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: Conrad Arthur Nunweiler

Heard: March 8, 2012 in Vancouver, British Columbia
Reasons for Decision: May 28, 2012

REASONS FOR DECISION

Hearing Panel of the Pacific Regional Council:

Stephen D. Gill	Chair
Sharon Moskalyk	Industry Representative
Cecilia Wong	Industry Representative

Appearances:

David Halasz	)	Counsel, For the Mutual Fund Dealers
	)	Association of Canada
Conrad Arthur Nunweiler	)	No in attendance or represented by counsel
	)	
	)	

Background

1. By a Notice of Hearing dated October 5, 2010 the Mutual Fund Dealers Association of Canada ("MFDA" or the "Association") commenced disciplinary proceedings against Conrad Arthur Nunweiler ("Nunweiler" or the "Respondent"). A first appearance took place by teleconference before the Hearing Panel on November 9, 2010; the Respondent appeared by his agent, Gilbert Wong. There were a number of further proceedings, and directions from the Panel, which are set forth in the Decision and Reasons in this matter of July 4, 2011.

2. Pursuant to directions from the Panel, the Respondent filed an Amended Reply dated March 20, 2011. In that Reply, the Respondent made a number of admissions in respect of matters alleged in the Notice of Hearing.

3. On July 4, 2011 the Panel directed the Respondent to provide full particulars to MFDA staff in respect of his Reply, such particulars to be delivered no later than July 29, 2011. The Respondent did not comply with that Order and did not provide any particulars.

4. Following the decision of the Panel dismissing the two motions brought by the Respondent, this matter was set for a hearing on the merits on March 7th and 8th, 2012. The Respondent was duly served with notice of the Hearing on the merits, but did not appear either personally or through counsel.

March 7, 2012 Hearing

5. As scheduled, the hearing on the merits convened in Vancouver on March 7, 2012. The Respondent did not appear personally or through counsel. Rule 7.3 of the MFDA Rules of Procedure states:

> "**7.3** ***Failure to Attend Hearing***
>
> (1) Where a Respondent fails to attend the hearing on the date and at the time and location specified in the Notice of Hearing, the Hearing Panel may:
>
> (a) proceed with the hearing without further notice to and in the absence of the Respondent; and

(b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1."

6. Pursuant to Rule 7.3, the Panel proceeded with the hearing, and accepted the facts alleged and conclusions drawn by the MFDA in the Notice of Hearing as proven. After hearing further evidence, and detailed submissions from counsel for the MFDA, including a written brief, the Panel imposed the penalties and costs which were published by the MFDA on March 8, 2012, and will be set forth later in this decision.

7. It is appropriate at this point to set out the allegations in the Notice of Hearing, and the Particulars.

Allegation #1: Between May 2006 and December 12, 2008, the Respondent borrowed monies from at least two clients totaling approximately $56,300, thereby giving rise to an actual or potential conflict of interest which 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 2.1.4 and 2.1.1.

Allegation #2: Between May 2006 and December 12, 2008, the Respondent failed to comply with the policies and procedures of the Member in respect of conflicts of interest and borrowing from clients by borrowing monies from at least two clients and personally guaranteeing at least one of the loans, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #3: On October 21, 2008, the Respondent misled the Member by representing to the Member that he had not borrowed from clients, when he knew that to be an incorrect statement at the time and in the circumstances when he made it, thereby interfering with the ability of the Member 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 Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #4: Commencing March 19, 2009, the Respondent has failed or refused to provide documents, information, and a written statement to the MFDA and to attend an interview requested by the MFDA during the course of an investigation, contrary to s.22.1 of MFDA By-law No. 1.

8. The Particulars in the Notice of Hearing state the following:

Registration History

1. The Respondent was registered in British Columbia as a mutual fund salesperson with the IPC Investment Corporation ("IPC") from July 2, 2001 to December 12, 2008, when he resigned.

2. The Respondent was previously registered in British Columbia as a mutual fund salesperson with Assante Financial Management Ltd. from January 23, 2001 to June 30, 2001, and, prior to that, with three other dealers since 1987.

3. IPC became a member of the MFDA on March 8, 2002.

Allegation #1 – Personal Financial Dealings

4. On December 12, 2008, the Respondent resigned from IPC. Clients whose accounts were previously serviced by the Respondent while at IPC were assigned to another Approved Person, who contacted the clients, and, in doing so, determined that the Respondent had entered into personal financial dealings with at least five clients. In particular, the five clients reported having loaned monies to the Respondent either directly or indirectly through a company that he operated, as described below.

5. Due to the Respondent's failure or refusal to cooperate with the MFDA's investigation, it is unknown, in the case of three of the five clients from whom the Respondent borrowed monies, whether he borrowed the monies from the clients, or continued to be indebted to them, following March 8, 2002, the date on which the Respondent became subject to the jurisdiction of the MFDA.[1]

Client #1

6. The Respondent was the sole officer and director of 577760 BC Ltd. (the "Numbered Company"). In or about May 2006, Client #1 loaned $50,000 to the Numbered Company, which was evidenced by a promissory note from the Numbered Company to Client #1 dated May 18, 2006 (the "Promissory Note").

