 2013, the Respondent serviced client JM’s account at FundEX.

16. In June 2010, the Respondent requested that client JM provide a mortgage loan to him so that he and BW could purchase the Cottage. The Respondent knew that client JM had previously provided mortgage loans to other individuals.

17. On June 30, 2010, client JM loaned \$80,000 to the Respondent (the “JM Loan”). The terms of the JM Loan were recorded in a mortgage agreement (the “Mortgage Agreement”). Among other things, the Mortgage Agreement stated that:

- a) the principal amount of the JM Loan was \$80,000;
- b) the Respondent provided a charge over land to client JM;
- c) the interest rate of the JM Loan was 5%;
- d) the “Balance Due Date” of the JM Loan was June 30, 2012; and
- e) the Respondent was to provide client JM “with a series of 12 post-dated cheques annually on the commencing date, the 30th day of June in each year”.

18. The Respondent did not repay the JM Loan when it became due.

19. The Respondent repaid the JM Loan in early 2014.

20. By engaging in the conduct described above, the Respondent engaged in personal financial dealings with client MP and client JM, which gave rise to a conflict or potential conflict of interest between the Respondent and the clients that the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of the clients, contrary to MFDA Rules 2.1.1 and 2.1.4.

Allegation #2 – Failure to Report Complaint in respect of Personal Financial Dealings

21. As described above in paragraph 13, client MP made the Demand for Repayment to the Respondent on May 15, 2013.

22. MFDA Policy No. 6, subsection 4.1(b)(v) requires an Approved Person to report to his or her Member, within 2 business days, whenever the Approved Person becomes aware of a complaint from any person (in any form) against him or her involving allegations of personal financial dealings with a client.

23. The Demand for Repayment constituted a complaint in respect of the Respondent engaging in personal financial dealings with client MP, which the Respondent was required to report to FundEX within 2 business days of being made aware of the event in accordance with the requirements of MFDA Policy No. 6, subsection 4.1(b)(v). The Respondent failed to report the Demand for Repayment within 2 business days or at all.

24. As described below, FundEX did not become aware of the Demand for Repayment or the personal financial dealings between the Respondent and client MP until about July 19, 2013 when it received a complaint directly from client MP.

25. By engaging in the conduct described above, the Respondent failed to comply with the requirements of MFDA Policy No. 6, subsection 4.1(b)(v).

Allegation #3 – Misleading the Member

26. On or about July 19, 2013, client MP submitted complaints to FundEX and to the MFDA alleging, among other things, that the Respondent borrowed \$20,000 from him.

27. Prior to receiving a complaint from client MP, FundEX had not been aware of any personal financial dealings between the Respondent and his clients.

28. On July 31, 2013, FundEX requested a written statement from the Respondent advising, among other things, of the details of the MP Loan and whether the Respondent had borrowed monies from any other clients.

29. By letter dated August 8, 2013, the Respondent provided his written statement to FundEX. In the letter, the Respondent misled FundEX by:

- a) stating that the MP Loan was entered into between BW and client MP;
- b) failing to disclose that he was also a party to the MP Loan; and
- c) failing to disclose that he had entered into the JM Loan with client JM.

30. On August 13, 2013, as a result of the complaint by client MP, FundEX conducted a sales compliance review of the Respondent. During the sales compliance review, the Respondent falsely stated that he had never borrowed money from clients. The Respondent also falsely stated that the MP Loan was between BW and client MP and that he was not a party to the MP Loan.

31. By letter dated August 27, 2013, the Respondent provided another written statement to FundEX in respect of the complaint by client MP. In the letter, the Respondent again failed to disclose his own involvement in the MP Loan and continued to suggest that the MP Loan was only between BW and client MP.

32. In the letter dated August 27, 2013, the Respondent acknowledged that he had entered into the JM Loan with client JM. This was the first time that the Respondent disclosed to FundEX that he had borrowed monies from client JM.

33. On September 16, 2013, FundEX requested a further written statement from the Respondent regarding the Respondent's personal financial dealings with client MP and client JM.

34. By letter dated September 17, 2013, the Respondent provided his written response to FundEX. In the letter, the Respondent acknowledged, for the first time, that he was a party to the MP Loan.

35. By misleading FundEX in the manner described above, the Respondent interfered with the ability of FundEX to conduct a reasonable supervisory investigation of the Respondent's activities and failed to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rule 2.1.1.

3. The Allegations above are confined to the issues arising from the loans from the clients, and do not include any complaint against the Respondent related to his handling of the investment portfolios of the clients. JM had no complaint with respect to his loan nor to the handling of his FundEX account. Although in his formal Complaint, MP did articulate a complaint with respect to the Respondent's handling of his account, FundEX found that there was no valid basis for that complaint.³

4. The Notice of Hearing and the Reply are equivalent to pleadings, and are not factual evidence for the Panel. However, Rule 8.3(1) of the MFDA Rules of Procedure provides that the Panel may accept as proven any alleged fact or conclusion drawn by the Corporation in the Notice of Hearing, that the Respondent does not specifically deny in the Reply. The Panel is satisfied that the Respondent has specifically denied the allegations and particulars set out in the

³ Exhibit 4, Tab 14 FundEX Member Response

Notice of Hearing, except for the particulars specifically admitted by him (particulars 1, 2, 4, 6, 7, 15, 16, 17, and 22).

5. The Panel will address its factual findings, based upon the oral and documentary evidence called at the Hearing, later in this decision.

