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: Joel Henry Attis

Heard: July 12-16, 2021 and October 26, 2021
by electronic hearing in Moncton, New Brunswick
Decision and Reasons (Misconduct): July 5, 2022

DECISION AND REASONS (MISCONDUCT)

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C	Chair
Edward Jackson	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Alan Melamud	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Edwin G. Ehrhardt, Q.C	)	Counsel for the Respondent
Joel Henry Attis	)	Respondent

I. BACKGROUND

1. By Notice of Hearing, dated December 18, 2019, the Mutual Fund Dealers Association of Canada (the "MFDA") made the following allegations against Joel Henry Attis (the "Respondent"):

> **Allegation #1**: Between December 2015 and August 2017, the Respondent engaged in discretionary trading in respect of four series of bulk trades he processed in client accounts, contrary to the Member's policies and procedures, and MFDA Rules 2.3.1(b), 1.1.2, 2.5.1, or Rule 2.1.1.
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> **Allegation #2**: Between December 2015 and November 2016, the Respondent failed to maintain adequate records of the clients' authorization for trades, contrary to the Member's policies and procedures and MFDA Rules 5.1, 1.1.2 and 2.5.1, or Rule 2.1.1.

2. The Notice of Hearing was served on the Respondent on January 2, 2020, as shown by the Affidavit of Terri Ash**,** sworn on January 3, 2020 and the exhibits attached thereto.

3. On January 21, 2020, the Respondent served a Reply and later filed same.

4. On February 25, 2020, the first appearance was held via teleconference before one public representative of a Regional Council acting on behalf of the Atlantic Regional Council of the MFDA, pursuant to section 19.13(6) of MFDA By-law No. 1.

5. After hearing and considering the submissions of counsel for the Respondent and counsel for Staff of the MFDA ("Staff") with respect to scheduling and other procedural matters, it was ordered, *inter alia*, that the Hearing on the Merits would proceed in Moncton, New Brunswick on September 16 – 18, 2020, at 10:00 a.m. (Atlantic) each day.

6. On August 20, 2020, a second appearance was held via videoconference.

7. After hearing and considering the submissions of counsel for the Respondent and counsel for Staff with respect to various matters, it was ordered that the Hearing on the Merits be adjourned and that a further appearance be scheduled before the Hearing Panel on September 24, 2020, at 10:00 a.m. (Atlantic).

8. On September 24, 2020, a third appearance was held via videoconference. After hearing and considering the submissions of counsel for the Respondent and counsel for Staff with respect to various matters, it was ordered that a further appearance be scheduled before the Hearing Panel on January 14, 2021, at 10:00 a.m. (Atlantic).

9. It was further ordered that the Hearing on the Merits would proceed in Moncton, New Brunswick, or by electronic hearing, on March 22-26, 2021.

10. On January 14, 2021, a fourth appearance was held via teleconference. After considering the submissions of counsel for the Respondent and counsel for Staff with respect to various matters, it was ordered that the Hearing on the Merits would proceed, in person, in Moncton, New Brunswick, or, if an in person hearing was not possible due to the pandemic, then via electronic hearing on April 26-30, 2021.

11. On April 26, 2021, a fifth appearance was held via teleconference. After hearing and considering the submissions of counsel for the Respondent and counsel for Staff with respect to various matters, it was ordered that the Hearing on the Merits would proceed by way of electronic hearing on July 12-16 and July 19, 2021, commencing at 10:00 a.m. (Atlantic) each day.

12. On July 8, 2021, Staff brought a Motion returnable immediately preceding the Hearing on the Merits for an Order of the Hearing Panel granting leave to amend the Notice of Hearing. The Respondent consented to the proposed amendment. After considering the submissions of counsel for Staff and counsel for the Respondent, the Hearing Panel granted leave to amend the Notice of Hearing as a consequence of which Allegation #2 reads as follows:

> **Allegation #2**: Between December 2015 and August 2017, the Respondent failed to maintain adequate records of the clients' authorization for trades, contrary to the Member's policies and procedures and MFDA Rules 5.1, 1.1.2 and 2.5.1, or Rule 2.1.1.

13. The Hearing on the Merits was held by videoconference between July 12 and July 16, 2021, during which the Hearing Panel heard the evidence presented by Staff and Counsel for the Respondent.

14. At the conclusion of the oral evidence, the Hearing Panel heard and considered the submissions of counsel for Staff and the Respondent with respect to the making of both written and oral submissions. The Hearing Panel made an order with respect to the delivery of written submissions and then adjourned the Hearing on the Merits to October 26, 2021, at 10:00 a.m. (Atlantic) by electronic hearing for the hearing of oral submissions.

15. The parties delivered their written submissions in accordance with the Order of the Hearing Panel, as amended. On October 26, 2021, after hearing the oral submissions of the parties, the Hearing Panel reserved its decision on the merits.