7. The Promissory Note stated, among other things, that:

(a) the Numbered Company borrowed $50,000 from Client #1 for a term of 12 months at a ten percent annual rate of interest;
(b) the principal was to be repaid on May 15, 2007;
(c) the Promissory Note was "secured" by another promissory note and a letter of guarantee provided by the shareholders of "Scicorp Systems Inc." to the Respondent and the Numbered Company; and
(d) the Respondent personally guaranteed the Promissory Note.

8. By September 15, 2007, four months after May 15, 2007, the date when the loan was to be repaid in full, $48,345.41 remained owing. Client #1 informed IPC during the course of its review of the Respondent's activities that the Respondent intended to repay

[1] Allegations #1 and #2 have been confined to the two clients from whom the Respondent is known to have borrowed monies while subject to the jurisdiction of the MFDA.

the remaining balance owing on the loan when he sold a property in which he or his company had an interest.[2]

Client #2

9. On or about May 31, 2007, the Respondent borrowed $6,300 from Client #2 at a 12% interest rate, which the Respondent repaid on or about August 3, 2009. The loan was evidenced by a promissory note.

Additional Clients from Whom the Respondent Borrowed Monies

10. During the course of IPC's review of the Respondent's activities, three additional clients acknowledged that the Respondent had borrowed monies from them, as described below:

11. Clients #3, #4 and #5 were unwilling to provide further details to IPC concerning the circumstances of their personal financial dealings with the Respondent. As a result, the dates of the loans and the period for which the Respondent remained indebted to Clients #3, #4 and #5 are unknown.

12. The Respondent did not disclose to IPC that he had borrowed monies from any of the clients described above, including in particular Clients #1 and #2.

13. By borrowing monies from Clients #1 and #2, the Respondent placed his own interests above those of the clients, thereby giving rise to an actual or potential conflict of interest which 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 2.1.4 and 2.1.1.

Allegation #2 – Failure to Follow the Member's Policies and Procedures

14. IPC's policies and procedures dated February 2006 stated:

> ***Conflicts of Interest and Personal Financial Dealings with Clients Conflicts of Interest***
>
> *[IPC], its employees and its representatives are required to deal fairly, honestly, and in good faith with clients and to observe the IPC Code of Ethics in the transaction of business.*
>
> *It is [IPC] policy that no agent or employee shall permit private interests to conflict with the proper discharge of official duties, or use the position held or the knowledge gained therein in such manner as to give the appearance of such conflict. All business conducted with the investing public is to be made solely on the basis of a desire to promote the best interests of the public.*

[2] IPC and the MFDA are unaware whether Client #1, who ceased to be a client of IPC on June 4, 2007, was repaid by the Respondent prior to his resignation from IPC on December 12, 2008.

Any agent or employee of IPCI shall immediately disclose to IPCI full and complete details if they are in or they could reasonably be perceived to be in a conflict of interest position. After a review, IPC's compliance department will assist the representative in determining what disclosure if any is required to the clients and the regulators. Any disclosure to clients of a conflict or potential conflict must be made in writing prior to proceeding with a proposed transaction giving rise to the conflict or proposed conflict.

No agent or employee of IPCI shall profit or gain, or shall be perceived to profit or gain, other an through business processed through IPC, or through business specifically disclosed to clients and IPCI in writing as not through IPC. Any business activities outside of IPCI and the related written disclosures must be approved by IPCI prior to conducting such activity. Referral arrangements for securities related business can only be through the dealer, as described in the section on referrals.

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Personal Financial Dealings with Clients

In addition to the general conflict of interest requirements described above, the following provides further clarification regarding specific situations involving personal financial dealings with IPCI clients.

Borrowing from Clients

IPCI does not permit representatives to borrow from clients as this activity would create a significant and direct conflict that is virtually impossible to resolve in an acceptable manner. (Emphasis Added).

15. The Respondent's activities as alleged in Allegation #1 constituted a breach of IPC's policies and procedures in respect of conflicts of interests and borrowing from clients, in so far as he borrowed monies from at least Clients #1 and #2 while he was registered with IPC.

16. By failing to comply with IPC's policies and procedures, the Respondent engaged in conduct contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #3 – Misleading the Member

17. The Respondent completed IPC's Approved Persons Questionnaire on October 21, 2008, and responded in the negative to the following two questions:

1) *"Have you ever borrowed money or lent money to a client for any purpose?"* and

2) *"Do you ever borrow money/securities from or lend money/securities to clients."*

18. The Respondent resigned from IPC effective December 12, 2008. Thereafter IPC determined, through conversations directly with clients, that the Respondent had borrowed monies from at least Clients #1 to #5, as described above.

19. The Respondent misled IPC by representing that he had not borrowed money from clients when he knew that to be an incorrect response at the time and in the circumstances when he made it in respect of at least Clients #1 and #2. In so doing, the Respondent interfered with IPC's ability 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 Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1.