6. The Panel has decided to set out a summary of the Respondent's Reply, in recognition of the considerable effort of an unrepresented man, whose personal and professional reputation was on the line, to articulate all factors that may impact the issue of non-compliance, or, if violation is found, to measure the degree of violation.

The Respondent's Written Reply:

7. In his Reply, the Respondent denied the three Allegations, but admitted the particulars in the Notice of Hearing, set out as particulars 1, 2, 4, 6, 7, 15, 16, 17, and 22, above. In his Reply, the Respondent, specified the nature of his challenge to each of the other particulars.

8. To achieve focus in the drafting of this decision, the Panel is satisfied that the challenges set out in the detailed Reply can be summarized as follows:

General Assertions:

(a) MFDA Rules do not explicitly prohibit Approved Persons from obtaining a loan from a client, but simply prohibit an action that constitutes actual or potential conflict of interest as between an Approved Person and client. The Respondent cited the difference between the texts of FundEX Compliance Policy & Procedural Manual page 87,⁴ and MFDA Staff Notice MSN 0047 pages 1-2.⁵ The Respondent concedes that FundEX prohibits a Member from borrowing from a client, but asserts that the prohibition was based upon FundEX's view, not fully shared by MFDA, that all such borrowing constitutes a potential conflict between the Member and the lending client.

⁴Exhibit 4 Tab 7

⁵MFDA's Book of Authorities Tab 2

(b) The Respondent denies that his dealings with JM and BP involved any discernible conflict or potential conflict of interest, or compromised the integrity of his professional duty to them. He did not realize nor should he have realized, at any material time, that any such conflict or potential conflict came into play. In the circumstances, there was no professional duty to report the loans to FundEX prior to their initiation.

(c) The funds received were not from investment accounts that MP and JM had at FundEX, nor were they funds intended by the clients to be brought into their FundEX portfolios. The loans were properly documented and secured in the best interest of the client. JM had his own lawyer review and approve the transaction and supporting documents. MP declined the suggestion of the Respondent that he retain a lawyer.

(d) At no time prior to July 19, 2013, viz, the date that client MP filed his written Complaint, was the Respondent the recipient of a "complaint", and thereby required to give notice to FundEX, within two days thereafter. The client JM did not at any time make or file a complaint. His mortgage was paid in accordance with its terms, and was paid off early, and JM was very pleased with his mortgage transaction. The loan from MP was repaid on May 31, 2013, prior to MP's formal Complaint of July 19, 2013. The oral exchanges between the Respondent and MP in May 2013 did not constitute a complaint, but were simply a request for payment, and consequently there was no professional requirement that the Respondent report a complaint to FundEX. There is no MFDA rule or policy statement, that states that a Demand for Repayment is equivalent to a complaint .

(e) Both loans were repaid in full, in accordance with the timing expectations of the clients. before any complaint by MP was brought to his attention. The Respondent had sufficient funds at all material times (as confirmed by bank statements that he furnished to FundEX) to satisfy his obligations to the clients and had been making regular monthly payments to JM in accordance with the terms of the mortgage, including interest at 5% per annum. MP, on May 22, 2013, declined interest on his loan, notwithstanding the Respondent's expressed intention to pay it at

that time. MP stated that he did not want any interest (as provided for in the promissory note), but simply wanted the principal.

(f) With respect to Allegation No. 3, the Respondent denies that he at any time attempted to mislead FundEX or MFDA. He asserted that, after he was advised by FundEX of the MP complaint, he co-operated fully with FundEX, providing, inter alia, written responses to FundEX on August 8, 2013, August 27, 2013, and September 17, 2013; attending an MFDA interview on June 14, 2014; and providing his bank and phone records.⁶

(g) He did not deliberately mislead FundEX when, in August 2013, he advised FundEX that his wife, alone, was the borrower with respect to the MP loan. He based that assertion upon his viewing of his retained copy of the promissory note that contained only his wife's signature. He confirmed his involvement in September 2013, when he was shown by FundEX a copy of the promissory note that contained his signature. As well he did not reveal the JM loan to FundEX until August 2013, believing that such revelation, in the absence of specific consent of the client to disclosure of his private business, would breach the confidentiality rights of client JM as per the Federal *Privacy Act*. JM's absence on vacation, delayed the securing of that consent until mid- August 2013, at which time the Respondent revealed the JM loan to FundEX.

Reply Assertions Specific to Client MP:

(h) The Respondent did not solicit the loan from MP. MP, who was a friend as well as client, offered the loan, in response to appreciation of the Respondent's, and his wife's, immediate need for the money to close a deal for the purchase of the cottage. The bank (credit union), that was entertaining the provision of the mortgage for the cottage deal, at the last minute declined to make the mortgage loan, because the cottage was on an island. The Respondent provided a land mortgage to JM and a promissory note (executed by both the Respondent and his wife), to MP, to provide effective security to the lenders.

⁶Exhibit 4 Affidavit of Daniela Capozzolo Tabs 6, 14, 16, 18,

(i) The loan to MP was repaid in full on May 31, 2013, by the Respondent's wife, in response to MP's demand, before any complaint by MP was brought to his attention. The Respondent had sufficient funds at all times (as confirmed by bank statements that he furnished to FundEX) to satisfy his obligations to the clients MP and JM, and had been making regular monthly payments to JM in accordance with the terms of the mortgage, including interest at 5% per annum. MP, on May 22, 2013, stated that he did not want any interest, but simply wanted the principal paid immediately.

