



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

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

**Re: Adam Alexander Aleshka**

Heard: October 27, 2015 in Winnipeg, Manitoba  
Reasons for Decision: February 12, 2016

**REASONS FOR DECISION**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh  
Marc Albert  
Elaine Bradley

Chair  
Industry Representative  
Industry Representative

Appearances:

|                   |   |                                     |
|-------------------|---|-------------------------------------|
| David Babin       | ) | Counsel for the Mutual Fund Dealers |
|                   | ) | Association of Canada               |
|                   | ) |                                     |
| Jonathan B. Kroft | ) | Counsel for the Respondent          |
|                   | ) |                                     |
|                   | ) |                                     |
|                   | ) |                                     |

## **Background**

1. This matter came before the Hearing Panel on October 27, 2015 as a Settlement Hearing, pursuant to Section 24.4 of By-Law No. 1 of the Mutual Fund Dealers Association of Canada (the “MFDA”) and Rule 15 of the MFDA *Rules of Procedure*. The full [Settlement Agreement](#) entered into between the MFDA (“Staff”) and Adam Alexander Aleshka (the “Respondent”), dated October 5, 2015, is available on the MFDA website and will not be set out in full, in these Reasons.

## **Settlement Hearing**

2. Mr. Aleshka appeared at the Settlement Hearing and was represented by counsel.

3. At the commencement of the hearing, the Panel granted Staff’s Motion to which Counsel for the Respondent did not object, to move the proceedings *in camera* while we considered the Settlement Agreement, together with Staff’s written and oral submissions and oral submissions made by counsel for the Respondent.

4. After a detailed review of the Settlement Agreement and careful consideration of the parties’ submissions, the Panel concluded that it was in the public interest that the Settlement Agreement be accepted.

5. The Panel issued an Order dated October 27, 2015 confirming our acceptance with Reasons to follow.

6. Accordingly, these are our Reasons.

## Settlement Agreement dated October 5, 2015

### The Allegations

7. As the Notice of Settlement Hearing issued September 29, 2015 identified, the proposed Settlement Agreement concerned allegations that between February 20, 2012 and February 16, 2014, the Respondent obtained and used 29 pre-signed partially completed or photocopied versions of pre-signed partially completed forms in respect of 14 client accounts, contrary to MFDA Rule 2.1.1(c).

### Facts

8. The facts upon which a Panel can rely to make a determination at a hearing convened pursuant to s. 24.4 of MFDA By-law No. 1, are only those which are set out in the Settlement Agreement. Rule 15.3(1) of the MFDA *Rules of Procedure* provides:

“The Hearing Panel may advise the parties of any additional facts which it considers necessary to assess the settlement but unless the parties consent, any facts which are not contained in the Settlement Agreement shall not be disclosed to the Hearing Panel.”

9. In this case, the Hearing Panel was able to make its determination without having to seek any additional facts other than those contained in the Settlement Agreement.

10. The Settlement Agreement set out the following facts which had been agreed to by both Staff and the Respondent:

### Registration History

6. Since January 16, 2004, the Respondent has been registered in Manitoba as a mutual fund salesperson (now known as a dealing representative) with Sterling Mutuals Inc. (“Sterling”), a Member of the MFDA.

## **Blank and Partially Completed Pre-Signed Account Forms**

7. At all material times, Sterling's policies and procedures did not permit its Approved Persons to have account transfer forms executed by clients until they were fully completed or to revise account transfer forms that had already been executed.
8. Sterling's policies and procedures also required that separate account transfer forms be executed for each account being transferred notwithstanding that the client was the same.
9. On approximately 28 occasions between February 20, 2012 and February 16, 2014 the Respondent, in respect of 14 client accounts, took one of the following actions:
  - a) obtained an executed account transfer form from a client that was not fully completed;
  - b) corrected information on a client account form that had already been executed; or
  - c) used a photocopy of an account transfer form completed by a client in respect of one account to process the transfer another account.
10. On one occasion during the same time period the, Respondent inserted information provided by a client in respect of an RESP withdrawal form after the client had signed the partially completed form.

## **Member Response**

11. In about February or early March 2014, Sterling reviewed all of the client files maintained by the Respondent. Sterling did not detect any use of pre-signed account forms beyond those described in paragraphs 9 and 10, above.
12. On March 5, 2014, Sterling issued a letter of reprimand to the Respondent and placed him under strict supervision. Sterling is currently charging the Respondent a fee of 5% of his commissions earned in order to cover its costs of strict supervision. Sterling will cease charging the 5% fee at the conclusion of Staff's proceeding against the Respondent. To date, the Respondent has paid approximately \$19,244.21 in supervision fees as a result of the strict supervision requirements.