Allegation #4 – Failure to Cooperate

20. In February, 2009, the MFDA commenced an investigation of the Respondent's activities.

21. By letter dated February 27, 2009, sent by registered and regular mail, MFDA Staff requested that the Respondent provide certain documents, information, and a written statement related to the investigation that MFDA Staff was conducting with respect to complaints received by IPC concerning the Respondent's personal financial dealings with clients. MFDA Staff requested that the Respondent provide a response to its request by March 19, 2009.

22. MFDA Staff did not receive a response to its February 27, 2009 letter, and left voicemail messages for the Respondent on March 24 and 27, and on April 28, 2009, seeking a further response from the Respondent.

23. MFDA Staff received no response from the Respondent, and by letter dated May 6, 2009 sent by registered and regular mail, MFDA Staff made a further request of the Respondent to deliver the documents and information by May 20, 2009, failing which the matter would be referred for possible commencement of MFDA disciplinary proceedings against the Respondent for failing to cooperate.

24. MFDA Staff received no response from the Respondent, and by letter dated June 8, 2009 sent by registered and regular mail, MFDA Staff wrote the Respondent advising him that this matter had been escalated to MFDA Investigations.

25. By letter dated August 6, 2009, sent by registered mail, MFDA Staff wrote to the Respondent again and advised him of his obligation to respond to the MFDA, and requested that he provide documents to assist in the investigation no later than August 24, 2009. MFDA Staff also requested that the Respondent contact Staff to arrange for an interview, and that if he failed to satisfy the request for documents or attend for an examination, that authorization would be sought to commence enforcement proceedings against him due to his failure to cooperate.

26. By letter dated September 16, 2009, sent by registered and regular mail, MFDA Staff again wrote the Respondent and advised him of his obligation to respond to the MFDA and requested that he provide documents to assist in the investigation no later than September 30, 2009. MFDA Staff also requested that the Respondent contact Staff

to arrange an interview, and again advised him that, should he fail to provide the requested documents or fail to attend for an examination, that authorization would be sought to commence enforcement proceedings against him due to his failure to cooperate.

27. By letter dated September 29, 2009, MFDA Staff wrote to the Respondent again and advised him of his obligation to respond to the MFDA and requested that he immediately provide the documents to assist in the investigation. MFDA Staff also requested that the Respondent contact Staff to arrange for an interview and again advised him that, should he fail to provide the requested documents or fail to attend for an examination, that authorization would be sought to commence enforcement proceedings against him due to his failure to cooperate. The letter was personally served on the Respondent on October 5, 2009.

28. The Respondent has failed or refused to deliver any documents, information, and a written statement, and has not contacted MFDA Staff to attend an interview.

29. As a result of the Respondent's conduct, MFDA Staff have been unable to determine the full nature and extent of the Respondent's activities as described Allegations #1, #2, and #3 above.

30. By virtue of the foregoing conduct, the Respondent has failed to cooperate with an MFDA investigation, contrary to s.22.1 of MFDA By-Law No. 1.

9. Notwithstanding that the Panel accepted as proven the facts and violations alleged by the MFDA in the Notice of Hearing, counsel adduced evidence, both through witnesses and affidavits, to prove the violations alleged in the Notice of Hearing. The Panel received the evidence of Mr. Ian R. Smith (who was present), a senior investigator in the Enforcement Department of the MFDA. Mr. Smith has extensive experience, and conducted the investigation into the business conduct of the Respondent arising from allegations that the Respondent borrowed monies from clients of IPC Investment Corporation ("IPC"). Mr. Smith's affidavit (Exhibit 7) was 38 paragraphs and 21 documentary exhibits.

10. Counsel also submitted the affidavit of Susan Lynn Schulze, currently the Vice-President, Regulatory Affairs, Chief Anti-Money Laundering Officer and Chief Privacy Officer of IPC, a member of the MFDA. Ms. Schulze was also the Branch Manager for the Respondent from September, 2006 until his resignation from IPC in December, 2008. Ms. Schulze's affidavit was 46 paragraphs, and contained 15 documentary exhibits.

11. Counsel also submitted the affidavit of service of Bailiff Trina Powers (Exhibit 8) confirming service of the letter of September 29, 2009 from the MFDA.

12. The Panel having considered the evidence adduced, found that the Association had proven the facts and violations alleged in the Notice of Hearing.

13. In the course of his investigation, Mr. Smith was provided information with respect to the Respondent's bankruptcy. According to the evidence, on or about September 23, 2011, the Respondent gave Notice of Intention to make a Proposal, which proposal was Exhibit 20 to Mr. Smith's affidavit. In March, 2012, Mr. Smith conducted an electronic search of the records of the office of the Superintendent of Bankruptcy, and that search disclosed that the Respondent is bankrupt; the Respondent's total declared liabilities are $1.9 million dollars, and declared assets are approximately $500,000; an Estate Trustee has been appointed.