(j) The promissory note was repayable to MP at the end of its first term, in June 2011. The Respondent was ready and able to pay off the note at that time. MP advised the Respondent that he did not want the loan paid off at that time, and requested an extension for a further year, viz., until June 2012. The Respondent agreed. However, in February, 2012, MP requested payment in full, and the Respondent, although prepared to pay at that time, expressed his preference to have the payment made in June 2012, as previously agreed, so that he could avoid the tax consequence of withdrawing funds from his RRSP. The Respondent believed that MP concurred. In March 2012, the Respondent unsuccessfully attempted to contact MP by telephone to arrange for the payment. MP refused to return his call. Numerous unsuccessful contact attempts by telephone, mail, personal notes and contact with family members of MP were made by the Respondent during the balance of 2012, and early 2013, to address repayment. Finally, on May 15, 2013, MP contacted the Respondent to request payment, and the Respondent's wife made the payment on May 31, 2013 (consistent with the Respondent's belief at that time that the loan was made solely to his wife i.e. his retained copy of the promissory note had been signed only by his wife BW).

(k) The Respondent was not aware that MP had any complaint of any sort until July, 2013, when MP filed his written complaint. His dialogue with MP in May 2013, could not reasonably be considered as a "complaint" that required disclosure to FundEX or MFDA. The request of MP for repayment is not equivalent to a complaint. There is no MFDA rule or policy statement that states that a request for repayment constitutes a complaint. Therefore there was no requirement for the Respondent to report the loan, or request for payment, to FundEX prior to July 2013.

The promissory note was never in default - the delay in payment arose from MP's deliberate failure to respond to the Respondent's effort to schedule the repayment. On repayment, interest was offered but was not paid, because MP stated specifically that he did not want interest.

(l) In responding to FundEX in August, 2013, following MP's July 2013 complaint, the Respondent initially advised FundEX that the loan from M.P was not made to him, but rather to his wife. He based that assertion on his inspection of his retained copy of the promissory note that contained only his wife's signature. In due course when he was shown by FundEX the copy of the promissory note, that contained both his and his wife's signatures, he conceded that the loan from MP was made to him and his wife.

(m) While the FundEX investigation was underway, the Respondent voluntarily gave up his registration pending the resolution of the complaint, although uncertain as to the precise nature of the complaint. The official termination by FundEX flowed thereafter, on October 1, 2013.

Reply Assertions Specific to Client JM:

(n) Client JM at no time made any complaint to FundEX or to MFDA, with respect to the Respondent's handling of his portfolio, or with respect to the loan, and was very satisfied with the Respondent's services. The mortgage to JM was paid in monthly installments of principal and interest, and was paid off early and fully in January 2014. The mortgage loan was never in default. It was renewed from year to year by unsolicited mutual consent. The due date became June 30, 2014. JM, a sophisticated investor with over twenty-years' experience with respect to mortgage investment, stated to the Respondent that he was very satisfied with the mortgage deal, and had his own lawyer involved throughout.

(o) In his Reply, responding to MFDA particulars Items 19 to 27 contained in the Notice of Hearing, the Respondent stated that, by then, he had not as yet received the MFDA documents addressing those allegations, and was therefore unable to make an informed response. However he did deny those particulars. He did state that the transaction with JM was a private deal and that disclosure to FundEX or MFDA of its particulars, was contrary to the *Federal Privacy Act*,

FundEX Policy, and MFDA Policy. He sought, and received JM's consent to reveal the JM loan details, and provided them to FundEX.

THE EVIDENCE:

9. The Respondent appeared, unrepresented, at the Hearing. Mr. Paul Blasiak, counsel for MFDA, made an opening statement, as did the Respondent. MFDA called one witness, Ms. Daniela Capozzolo, Senior Investigator with MFDA, and filed Ms. Capozzolo's affidavit⁷, containing extensive documentary exhibits (i.e. exhibits to her affidavit), separated by 20 numbered tabs.

10. The affidavit was entered as Exhibit 4, without objection. The Respondent cross-examined Ms. Capozzolo, and testified himself, and filed certain exhibits.

11. Tab 4 of Ms. Capozzolo's affidavit contained the transcript of the Interview of the Respondent conducted by Ms. Capozzolo and Mr. Clement Wai, MFDA Enforcement Counsel, on June 11, 2014, pursuant to MFDA By-law 1, Section 22.⁸

12. Neither MP nor JM appeared to give evidence. Mr. Blasiak pointed out that MFDA had no legislative power to compel the attendance of MP or JM to testify at the Hearing. Neither MP nor JM wished to co-operate with the MFDA investigation, and their attendance at the Hearing was not sought by MFDA. JM was quite satisfied with the Respondent's services, and had no complaint with respect to his loan, or to the handling of his FundEX portfolio. Ms. Capozzolo confirmed under cross-examination that MP, although having filed a complaint, was less than cooperative with FundEX and MFDA during the investigation process, and refused to attend for an MFDA interview. As well Ms. Capozzolo confirmed that FundEX found no professional deficiency related to the Respondent's handling of MP's investment portfolio.⁹

⁷Exhibit 4

⁸Exhibit 4 Tab 6

⁹Exhibit 6 - Letter from FundEX to MP dated October 18, 2013.