## **Additional Factors**

13. The Respondent has been an Approved Person for more than 10 years and has no prior disciplinary history with the MFDA.
14. There is no evidence of misappropriation, unauthorized trading, or client harm in this matter.
15. There is no evidence that the Respondent received any financial benefit from engaging in the misconduct beyond the commissions or fees to which the Respondent

would have been ordinarily entitled had the transactions in the clients' accounts been carried out in the proper manner.

16. The Respondent has cooperated fully with Staff during the course of the investigation, and by agreeing to this settlement, has avoided the necessity of a full hearing on the merits.

17. The Respondent has expressed remorse for his misconduct.

### **Admission**

11. On the basis of the agreed upon facts, as set out above, the Respondent admitted that between February 20, 2012 and February 16, 2014, he obtained and used 29 pre-signed partially completed or photocopied versions of pre-signed partially completed forms in respect of 14 client accounts, contrary to MFDA Rule 2.1.1(c).

12. He further agreed and consented to the following terms of settlement as set out in the Settlement Agreement:

- (i) the Respondent shall pay a fine in the amount of \$5,000, pursuant to section 24.1.1(b) of By-law No. 1;
- (ii) the Respondent shall pay costs in the amount of \$2,500, pursuant to section 24.2 of By-law No. 1;
- (iii) the Respondent shall in the future comply with MFDA Rule 2.1.1(c); and
- (iv) the Respondent will attend in person, on the date set for the Settlement Hearing

### **Role of the Hearing Panel in a Settlement Hearing**

13. The role performed by a Hearing Panel in a Settlement Hearing is fundamentally different than the role a Panel performs in a Contested Hearing. In a Settlement Hearing, the Panel has no authority to add, delete or vary the terms which have been agreed to by the parties and set out in the Settlement Agreement.

14. In reviewing a Settlement Agreement at a Settlement Hearing, a Hearing Panel, therefore, has two options. Section 24.4.3 of By-law No. 1 provides that the Hearing Panel shall either:

- (a) accept the Settlement Agreement; or
- (b) reject it.

15. In making its determination as to whether to accept or reject a Settlement Agreement, the Panel “will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.” (*In re Milewski*, [1999] I.D.A.C.D. No. 17 as cited in *Sterling Mutuals Inc. (Re)* 2008 LNCMFDA 16, at para 37).

16. As the panel in *Sterling Mutuals Inc., supra*, stated, Hearing Panels have expressed the view that, in general, settlement agreements should be accepted, bearing in mind the following criteria:

- “1. That it is in the public interest to do so and that the penalties proposed will be sufficient to protect investors;
- 2. That the agreement is reasonable and proportionate, having regard to the conduct of the Respondent;
- 3. That the agreement addresses the issues of both specific and general deterrence;
- 4. That the agreement is likely to prevent the type of conduct set out in the facts;
- 5. That the agreement will foster confidence in the integrity of the Canadian capital markets;
- 6. That the agreement will foster confidence in the integrity of the MFDA; and
- 7. That the agreement will foster confidence in the regulatory process itself.”

*Sterling Mutuals Inc. (Re), supra*, at para 36

## **Appropriateness of the Proposed Penalty**

17. The primary goal of securities regulation, whether in the context of a Settlement Hearing or a Contested Hearing, is protection of the investor. (*Breckenridge (Re)*, MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para. 74).

18. The panel in *Breckenridge* said that “sanctions ... should be preventative, protective and prospective in nature...” and that in exercising its discretion to impose a penalty, the Hearing Panel should take into account the following considerations:

- “(a) the protection of the investing public;
- (b) the integrity of the securities markets;
- (c) specific and general deterrence;
- (d) the protection of the MFDA’s membership; and
- (e) the protection of the integrity of the MFDA’s enforcement processes.”