14. The Panel having concluded that the facts and violations alleged in the Notice of Hearing had been proved, not only pursuant to Rule 7, but by the evidence adduced, the Panel proceeded to hear submissions as to penalty. The Panel then made an order with respect to penalty, with reasons to follow. These are the Reasons.

Analysis

Re: Allegation #1 – Conflict of Interest

15. From the evidence adduced, and the Respondent's admissions, it is clear that the Respondent borrowed money from at least two clients, (and probably more). The Respondent therefore acted contrary to MFDA Rules 2.1.4 and 2.1.1. They state:

MFDA Rule 2.1.4

"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 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 by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest."

MFDA Rule 2.1.1

"2.1.1 **Standard of Conduct**. Each Member and each Approved Person of a Member shall:

(a) deal fairly, honestly and in good faith with its clients;

(b) observe high standards of ethics and conduct in the transaction of business;

(c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and

(d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation."

16. As can be seen, the conflict of interest rule requires an Approved Person, like the Respondent, to be alert to the creation of potential or actual conflicts of interest arising in connection with their business, and if such a potential or actual conflict of interest arises, it must immediately be disclosed in writing to the client in advance of the transaction. The Approved Person is required to have the potential or actual conflict of interest addressed by the exercise of reasonable judgment influenced only by the best interests of the client.

17. Where an Approved Person borrows money from a client, or arranges investments by clients in companies in which the Approved Person has a personal interest, such conduct immediately raises a significant actual conflict of interest, a conflict that in most if not all cases will be impossible to resolve in favour of the client. It is patently obvious that facilitating investments by a client in your company, or borrowing money from a client is not the exercise of responsible business judgment in the best interests of the client.

18. Staff referred the Panel to Member Regulation Notice MR-0047, released October 3, 2005, which provides guidance on the topic of personal financial dealing with clients. In respect of borrowing from clients it provides:

> "a) ***Borrowing from Clients***
>
> Borrowing from a client by either the Member or Approved Person raises a significant and direct conflict that in almost all cases will be impossible to resolve in favour of the client. 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 any such arrangements would be able to demonstrate that the conflict has been properly dealt with."

In this case, the Respondent had been an Approved Person since July 2, 2001. We are satisfied that the Respondent well knew that borrowing money from a client, or facilitating investments by a client in his company was an actual, significant conflict of interest. In our view the Respondent choose to ignore that conflict of interest in pursuing his own personal business interests.

19. MFDA Counsel referred us to 7 cases where Hearing Panels have found that where an Approved Person borrows monies from Member clients, that such conduct amounts to personal financial dealings and a conflict of interest, contrary to MFDA Rules 2.1.4 and 2.1.1. The cases cited are:

- *In the Matter of Gideon Stephen Mills Wiseman,* [2011] Hearing Panel of the Pacific Regional Council, MFDA File No. 201104, Hearing Panel Decision dated October 17, 2011;
- *In the Matter of Raymond Brown-John,* [2005] Hearing Panel of the Pacific Regional Council, MFDA File No. 200502, Hearing Panel Decision dated June 27, 2005;
- *In the Matter of Glenn Murray Greyeyes,* [2006] Hearing Panel of the Prairie Regional Council, MFDA File No. 200510, Hearing Panel Decision dated June 5, 2006;
- *In the Matter of Christopher Philip Jones,* [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201008, Hearing Panel Decision dated February 7, 2011;

- *In the Matter of Ronald Freynet,* [2007] Hearing Panel of the Prairie Regional Council, MFDA File No. 200704, Hearing Panel Decision dated August 14, 2007;
- *In the Matter of Arnold Tonnies,* [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 27, 2005;
- *In the Matter of Marlene Legare,* [2010] Hearing Panel of the Pacific Regional Council, MFDA File No. 200813, Hearing Panel Decision dated October 29, 2010 (Misconduct); and Hearing Panel Decision dated June 10, 2011 (Penalty).

20. In the present case it is clear that the Respondent borrowed $50,000 from IPC Client #1 through his numbered company. The loan was evidenced by a Promissory Note, and the Promissory Note states that the Respondent personally guaranteed the loan. The evidence establishes the Respondent has not paid back a majority of the monies to Client #1, and there is no reasonable prospect of the Respondent repaying Client #1.

21. The Respondent also borrowed $6,300 from IPC Client #2 through his company and there was a Promissory Note and a repayment schedule. The loan was "secured" by personal guarantees. Client #2 has reported that the Respondent has repaid the amounts owing pursuant to the loan.

22. Clients 3, 4, and 5 reported that the Respondent borrowed monies from them; however, the clients did not provide details of the loans. We note that Allegation #1 in the Notice of Hearing is confined to Clients #1 and 2.

23. It is clear on the evidence that the Respondent did not disclose to, or seek approval from IPC to borrow monies from IPC clients. Further, IPC was not aware that the Respondent was borrowing monies from IPC clients. The full nature and extent of the Respondent's personal financial dealings with IPC clients is not known because the Respondent failed to cooperate with the investigations of both IPC and MFDA Staff.