13. The Panel is satisfied that the oral testimony at the Hearing and the documentary evidence received as exhibits were admissible in evidence pursuant to s. 1.6 of the MFDA Rules of Procedure. The Notice of Hearing and the Reply are not evidence, but are equivalent to pleadings. However the degree to which the factual allegations and conclusions, set out in the Notice of Hearing and Reply, are supported by the evidence, can be relevant in due course to the issue of costs of the Hearing.

The Facts, as accepted by the Panel:

(a) Borrowing from Clients:

14. MP and JM were clients of the Respondent, at FundEX, from approximately 2006 until June 2013(MP) and October 1, 2013 (JM). The Respondent, a mutual-fund investment advisor, serviced their accounts. The Panel accepts the uncontested evidence of the Respondent that he and MP became close friends, playing golf together, sharing lunch dates, other social interaction, visits of the Respondent and his wife to the home of MP's mother (where MP lived), and MP overnight visits to the Respondent's cottage. JM was also a friend, but more casual.

15. In 2010, the Respondent and his wife ("BW") decided to purchase a cottage for \$215,000.00. They applied for a mortgage on the cottage to address the purchase, and were initially advised that the mortgage company was prepared to proceed with the mortgage. However, after the agreement of purchase and sale had been executed, their mortgage request was turned down, by the intended mortgage company (i.e. a credit union), because the cottage was located on an island. This created an immediate need to find alternative mortgage financing. When the Respondent casually disclosed this mortgage glitch to his friend MP, MP volunteered to lend \$20,000.00 toward the purchase, and the Respondent accepted. The Panel is satisfied, on balance of probabilities, that this loan offer was not solicited by the Respondent, but resulted from MP's appreciation that his friends, the Respondent and BW, were in a bit of a bind. MP had cash on hand in a safety deposit box.

16. The Respondent contacted client JM, whom he knew had extensive experience in providing mortgage funding, and asked him if he would be interested in lending money to the Respondent to enable the cottage purchase. JM agreed to do so to the tune of \$80,000.00. This loan was solicited by the Respondent. The purchase proceeded in June 2010, and title to the cottage was taken in the name of the Respondent.

17. The loans were processed to affect the closing of the cottage purchase. To secure the repayment of the loan from MP, the Respondent and his wife BW provided to MP a promissory note in the amount of \$20,000.00 with a term of one year, and bearing interest at the rate of 5% per annum, payable at maturity. To secure the JM loan, the Respondent gave to JM a mortgage on land in the amount of \$80,000.00 for a term of two years, open and renewable, with interest at 5% per annum, and repayable during its term by monthly payments of principal and interest. The Respondent advised MP that he should obtain the advice of a lawyer in connection with his transaction. MP declined that suggestion. JM was throughout represented and advised by a lawyer. It is undisputed that the Respondent did not advise FundEX of these loans prior to their implementation, or prior to MP's complaint of July 19, 2013.

18. Client JM at no time made any complaint to FundEX or to MFDA, with respect to the Respondent's handling of his portfolio, or with respect to his loan. The mortgage to JM was paid in monthly installments of principal and interest, and was paid off early and fully in January 2014. The mortgage loan was never in default. Its original term was two years. However, it was renewed thereafter in accordance with its terms, by unsolicited mutual consent, and the due date became June 2014. It was fully paid off, including interest, in January 2014. JM, a sophisticated investor with over twenty-years' experience with respect to mortgage investment, stated to the Respondent that he was very satisfied with the mortgage deal.

19. The Panel accepts that these loans were not being sourced from the clients' FundEX investment portfolios, nor were they identified by the clients as funds they intended to be invested through FundEX, or any other investment service provider. MP did not testify at the Hearing, nor did he cooperate with MFDA investigators to provide further assistance in support of his Complaint allegations. The thrust of his written Complaint was the allegation that the

Respondent did not, in timely fashion, attend to his expressed desire to change his portfolio products during August 2011. MP was seeking compensation from FundEX in that regard. FundEX, in its investigation determined that this complaint was without merit.

20. In the second paragraph of his Complaint, MP addressed the loan. MP stated that the Respondent solicited the loan from MP when MP had considered placing the funds in his FundEX portfolio. The Panel accepts the evidence of the Respondent, on balance of probability, that the loan was not solicited by him but rather was offered by MP to assist his good friend, and friend's wife, whom he understood were experiencing a financing problem in connection with the cottage purchase, and that MP had not expressed to the Respondent any intention to place those funds into his FundEX account. MP, in his Complaint, admitted that the \$20,000.00 was all cash, accumulated over "a number of years" and lodged in a safety deposit box, in anticipation of the possible eventual purchase of a car or motorcycle. MP stated that he liked to have cash on hand. These facts suggest to the Panel that it was unlikely at that time that MP was thinking of adding this cash to his FundEX portfolio. FundEX Rules prohibit the receiving of cash from a client to purchase an investment product. MP did concede in his Complaint¹⁰ that in June 2011, when the promissory note was due, MP requested that, as he had no need for the cash at that time, the Respondent agree to extend the pay-off date. The Respondent agreed. This scenario supports the Panel's conclusion that MP at no time had intended to have the loan monies applied to his FundEX account. *A fortiori*, there was no evidence that MP ever conveyed that intention to the Respondent.