*Breckenridge (Re)*, *supra*, at paras. 75 and 76

19. The Panel in *Breckenridge* was presiding over a Contested Hearing. However, the factors to consider when determining an appropriate penalty are equally applicable to the deliberations of a Panel which is presiding over a Settlement Hearing. As set out above, a Settlement Hearing Panel will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

20. In determining an appropriate penalty the panel in *Breckenridge* set out the following additional factors which should be considered:

- “(a) The seriousness of the allegations proved against the respondent;
- (b) The respondent’s experience in the capital markets;
- (c) The level of the respondent’s activity in the capital markets;

- (d) The harm suffered by investors as a result of the respondent's activities;
- (e) The benefits received by the respondent as a result of the improper activity;
- (f) The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
- (g) The damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activity;
- (h) 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;
- (i) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
- (j) Previous decisions made in similar cases.”

*Breckenridge, supra at para 77.*

### **MFDA Penalty Guidelines**

21. The MFDA Penalty Guidelines (the “Guidelines”) are an additional resource that a Hearing Panel may consult when determining the appropriateness of the penalty to be imposed pursuant to a Settlement Agreement.

22. The Guidelines say that they have been prepared to assist “... Hearing Panels in the fair and efficient imposition of penalties in settled or contested disciplinary proceedings commenced pursuant to s. 20 and s. 24 of MFDA By-law No. 1.”

23. The Guidelines go on to stipulate that the penalty types and ranges they set out are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel. (*Mutual Fund Dealers Association of Canada Penalty Guidelines*, Updated Version: September 20, 2006 at page 1).

24. In cases involving misconduct of the type admitted to in the present case, the Guidelines recommend consideration of the following penalties and factors:

| <b>BREACH</b>                                       | <b>PENALTY TYPE &amp; RANGE</b>   | <b>SPECIFIC FACTORS TO CONSIDER</b>   |
|---|---|---|
| Standard of Conduct (Rule 2.1.1) Guidelines, p. 27) | <ul style="list-style-type: none"> <li>• Fine (AP): Minimum of \$5,000</li> <li>• Write or rewrite an appropriate industry course (e.g. IFIC Officers’, Partners’ and Directors’ Course or Canadian Investment Funds Course)</li> <li>• Suspension</li> <li>• Permanent prohibition in egregious cases</li> </ul> | <ul style="list-style-type: none"> <li>• Nature of the circumstances and conduct</li> <li>• Number of individuals affected</li> <li>• Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute</li> </ul> |

MFDA Penalty Guidelines at p. 27

**Application of the Above Factors in the Present Case**

25. At the hearing of this matter Staff submitted that all of the above factors had been taken into account in reaching the proposed Settlement Agreement with the Respondent.

26. The Guidelines also stipulate that in determining appropriate penalties, both MFDA Staff and Hearing Panels must in any case, “... exercise judgment and discretion and consider appropriate aggravating and mitigating factors ...” (*Guidelines* at page 1).

**Aggravating Factor**

27. Staff submitted that in this case there is one single, large, aggravating factor and a series of mitigating factors. The aggravating factor, Staff submitted, is the nature of the misconduct, that is, the seriousness, of the misconduct.

28. The Respondent’s misconduct in this case was the fact that he obtained and used 29 pre-signed partially completed or photocopied versions of pre-signed partially completed forms, in respect of 14 client accounts.

29. MFDA Rule 2.1.1 sets out the standard of conduct expected of Approved Persons.

30. As the Panel in *Breckenridge* identified, this 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.” (*Breckenridge, supra*, at para 71).

31. MFDA Rule 2.1.1(c) requires that each Member and Approved Person refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

32. Staff pointed out that since October 31, 2007 the MFDA has made clear to Approved Persons that the obtaining, maintenance and use of pre-signed forms is contrary to the obligations detailed in Rule 2.1.1. Staff referred the Panel to Member Staff Notice 0066 which was issued by the MFDA on October 31, 2007 and updated on March 4, 2013.

33. The dangers posed by pre-signed forms are as follows:

- (a) Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading;
- (b) At worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client; and
- (c) Pre-signed forms subvert the ability of a Member to properly supervise trading activity.

*Price (Re)*, MFDA File No. 200814, at paras 122-124

34. Staff was quick to note that such prohibited conduct is not alleged in this case; rather that the obtaining of pre-signed forms could expose clients to this type of danger and could affect the supervisory chain of which Members are a part. For that reason, obtaining pre-signed forms even without using them, is conduct which is considered to be contrary to MFDA Rule 2.1.1(c).

35. On the basis of the foregoing, Staff submitted that by obtaining and using pre-signed forms as described in the facts set out in Part III of the Settlement Agreement, the Respondent

engaged in conduct which is prohibited by MFDA Rule 2.1.1(c) and, therefore, engaged in misconduct that should be regarded as serious.