Re: Allegation #2 – Policies and Procedures

24. It is fundamental to this industry that each Approved Person who conducts or participates in any securities related business in respect of a Member must comply with the By-laws and

Rules as they relate to the Approved Person. This requirement ensures the effectiveness of the compliance and supervision process. Failure to comply with the policies and procedures of the Member constitutes a breach of the standard of conduct, and is inconsistent with the high standards of ethics and conduct in the transaction of business that is expected of Approved Persons.

25. In this case, IPC policies and procedures pertaining to conflicts of interest and, in particular, the prohibition against borrowing from clients, were set out in various forms including IPC written policies and procedures, compliance bulletins, and representative questionnaires. IPC policies and procedures require IPC's Approved Persons, including the Respondent:

(i) Not to permit their private interest to conflict with the proper discharge of their duties;
(ii) To immediately disclose to IPC full and complete details if they are in, or could reasonably be perceived to be in a conflict of interest position;
(iii) After a review by IPC Compliance Department, the Department will assist the Approved Person in determining any appropriate disclosure to the client and the regulators;
(iv) That any disclosure to clients must be made in writing prior to proceeding with the proposed transaction;
(v) That Approved Persons shall not be perceived to profit or gain from business activities not processed through IPC, or through business activities not disclosed to clients and IPC in writing;
(vi) That any business activity outside of IPC must be approved by IPC prior to conducting such activity; and
(vii) That IPC does not permit representatives to borrow from clients as this activity would create a significant and direct conflict of interest that is virtually impossible to resolve in an acceptable manner.

26. In our view given the Respondent's experience in the securities industry, he would know that borrowing from clients was contrary to IPC's policies and procedures. Notwithstanding this he borrowed monies from at least two clients.

Re: Allegation #3 – Misleading the Member

27. The policies and procedures established by Members are based upon the assumed honesty and candour of the Approved Persons employed by the Member. Most if not all Member firms have procedures in place whereby Approved Persons are required to confirm, in writing, compliance with various rules and procedures.

28. On October 21, 2008 the Respondent completed IPC's Representative Questionnaire, and denied that he had ever borrowed money or lent money to a client, denied that he had ever borrowed monies/securities from or lent monies/securities to a client. Clearly the Respondent mislead IPC by representing that he had not borrowed money from clients when he knew that to be a deceitful and incorrect response at the time and in the circumstances.

29. These answers misled IPC, and as a result, IPC was not alerted, and was not able to conduct a supervisory investigation of the Respondents activities.

30. We find that the Respondent's conduct violated the required standard of conduct corresponding to factors that constitute MFDA Rule 2.1.1:

- unfair, dishonest, and not in good faith;
- unethical;
- unbecoming; and
- detrimental to the public interest.

31. An Approved Person misleading his or her Member is very serious misconduct. MFDA Hearing Panels have consistently stated that the Rule encompasses "the most fundamental obligations of all registrants in the securities industry" see:

(1) Rule 2.1.1 of the MFDA Rules;
(2) *In the Matter of Kenneth Roy Breckenridge*, [2007] Hearing Panel of the Ontario Regional Council, MFDA File No. 200718, Hearing Panel Decision dated November 14, 2007 at pages 19 – 20;
(3) *Wiseman*, supra., at page 3;

(4) *In the Matter of David MacIver Potter,* [2011] Hearing Panel of the Central Regional Council, MFDA File No. 201038, Hearing Panel Decision dated January 24, 2012 at pages 5 and 10.

32. In *Breckenridge*, the Panel stated:

> "MFDA Rule 2.1.1 sets out the standard of conduct expected of Approved Persons. The Rule is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct. The Rule articulates the most fundamental obligations of all registrants in the securities industry.
>
> It is clear that, by actively concealing from FundEX the business activity he was engaging in outside the accounts and facilities of FundEX, the Respondent failed to observe high standards of ethics and conduct in the transaction of business and also failed to refrain from engaging in business conduct or practice which was unbecoming or detrimental to the public interest….".
>
> (page 20).

33. The conduct of the Respondent in this case is exactly as described by the Panel in *Breckenridge.*

Re: Allegation #4 – Failure to Cooperate with MFDA Staff

34. MFDA Staff has a duty to conduct examinations and investigations of a Member, Approved Person, and any other person under its jurisdiction, as it considers necessary or desirable, in connection with any matter related to that Member's or person's compliance with, among other things, the By-laws, Rules and Policies of the MFDA (Section 21 of MFDA By-Law No. 1). In carrying out this duty, the MFDA is authorized to require the persons under its jurisdiction, including an Approved Person, to:

- submit a report in writing with regard to any matter involved in any such investigation;
- produce for inspection and provide copies of the books, records and accounts of such person relevant to the matters being investigated; and
- **attend to give information respecting any such matters.**

(Section 22.1 of the MFDA By-Law No. 1).