21. In June 2011, when the MP loan became due, MP advised the Respondent that he did not wish to receive payment at that time, but wanted the term extended until June 2012. The Respondent's evidence in that regard is confirmed in MP's written Complaint to FundEX, dated July 18, 2013¹¹, except that the written Complaint states that the repayment date was not fixed, but would simply await MP's future notice to the Respondent when repayment would be sought. The Panel accepts the Respondent's statement that, by mutual agreement, the due date for payment of the debt was not left open, but was extended to June 2012, at which time the full principal, plus two year's interest, would be paid in full. The Respondent agreed to the extension,

¹⁰Exhibit 4 Tab 5

¹¹Exhibit 4 Tab 5

although he had funds available to pay the loan at that time (as confirmed by his bank records provided to MFDA¹² during the investigation). However, in February 2012, MP contacted the Respondent to request repayment at that time, as he was considering the purchase of a car for his sister. The Respondent advised MP that he was prepared to make payment at that time, but preferred to make the payment in June 2012, as previously agreed, so as to avoid the income tax exposure associated with the anticipated withdrawal from his RRSP. The Respondent had apparently used up his available liquidity when he purchased the lot next to his cottage for \$40,000.00 in October 2011. According to the Respondent, MP appeared to him to be agreeable to maintaining the June 2012 deadline. Then, inconsistent with that impression of MP's acceptance, the Respondent, in March of 2012, was unable to receive response to his efforts to make contact with MP to discuss MP's investment account, and the anticipated procedure for the repayment at that time.

(b) Reporting a Complaint:

22. The basis of Allegation #2 is that the dialogue between the Respondent in May 2013 was equivalent to a complaint that was not disclosed to FundEX within 2 days thereafter.

23. It was clear on the evidence that in the Spring of 2012, M.P. was not happy with the Respondent. The Panel did not have the benefit of MP's testimony, and therefore has to speculate to some degree as to the reason for MP's discontent. The Panel is satisfied that the misunderstanding between MP and the Respondent, as to the timing for repayment, was likely the trigger for MP's discontent. The Respondent did acknowledge that MP's mother (who had become his and his wife's friend), in response to the Respondent's effort to make contact with MP during March 2012, advised the Respondent that MP was angry as a result of his perception that the repayment should have been made at that time. In his letter to FundEX dated August 27, 2013, the Respondent stated that he had monthly contacts with MP from August 2011 to February 2012, and stated that the contacts were cordial.¹³ That evidence was not challenged.

¹²Exhibit 6

¹³Exhibit 4 Tab 18 p.112

24. MP's formal Complaint to FundEX in July 2013 focused initially on his complaint that the Respondent had not diligently responded to the request made by MP in August 2011, to effect sales from MP's FundEX portfolio. As we stated below, this allegation was rejected by FundEX after appropriate file review. MP in his Complaint stated that he contacted the Respondent by phone on May 15, 2013 to request that the Respondent effect the closure of his FundEX account, and the Respondent tried to put him off for two weeks. This, he said, made him angry, and he insisted that the Respondent meet with him at his home on May 22, 2013 and bring with him detailed documentary account information, and the repayment funds. MP stated that the Respondent called him on May 22, 2013, and refused to meet with him, and he called FundEX the same day to have his account moved to the FundEX house account.

25. In his detailed letters to FundEX, dated August 8, 2013 and August 27, 2018, the Respondent addressed MP's complaint with respect to the handling of his portfolio.¹⁴ FundEX's internal investigation report, dated September 19, 2013, responding to MP's Complaint, rejected the validity of any complaint that MP could have with respect to the Respondent's handling of his account.¹⁵

26. The second paragraph of MP's formal Complaint addressed the loan. The Panel accepts the Respondent's testimony that MP, in June 2011, had requested that repayment of his loan be extended to June 2012. The Panel accepts the Respondent's assertion that when MP requested repayment in February 2012, the Respondent was not aware that MP had any anger-causing issue with him. The Panel accepts the evidence of the Respondent that MP had not expressed to him, at any time, prior to May 15, 2013, a complaint with respect to his handling of MP's portfolio. On the evidence, it is difficult for the Panel to understand the precise reason why MP was very angry in May 2013, given the un-contradicted evidence that the Respondent, since March 2012, had made substantial attempt to contact MP to facilitate the repayment of the loan. However, the Panel does find that MP's resistance to the Respondent's contact efforts from March 2012 to May 15, 2013, combined with the disclosure by MP's mother in the Spring of 2012 that MP was angry that the Respondent wished to withhold payment until June 2012, must have informed the Respondent that MP was likely angry with respect to the loan.

¹⁴Exhibit 4, Tabs 16 and 18 Responses of Respondent

¹⁵Exhibit 4 - Tab 14: FundEX Internal Investigation Report

27. MP did contact the Respondent on May 15, 2013 to demand repayment and to discuss the closing of his FundEX account. The Respondent advised him that he would need a few days to access the funds. On May 22, 2013, MP contacted the Respondent, by phone, and was "irate and irrational" and "berated" ¹⁶ the Respondent demanding that the Respondent attend at MP's residence (his mother's home) that day with the money and with draft forms to effect closure of his FundEX portfolio. The Panel accepts the Respondent's evidence that, on the phone call, when he responded to MP's complaint that he had not diligently addressed MP's investment change intentions in August 2011, the Respondent, while denying that MP was neglected, reminded MP that the Respondent, in August 2011, was dealing with a traumatic event, the life-threatening tragic injury suffered by his son in a fall at the Niagara Gorge. When MP responded that the son's injuries were irrelevant to his concerns, the Respondent hung up the phone. The Respondent had no further direct contact with MP. MP contacted FundEX to request the transfer of his portfolio to a FundEX home account. There is no evidence that MP made any complaint to FundEX at that time with respect to the loan. The Respondent and BW attended at the office of a lawyer and, through the services of the lawyer, sent BW's cheque for \$20,000.00¹⁷, to MP on May 31, 2013 in full payment of the principal. The Panel accepts the Respondent's assertion that MP said, on May 22, 2013, that he did not want the interest, just the principal.