### **Mitigating Factors**

36. Weighed against the aggravating factor of the seriousness of the misconduct, Staff submitted there are a number of mitigating factors in this case.

37. First, the Respondent has a long record of being in the mutual fund industry dating back to January of 2004, with no record of disciplinary action.

38. Second, Staff submitted that the Respondent has recognized the seriousness of his misconduct in this matter, and has acknowledged that seriousness by entering into the Settlement Agreement.

39. Third, Staff pointed to the fact that there was no evidence of client harm, nor of client complaints having been received in this matter, nor any evidence of benefits accruing to the Respondent as a result of his conduct.

40. Further, the MFDA Guidelines stipulate that in settlement agreements, the “agreement as to facts and the admission of wrong doing that are requirements of any settlement agreement under s. 24.4 of By-law No. 1 are usually considered to be mitigating factors since they save the MFDA and affected clients from a lengthy, complicated or expensive hearing.”

41. Staff also submitted that important additional facts for a Panel to consider are the factors of specific and general deterrence.

42. In this case, Staff submitted that the proposed penalty satisfied the criterion of specific deterrence, such that it will deter the Respondent from engaging in this type of conduct again in the future.

43. Staff also submitted that the proposed penalty satisfied the criterion of general deterrence by sending a message to other Approved Persons in the industry that the use of pre-signed forms is prohibited.

44. Staff also submitted that the proposed penalty was in line with what has been imposed in previous cases where the facts were similar, in terms of the number of forms obtained and clients involved.

45. Staff specifically referred the Panel to a number of cases involving similar facts and circumstances to this matter, where the Hearing Panel determined that the same penalty which is proposed in this case, was appropriate:

- (a) *Kahlon (Re)*, MFDA File No. 201438, Hearing Panel of the Central Regional Council, Decision and Reasons dated March 4, 2015;
- (b) *Kujala (Re)*, MFDA File No. 201423, Hearing Panel of the Central Regional Council, Decision and Reasons dated June 23, 2015;
- (c) *McKale (Re)*, MFDA File No. 201333, Hearing Panel of the Central Regional Council, Decision and Reasons dated January 16, 2014; and
- (d) *Byce (Re)*, MFDA File No. 201311, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 4, 2013.

46. In each of those cases the respondents were similarly situated to the Respondent in this matter in terms of the number of forms and clients, the fact that there was no evidence of client complaints or client harm and the Respondent has no disciplinary history.

47. In summary, Staff submitted that, having regard to the factors a Panel must consider in determining whether to accept a settlement agreement, the penalties proposed in the instant agreement satisfy the goals of investor protection and specific and general deterrence, and will uphold public confidence in both the MFDA industry and the Approved Persons who work within the MFDA regulatory regime.

48. Counsel for the Respondent added only a brief submission to point out that when looking at the Penalty Guidelines relating to a violation of Rule 2.1.1, it is important to note that that Rule covers a wide range of behavior, from behavior which is intentional or even fraudulent, to the type of conduct which occurred in this case which, counsel submitted, is at the least serious of the range covered by the Rule. Accordingly, counsel submitted, it is appropriate to impose a penalty which is at the lower end of the spectrum of the Penalty Guidelines in order to leave room for higher penalties relating to more serious breaches of the Rule.

### **Conclusion**

49. Having taken into consideration all of the factors relating to the determination of an appropriate penalty as set out above, together with the submissions of Staff and counsel for the Respondent, the Panel finds that the penalties proposed in the Settlement Agreement fall within the reasonable range of penalties imposed for breaches of Rule 2.1, in similar circumstances. The Panel agrees that the penalties will deter the Respondent and other Approved Persons from obtaining, maintaining and using pre-signed forms in the future. Acceptance of this Settlement Agreement will advance the public interest and the objective of the MFDA to enhance investor protection and ensure high standards of conduct in the mutual fund industry.

50. Accordingly, the Panel accepts the Settlement Agreement reached between MFDA Staff and the Respondent on October 5, 2015.

**DATED** this 12<sup>th</sup> day of February, 2016.

“Sherri Walsh”

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Sherri Walsh  
Chair

“Marc Albert”

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Marc Albert  
Industry Representative

“Elaine Bradley”

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Elaine Bradley  
Industry Representative

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