35. MFDA Hearing Panels have consistently found that a failure by an Approved Person to cooperate with an MFDA investigation by failing to provide information, documents, a written report, or attended an interview when requested to do so, is **serious misconduct**, and constitutes a failure to cooperate contrary to Section 22.1 of MFDA By-Law No. 1, see:

(1) *In the Matter of Kevin Desbois,* [2010] Hearing Panel of the Central Regional Council, MFDA File No. 200822, Hearing Panel Decision dated March 16, 2010;
(2) *In the Matter of Robert Brick,* [2007] Hearing Panel of the Ontario Regional Council, MFDA File No. 200705, Hearing Panel Decision dated October 29, 2007;
(3) *In the Matter of Arnold Tonnies,* [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Hearing Panel Decision dated June 27, 2005;
(4) *Wiseman*, supra. at pages 3-4.

36. It is trite law, cited by a number of MFDA Hearing Panels, that every professional has an obligation to cooperate with his self-governing body. (*Tonnies*, supra. at pages 19-20).

37. It is clear on the evidence before this Panel that despite repeated requests from Staff, the Respondent failed and refused to attend for an interview to provide information relevant to Staff's investigation into his misconduct, or to deliver requested documents, or a written statement. The obvious result of such refusal is a subversion of the ability of Staff to perform its regulatory function by fully investigating a matter, and determining all of the relevant facts, and the full extent and implications of the underlying events. Thus the failure to attend for an interview, or provide information requested in an investigation undermines the integrity of the self-regulatory system and the effectiveness of its operation.

38. In this case the Respondent's failure or refusal to comply with Staff's requests meant Staff were unable to determine the full nature and extent of the Respondent's involvement in the activities described in Allegations #1, #2 and #3 in the Notice of Hearing. The extent of the Respondent's borrowings, or financing activities with his clients, has not been disclosed.

Summary

39. This Panel finds that the Respondent engaged in the misconduct, and violated the MFDA Rules and By-laws as set out in Allegations #1 to #4 in the Notice of Hearing.

Penalty

40. Following the conclusion of the submissions with respect to the evidence regarding Allegations #1 to #4, MFDA counsel made submissions on penalty. The proposed sanctions against the Respondent were:

- a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Members;
- a total fine in the range of $150,000; and
- costs of $15,000.

41. MFDA Panels have held that when determining the appropriate sanctions to impose, Hearing Panels should consider:

- the protection of the investing public;
- the integrity of the securities market;
- specific and general deterrents;
- the protection of the governing body's membership; and
- the protection and integrity of the governing body's enforcement processes.

(see for example: *Tonnies*, supra. at page 22).

42. MFDA counsel submitted, and we agree, the factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- The seriousness of the allegations proved against the Respondent;
- The Respondent's past conduct, including prior sanctions;
- The Respondent's experience and level of activity in the capital markets;
- Whether the Respondent recognizes the seriousness of the improper activity;
- The harm suffered by investors as a result of the Respondent's activities;

- The benefits received by the Respondent as a result of the improper activity;
- The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
- The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- Previous decisions made in similar circumstances.

43. We were also referred to the MFDA Penalty Guidelines, which are intended to assist Hearing Panels and others in considering the appropriate penalties in MFDA disciplinary proceedings. It is clear that the range provided is a guideline only and is not binding on a Hearing Panel.

44. The MFDA Penalty Guidelines recommend the following penalties for the misconduct alleged in this matter:

- Personal financial dealings: minimum fine of $10,000, write or rewrite an appropriate industry course; period of increased supervision for 12 to 24 months; suspension; permanent prohibition in egregious cases;
- Policies and procedures: minimum fine of $10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; and permanent prohibition;
- Standard of conduct: minimum fine of $5,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; permanent prohibition; and
- Failure to cooperate: a minimum fine of $50,000; and the termination of the Member or a permanent prohibition of an Approved Person.

45. Staff submitted, and we agree, the Respondent's actions as reflected in this matter are a very serious case of Approved Person misconduct. The misconduct was not isolated; monies are outstanding; and given the Respondent's bankruptcy, it is unlikely that any monies owed will be repaid.

46. In our view the Respondent's misconduct is egregious in that the Respondent misled IPC as to his borrowing monies from clients, and he then refused to cooperate with IPC's and Staff's investigations. The Respondent's failure to cooperate demonstrates his unwillingness to comply with not only the Member's policies and procedures, but the regulation of his industry by the Association; all of which he agreed to uphold and comply with when he joined.

47. It is also clear on the evidence that there has been harm to clients in that at least $50,000 of client monies remains outstanding, and likely will not be repaid. However, due to the Respondent's failure to cooperate, Staff were unable to determine details of other clients' financings or losses.

48. The Respondent did not cooperate with Staff in its investigation, nor did the Respondent attend the hearing on the merits. Thus we can only conclude that the Respondent has not accepted any responsibility for his conduct, nor has he shown any remorse. Similarly, we do not know the extent of any benefits received by the Respondent as a result of his misconduct.

49. MFDA counsel submitted, and we agree, that although the Respondent has no past disciplinary history with the MFDA, this should be given very little weight in light of the serious nature of his misconduct as proven in this case.