28. The Panel notes that MP's formal complaint does not contain a complaint that he was not paid the interest.

29. The Panel accepts the evidence that the Respondent did not advise FundEX of the anticipated loans prior to their implementation, and thereupon seek approval. The Respondent did not inform FundEX of the potential problem, when the June 2012 pay-off deadline passed, and MP was refusing to respond to the Respondent's contact efforts. The Respondent did not inform FundEX immediately of the less than harmonious exchanges between him and MP in May 2013.

Misleading the Member:

¹⁶Exhibit 4 - Tab 5: MP's formal complaint.

¹⁷Exhibit 4 Tab 9

30. The Panel accepts the evidence that in the initial period of FundEX's investigation, the Respondent asserted to FundEX the misleading position that his wife, and not he, was the borrower of the MP loan. Whether or not this information was deliberately misleading, and the effect, if any, it had in impairing the investigation process will be addressed by the Panel below, in the Analysis and Decision section of this decision. The Panel will also deal with the issue as to whether or not the Respondent was justified in not revealing to FundEX the loan from JM, prior to receiving JM's consent to disclosure.

Analysis and Decision:

Allegation #1 Borrowing from Clients:

31. Allegation #1 alleges violation of MFDA Rules 2.1.1. and 2.1.4 . Those rules fall under the heading BUSINESS CONDUCT. Rule 2.1.1 sets out the ethical framework that binds the Member and the Approved Person in dealing with clients. Rule 2.1.4 addresses Conflicts of Interest. The text of Rule 2.1.4 is as follows:

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 of interest, 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 Approved Person as the Member directs....prior to the 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).

32. The MFDA Rules 2.1.1 and 214 do not specifically prohibit borrowing from a client. MFDA's emphasis is the identifying and disclosing of conflicts or potential conflicts, and the requisite need to avoid them. MFDA Staff Notice MSN-0047, dated October 3, 2005, states under the heading " Personal Financial Dealings with Clients", the following:

Borrowing from a client by either the Member or Approved Person raises a significant conflict that in almost all cases will be impossible to resolve in favour of the client. While such activity is not explicitly prohibited under MFDA Rules, MFDA staff are unaware of any circumstances where Members or Approved Persons proposing to enter into such arrangements would be able to demonstrate that the conflict has been properly dealt with.

33. In MFDA Staff Notice MSN-0054 (dated June 22,2006 - updated March 4, 2013) under the heading "CONFLICTS OF INTEREST - MFDA RULE 2.1.4." at page 1 the following words appear:

In applying the rule in practice, MFDA staff takes the position that the concept of materiality is implicit in the rule. MFDA staff does not expect members to anticipate every potential conflict regardless of the remoteness of a problem arising, and provide written disclosure to clients of such conflicts. However written notice must be provided in all cases where there is a reasonable likelihood that a client would consider the conflict important when entering into a proposed transaction.

At page 2: *In situations involving a particularly significant conflict of interest, the appropriate course of action may require a prohibition on the type of transaction giving rise to the conflict. For example, MFDA staff would expect that transactions involving borrowing from clients would generally be prohibited.*

34. In the Particulars set out in the Notice of Hearing, MFDA alleged that FundEX prohibited its Approved Persons from borrowing from a client. In purported compliance with MFDA Rule 2.1.4 (d), FundEX Compliance Policy & Procedure Manual "CPPM"), dated September 2008, prohibits an Associate from borrowing from a client, and identifies that act as a conflict of

interest and a breach of business professionalism.¹⁸ The same Manual ("CPPM"), dated January 2012, states, under the heading "Borrowing from clients" that:

*"Borrowing from a client is prohibited by MFDA Rules. We are unaware of any circumstances where Representatives proposing to enter into borrowing arrangements with clients would be able to demonstrate that the conflicts of interest have been properly dealt with."*¹⁹

35. On the same page, but under the heading "Lending to clients:" the following words appear:

*"In accordance with MFDA Rule 3.2.1 -...no Representative shall lend to, extend credit to, **or borrow** (Panel's emphasis) from any client for any reason..... Lending funds to or borrowing funds from a client,.....constitutes a conflict of interest and breach of business professionalism, and will result in disciplinary actions..."*

36. However, MFDA Rule 3.2.1. does not deal with borrowing, but only with lending or extending credit to a client. Nevertheless FundEX, in expressed compliance with MFDA Rule 3.2.1, prohibited, *inter alia*, borrowing from a client. The FundEX CPPM also prohibits a Representative from receiving cash from a client. MFDA did not, in the Notice of Hearing, allege violation of MFDA Rule 3.2.1.

37. In the Notice of Hearing, Allegation #1 was confined to the allegation that the Respondent breached MFDA Rules 2.1.1 and 2.1.4. The Allegation did not make direct reference to the FundEX CPPM, cited above. However the particular provided in the Notice of Hearing did. It stated:

5. At all material times, FundEX's policies and procedures prohibited its Approved Members, including the Respondent, from borrowing from clients.