50. MFDA counsel referred us to 10 MFDA cases where Hearing Panels have imposed similar sanctions to those sought in the present case in cases where there was similar contraventions of MFDA Rules and By-laws. We are satisfied that the penalties sought were within the guidelines, and within the range according to prior decisions.

51. As we have already stated, the failure to cooperate is very serious misconduct, as is borrowing from clients, and deceitfully misleading the Respondent's Member firm. The penalty guidelines, under failure to cooperate, suggest a minimum fine of $50,000. In *Wiseman* (supra.)

the fine set by the Panel was $150,000. In *Tonnies* (supra.) three fines were assessed in respect of the 3 allegations, the fines totalled $350,000.

52. It is the view of this Panel that on the facts of this case, the Respondent has committed very serious misconduct. It is conduct that was egregious, and reprehensible. It is our view that a substantial fine is called for.

53. As to costs, Staff requested an Order for Costs against the Respondent for the investigation, the two significant preliminary motions brought by the Respondent in this matter, and the Hearing on the merits. The awarding of costs on the motions was put over to this Hearing on the merits. Staff requested costs in the amount of $15,000, which is far less than the amount actually incurred in prosecuting this matter. In the view of this Panel an award of costs is appropriate, and $15,000 is reasonable.

Decision as to Penalty

54. Having found that the 4 allegations set out in the Notice of Hearing have been proved, we order:

(1) A permanent prohibition of the Respondent from conducting securities business in any capacity while in the employ of or associated with any MFDA Member;
(2) A fine in the amount of $50,000 with respect to Allegation #1;
(3) A fine in the amount of $50,000 with respect to Allegation #2;
(4) A fine in the amount of $50,000 in relation to Allegation #3;
(5) A fine in the amount of $100,000 in relation to Allegation #4; and
(6) Costs in the amount of $15,000.

Failure of the Respondent to Provide Full Particulars as Ordered

55. By Order dated July 4, 2011 (the "July 4th Order") the Panel not only dismissed two complex motions brought by the Respondent, but also ordered the Respondent to provide full particulars to MFDA Staff in respect of his Reply, such particulars to be delivered no later than July 29, 2011. The Respondent did not provide the particulars as ordered, or at all. The

Respondent provided no explanation to the Panel, or to Staff. Respondent's counsel withdrew from the record.

56. As described earlier, this matter proceeded on the merits as scheduled on March 8, 2012 and the Respondent did not attend. The Panel requested submissions from MFDA counsel on the issue of the Respondent's failure to comply with the terms of the July 4th Order in respect of delivery of particulars. We have now received written submissions from counsel.

57. Staff points out that the July 4th Order ordering delivery of particulars of the Respondent's Reply was a preliminary order. The particulars order was in reference to the Respondent's Reply, and specifically the Respondent's assertion that there had been disclosure to IPC, and they were aware of his borrowing activity; and that he complied with IPC's policies and procedures. It was the Panel's view that the Respondent's Reply was not in compliance with the Rules. The order required the Respondent to provide the particulars no later than July 29, 2011.

MFDA Rules of Procedure

58. The MFDA's Rules of Procedure (the "Rules") do not contain a specific provision addressing the situation where a party does not comply with the terms of a preliminary order. This is something that in our view the Association should address.

59. Pursuant to Rule 1.5, the Hearing Panel's General Powers, a Panel can "…issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate." (Rule 1.5(1)c. Further, Rule 1.3 sets forth General Principles with respect to the Rules:

> "(1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.
>
> (2) Where matters are not provided for in these Rules, the practice may be determined by an analogy to them."

60. In this case the Panel, having reviewed the Respondent's (Amended) Reply, were of the view that the Reply was non-compliant with the Rules, and that directions were appropriate, and would likely expedite the issues, and the hearing, and thus be cost effective. No submissions were received from the Respondent objecting to the order for directions. The Order is attached as Appendix A to these Reasons.

61. MFDA counsel submits, and we agree, that in view of the fact that the Respondent did not comply with the order and deliver the particulars, Rule 8.4 provides a means for a Hearing Panel to exercise its discretion where the Respondent fails to deliver a proper Reply. Rule 8.4 states:

> "*8.4 Effect of Failure to Deliver a Proper Reply*
>
> (1) Where a Respondent fails to serve and file a Reply in accordance with the requirements of Rules 8.1 and 8.2, the Hearing Panel may do any one or more of the following:
>
> (a) proceed with the hearing without further notice to and in the absence of the Respondent;
>
> (b) **accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1;**
>
> (c) order that the Respondent pay costs, at any stage of the proceedings, regardless of the outcome of the proceeding and in addition to any other penalties and costs imposed on the Respondent, in an amount which reflects the extent to which, in the Hearing Panel's discretion, the hearing will be or has been unnecessarily prolonged or complicated by the failure of the Respondent to deliver a proper Reply;
> (d) **prohibit, restrict, or place terms on the right of the Respondent to call witnesses or present evidence at the hearing.**"
>
> (Emphasis Added).