¹⁸Exhibit 4 Tab 7 p.17 (number at bottom of page)

¹⁹Exhibit 4 Tab 7 p.87 (number at bottom of page)

38. It is clear to the Panel that MFDA did not specifically prohibit borrowing from a client, recognizing that there may be a rare case where the borrowing does not raise a conflict or potential conflict. In view of the Respondent's defence that MFDA did not absolutely prohibit borrowing from a client, in all cases, the Panel had to address the issue as to whether or not FundEX had the jurisdiction to override the MFDA Rule 2.1.4., that did not recognize that borrowing from a client is **always** a conflict of interest.

39. The Panel concludes that MFDA's position, in this Hearing, is that FundEX's prohibition arose from its mandate or directive under MFDA Rule 2.1.4(d), and is therefore binding in any MFDA discipline process involving a FundEX Approved Person. That position was not specifically articulated by MFDA, but is implicit in the Notice of Hearing. The Panel is satisfied that the MFDA directive in Rule 2.1.4(d) anticipates that the Member will address the conflict of interest issue, and that MFDA will uphold the Member's Rule, with respect to that member's Approved Persons.

40. The Panel, after careful consideration, is satisfied that breach of FundEX's CPPM, referred to above, is tantamount to a breach of the conflict of interest provisions in MFDA Rule 2.1.4.

41. In the decision of the Hearing Panel of the MFDA Pacific Regional Council, dated May 28, 2012, in the case of Conrad Arthur Nunweiler, MFDA File No. 201030,²⁰ the Panel found that the Respondent's violation of the Rules of his Member, IPC, prohibiting borrowing from a client, was thereby a violation of MFDA Rules 1.1.2, 2.1.1 and 2.5.1. Those rules require the Member to institute and enforce rules binding its Approved Persons to adhere to the ethical standards articulated by MFDA Rules. The Panel of the Central Regional Council reached the same conclusion in the case of Carmel Toussaint, MFDA File No. 201039.

42. The decisions of Hearing Panels contained in the MFDA Book of Authorities, provided to the Panel, found, without hesitation, that the borrowing from a client, raised a conflict or potential conflict.

²⁰MFDA Book of Authorities, Tab 4

43. MFDA did by Rule 2.1.4.(d) direct that:

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4.(a), (b), and (c).

FundEX did so and articulated the policy that a Member shall not borrow from a client.

44. The Respondent testified that although he had read the FundEX CCPM dated September, 2008, he was unsure of the parameters of the potential conflict restriction, and following the filing of the MP complaint, consulted his lawyer. The Panel did not attempt to elicit information protected by solicitor-client privilege. In any event, the Respondent maintained his position that MFDA did not specifically prohibit borrowing from a client.

45. The Panel is satisfied that the FundEX CPPM prohibited the borrowing from a client, and that its authority for so doing complied with its obligation under MFDA Rule 2.1.4.(d). The Panel is satisfied that the borrowing from MP and JM violated the FundEX CPPM. As well, the Panel is satisfied that the Respondent's conduct constituted a potential conflict with the clients, contrary to MFDA Rule 2.1.4. The facts do not disclose an unusual scenario that would, reasonably, remove any potential conflict of interest, as between the Respondent and clients MP and JM.

46. The Panel accepts that the following factors do reduce the severity of the breach:

(a) the loan from MP was not solicited, and came from a friend, and a potential problem would not "jump off the page";

(b) the loan from JM was a loan from an experienced mortgage investor who had legal counsel involved throughout, No complaint from JM surfaced;

(c) there is no evidence that the loans were part of a continuous pattern of loan acquisition misconduct, or other misconduct - it was an isolated infraction;

(d) the Respondent took the allegations very seriously;

(e) the loans were not funds that came from the clients' FundEX portfolios, nor were they funds intended by the clients to be placed with FundEX; and

(f) the loans were repaid prior to the formal complaint.

47. However, the Panel finds that these factors are not sufficient to remove the potential conflict. These factors are relevant to the Panel's ultimate decision on appropriate penalty, and to Allegation #2.

48. The Panel is therefore satisfied that MFDA has proven Allegation #1.

49. Although Allegation #1 refers to violation of Rule 2.1.4, it does not in the pleaded particulars specifically allege a violation of Rule 2.1.4(c). The Panel therefore need not address whether or not that sub- Rule was complied with.

Allegation #2 Failure to Report Complaint:

50. The client JM made no complaint. This allegation is confined to the MP loan. The Respondent asserts that, prior to July 18, 2013, he was not aware, nor should he have been aware that a "complaint" was made by MP.

51. The thrust of Allegation #2 is that the Respondent, as a result of his telephone exchanges with MP on May 15, 2013 and May 22, 2013, knew that MP was angry about the delayed repayment of his loan, and that the expression of anger was equivalent to a complaint that had to be reported to the Member, in compliance with MFDA Policy No. 6, subsection 4.1(b)(v). The Allegation is confined to the delayed payment issue, and does not assert that MP's reference in the phone calls to the handling of his FundEX account was a complaint, that required reporting. The Allegation deals with duty arising on May 15, 2013 and continuing on May 22, 2013, related to the loan. Consequently the Panel will confine its consideration to the loan payment issue, and the issue of the duty of the Respondent commencing on May 15, 2013.

52. The Respondent argues that he was ready and able to repay the loan by its due date of June 2012, and that the payment was not made because he was unable to make contact with MP, who admitted in his Complaint that he would not return the Respondent's calls subsequent to their telephone chat in February 2012. The Respondent testified that prior to May 2013, he did not know why MP was not responding to the Respondent's efforts to contact him. The Respondent appeared to be asserting that because MP's anger was unjustified, such anger could not constitute a "complaint". The Panel is satisfied that whether or not a complaint is justified the complaint must be reported to the Member. The Panel is satisfied that the May 15, 2013 telephone conversation between MP and the Respondent addressed, *inter alia*, MP's anger that the loan had not been repaid in accordance with his expectation. But did this constitute a "complaint" within the meaning of MFDA Policy No. 6, subsection 4.1(b)(v) ?

53. The text of MFDA Policy No. 6, subsection 4.1(b)(v) is as follows:

An Approved Person shall report the following events to his or her current Member, in such detail as required by the Member, within two business days:

(b) the Approved Person is aware of a complaint from any person, whether in writing or any other form, and with respect to him or herself, or any other Approved person, involving allegations of:

(v) personal financial dealings with a client.

54. The subject matter of the complaint falls squarely within the wording of sub-subsection 4.1(b)(v) .

55. Not all expressions of dissatisfaction constitute a complaint. However, where an Approved Person engages in personal financial dealings with a client, and anger with respect thereto is expressed by the client, the Approved Person has the duty to report the dissatisfaction to the Member, notwithstanding that the expression of anger is unjustified. The Panel finds that the expressed anger, notwithstanding the intention of the Respondent to make an immediate payment to retire the loan, was equivalent to a complaint. The Respondent failed in his duty to

report the complaint. Any expectation that the payment would solve the problem and make the complaint disappear, does not relieve the Respondent of the duty to report.

56. The Panel is satisfied that Allegation #2 has been proven, on balance of probabilities.

Allegation #3 Misleading the Member MFDA Rule 2.1.1

57. This allegation pertains to both MP and JM. When the FundEX investigation got underway following the July 18, 2013 MP Complaint, the Respondent advised the Member that he did not borrow money from MP, and that it was his wife who borrowed the money. He pleaded in his Reply, and testified that he had initially believed that his wife was the actual borrower, and that that belief was based on the copy of the promissory note that he had retained, that had been signed only by his wife. When, in September 2013, he was shown by FundEX staff the copy of the promissory note that contained his signature, he conceded that he was one of the recipients of the loan.

58. The Respondent asserted that his denial to the Member, prior to September 2013, that he had borrowed money from any other client was based on his understanding at the time that revealing the loan from JM, without JM's consent to disclosure, would be a breach of JM's right to Privacy and confidentiality, contrary to the Federal *Privacy Act*. Upon receiving the requisite consent, he acknowledged the JM loan.

59. The Panel does not accept the Respondent's evidence that at the time of his initial response to the Member, he believed that he was not the borrower of the MP loan. He had the initial conversation with MP in 2010. He initiated the contact with JM. He made the attempts to contact MP to arrange for payment of the MP promissory note. He drafted the promissory note that showed that both he and his wife were the borrowers. He became the registered owner of the cottage. The Panel is satisfied that even were his wife the borrower, the same potential conflict would, to his knowledge, arise. The purchase of the cottage was for his benefit, as well as for the benefit of his wife, and he was an active participant throughout.

60. What the Panel finds happened is this. In response to a question from the Chair the Respondent admitted that following the Complaint, he was worried about the consequences, and fortuitously found his copy of the promissory note that was not signed by him, three years before. He admitted that he felt that that might give him a ready answer to the complaint.²¹ If indeed he had not signed the promissory note, it might be possible to legitimately claim in law that he was not the borrower, but merely a facilitator. That might provide an arguable reduction to the certainty of the alleged conflict allegation. He also asserted the *Privacy Act* as the reason for not identifying JM as a lender, such assertion following a visit to a lawyer in the summer of 2013.

61. The Panel does not accept that the *Privacy Act* comes into play when requisite communication is that between the Approved Person and the Member.

62. The Panel is satisfied, on balance of probability that the Respondent, who had an unblemished record until then, and felt that he was morally blameless in securing the loans, and had paid off the loans, was very upset in encountering the possibility of loss of professional reputation and accreditation. He was reluctant to abandon what he thought might fortuitously provide a valid technical defence, and, again "shot himself in the foot". Apart from those positions, the Respondent co-operated fully with the FundEX/MFDA investigation.

63. The Panel is satisfied that MFDA has proven Allegation #3.

64. Counsel for the MFDA requested an order of the Panel as follows:

"If at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*."

65. That request was unopposed.

²¹Transcript pp 180 and 181

66. The Panel hereby makes that Order.

PENALTY

67. There was insufficient time at the end of the first day of the Hearing for the Panel to receive submissions with respect to penalty. The Respondent indicated that he preferred not to have to return the next day for that purpose as he lived in Western Ontario. He suggested that if the Panel decided that he had committed any of the alleged violations, the penalty phase could perhaps be addressed by teleconference, or in writing.

68. The Panel has decided that brief submissions on penalty are required. The Panel will entertain the wishes of the parties as to the method and date for those submissions. The Panel requests that MFDA staff contact the parties to schedule the method and date for the penalty submissions. If the parties are unable to agree with respect to method and date, the penalty submissions shall be heard in person at 121 King Street West on a date in January 2017, agreeable to the parties, and the Panel.

DATED this 5th day of January, 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