62. MFDA Staff submits that had the Respondent participated in the hearing on the merits, and sought to lead evidence, Staff would have sought appropriate restrictions on the Respondent's ability to present evidence bearing on the matters for which the particulars were ordered pursuant to Rule 8.4(d).

63. Counsel also points out that pursuant to Rule 8.4(b) the Panel could have accepted the facts alleged and conclusions drawn in the Notice of Hearing as proven and imposed penalties just as we did pursuant to Rule 7.3.

Analysis

64. In our view, where a Hearing Panel makes an interim order issuing directions, and there is no objection from the Respondent, but there is then complete non-compliance by the Respondent, there should be a penalty. By analogy to the Rules of Court in various jurisdictions in Canada, the failure to obey an order of the court may result, for example, in a defendant's defence being struck. The analogy here would be for MFDA Staff to make an application, on the Respondent's non-compliance, to have the Respondent's Reply struck and proceed pursuant to the Rules.

65. Alternatively, had the Respondent appeared at the hearing on the merits, and not provided substantial grounds for the non-compliance with the order for particulars, in our view it would be appropriate to make an order prohibiting the Respondent from calling witnesses or presenting evidence at the hearing.

66. These Reasons may be signed in counterpart.

DATED this 28th day of May, 2012.

"Stephen Gill"
Stephen D. Gill,
Chair

"Sharon Moskalyk"
Sharon Moskalyk,
Industry Representative

"Cecilia Wong"
Cecilia Wong,
Industry Representative

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: Conrad Arthur Nunweiler

ORDER

WHEREAS on October 5, 2010, the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Hearing pursuant to sections 20 and 24 of MFDA By-law No. 1 in respect of a disciplinary proceeding commenced against Conrad Arthur Nunweiler (the "Respondent");

AND WHEREAS the Respondent brought two motions (the "Motions") which were heard by the Hearing Panel on May 25, 2011 in Vancouver, British Columbia as follows: (i) a motion for a finding of a reasonable apprehension of bias on the part of the Hearing Panel; and (ii) a motion to obtain an order pursuant to sections 20.6.2 and 20.6.3 of MFDA By-law No. 1 that certain persons attend before it at a proceeding to give information and produce for inspection books, records, and accounts relevant to the matters being considered;

AND WHEREAS upon hearing the submissions of the agent of the Respondent and counsel for MFDA Staff;

IT IS HEREBY ORDERED THAT:

1. The Motions are dismissed;
2. Costs in relation to the Motions may be spoken to at the conclusion of the hearing of this matter on the merits; and
3. The Respondent shall provide full particulars to MFDA Staff in respect of his Reply (Exhibit 5) no later than July 29, 2011, as follows:

    a) in respect of paragraph 2 of the Denials section of the Reply, the Respondent shall provide full particulars of the basis for the assertion: "that IPC knew about the $50,000 loan from Client #1 and the $6,300 loan from Client #2." Without restricting the generality of the foregoing, the particulars shall include the facts in support of this paragraph, including matters such as the date or dates of disclosure; whether the disclosure was verbal, in writing, by email, etc.; the names of the persons to whom disclosure was made; and who at IPC knew of the loans, and how they knew; etc.;

    b) in respect of paragraph 3 of the Denials section of the Reply, the Respondent shall provide full particulars of paragraph 3(b): the Respondent "has addressed any actual or potential conflict of interest through his disclosure of loans to IPC." Without restricting the generality of the foregoing, the Respondent shall provide the date or dates upon which disclosure was made; the manner in which disclosure was made, whether the disclosure was verbal, in writing, by email, etc.; the names of the persons to whom disclosure was made; by whom the disclosure was made; and full particulars of what was disclosed; etc.;

    c) in respect of paragraphs 4(b) and (c) of the Denials section of the Reply, the Respondent shall provide full particulars of the statements: "made disclosures to IPC in respect of the loans as required;" and "processed the business (i.e. the loans) through IPC as required". Without restricting the generality of the foregoing, the Respondent shall provide the date or dates upon which disclosure was made; the manner in which disclosure was made; the names of the persons to whom disclosure was made; whether particulars of the clients from whom the loans were obtained was given; etc. Further, the Respondent shall provide the particulars of how the business was processed; who did the processing; who received the processing; the dates or dates upon which the

business was processed; the manner in which it was processed; etc. With respect to the statement: "through IPC as required", the Respondent shall provide full particulars of the material facts demonstrating that the processing was as required by IPC; and

d) in respect of paragraph 5 of the Denials section of the Reply, the Respondent shall provide full particulars of how the Respondent: "complied with IPC's policies and procedures" in respect of Clients #1 and #2. Without restricting the generality of the foregoing, the Respondent shall provide a description of the specific policies and procedures that were complied with; how they were complied with; who provided the compliance from the Respondent; and who received the compliance at IPC; etc.

DATED this 4th day of July, 2011.

"Stephen Gill"
Stephen D. Gill,
Chair

"Sharon Moskalyk"
Sharon Moskalyk,
Industry Representative

"Cecilia Wong"
Cecilia Wong,
Industry Representative

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