II. AGREED FACTS

16. At the commencement of the Hearing on the Merits, the parties jointly filed a document entitled "Agreed Facts". This was marked as Exhibit 10. This document provides as follows:

> "1. The parties agree that the Respondent's registration history is as follows:
>
> a) Mr. Attis commenced registration in the securities industry as a dealing representative in January 2003.
>
> b) From January 2003 to September 2009, he was registered as a dealing representative with Partners in Planning Financial Services Ltd., a Member of the MFDA.
>
> c) From September 2009 to October 2015, he was registered as a dealing representative with Investia Financial Services Inc., a Member of the MFDA. From January 2011 to October 2015, he was also registered [as] a dealing representative (exempt market dealer) with Investia.
>
> d) From October 2015 to October 2017, he was registered with IPC Investment Corporation, a Member of the MFDA.
>
> e) From December 2017 to September 2019, he was registered with Louisburg Investments Inc., an exempt marker dealer, as a dealing representative and associate advising representative.
>
> f) He is no longer registered in the securities industry in any capacity.
>
> g) The dates above correspond with registration in New Brunswick, but during the course of this registration, Mr. Attis has at times also been registered over various periods in Alberta, Nova Scotia, Ontario, and Prince Edward Island.
>
> h) Mr. Attis conducted business in the Moncton, New Brunswick area.
>
> 2. The parties agree that the subject trades, as identified in the Amended Notice of Hearing, were processed at the request of, or submitted for processing by, Mr. Attis or his assistant for Mr. Attis' clients. In summary, the agreed details would be as follows:

Date of Trade	Number of Clients	Number of Trades	Type of trade
December 11, 14-15, 2015	97	610	Switch from Fidelity North Star Fund (FID253) to Fidelity North Star Currency Neutral Class Fund (FID1284) from Fidelity American Equity Fund (FID264) to Fidelity American Equity Currency Neutral Class Fund (FID2640)

Date of Trade	Number of Clients	Number of Trades	Type of trade
December 11, 14-18, 2015	96	318	Sell/Buy from Dynamic Dividend Advantage Fund Series A (DYN 054) to Mackenzie Global Strategic Income Fund Series F (MFC2310)
November 16-18, 21-25, 28-30, 2016	70	309	Sell/Buy Fidelity American Equity Currency Neutral Class Series F (FID2640) and Fidelity North Star Currency Neutral Series F (FID1284) were sold Manulife Strategic Dividend Bundle Series F (MFC4676) was purchased
August 9, 2017	144	545	Switches Fidelity North Star Currency Neutral Class Series F Fund (FID1284) to the Fidelity NorthStar Class F Fund (FID610) Fidelity American Equity Currency Neutral Class Series F Fund (FID2640) to the Fidelity American Equity Class Series F Fund (FID2316)"

17. The parties also filed a Joint Book of Documents, which was appreciated by the Hearing Panel.

III. THE EVIDENCE

(a) Overview

18. Over the course of the Hearing on the Merits, the Hearing Panel heard *viva-voce* testimony from a total of 6 witnesses. We also received and considered a significant volume of documentary evidence.

19. A substantial portion of the evidence was not contested. Each party, however, attached different nuances and interpretations to same. The conclusions which each party drew from the evidence, on the critical issues, were starkly different.

(b) The Respondent

20. The Respondent obtained a Bachelor of Commerce degree in 1973 from Dalhousie University. He obtained a Bachelor of Laws degree from the University of New Brunswick in 1977. He then practised law full time as a corporate/commercial lawyer for 5 to 6 years.

21. The Respondent then decided to become a Dealing Representative. To use his own words, he "embarked upon a dedicated learning effort". He completed the Canadian Investment Funds Course, the Canadian Securities Course, as well as an array of additional courses, which entitled him to become a Fellow of the Canadian Securities Institute, a Chartered Investment Manager, as well as a Certified Financial Planner.

22. For several years, the Respondent served as vice-president of the New Brunswick Investment Management Corporation, which managed the public pension for public workers. He also served on hearing panels with respect to the regulation of life insurance in New Brunswick.

23. The Respondent was a well-educated and experienced Dealing Representative, who had significant familiarity with the applicable rules and regulations.

(c) The Respondent's Business Practices

24. The Respondent ran his business through AttisCorp, which was comprised of himself and one assistant.

25. According to IPC Investment Corporation ("IPC"), with whom he was registered from October 2015 to October 2017, the Respondent had approximately 230 clients assigned to him and $61 million in mutual fund assets under administration. The Respondent agreed with the $61 million figure but thought that the number of clients was approximately 150.

26. To service his clients, the Respondent employed a series of "model portfolios", which would each contain the same six or seven mutual funds, but have different weightings to accommodate different risk profiles. The Respondent would then recommend particular portfolios to a client based on an assessment of the client's Know-Your-Client ("KYC") information.

27. Apart from a small number of clients who might choose to select their own mutual funds, the vast majority of the Respondent's clients all held the same mutual funds. As a consequence,

when the Respondent decided to change some aspect of his "model portfolios", the change would need to be made across a large number of his clients. This became known as the "bulk trades".

28. The Respondent also employed what he termed a "tactical currency strategy". This meant that when the Canadian dollar would reach what the Respondent believed was its outer limit relative to the U.S. dollar, he would switch his clients from/to a U.S. dollar denominated version of certain mutual funds to/from a Canadian dollar denominated hedged version (i.e. currency neutral) of the same mutual funds.

29. The Respondent testified that these "tactical" strategies were essentially short-term adjustments made to the portfolios. If the purpose was long-term, the adjustment would not fit within a tactical strategy but would be implemented into the strategic portfolios.

30. The Respondent also testified that he relied heavily on currency experts to guide him on his currency considerations.

31. The Respondent agreed that this strategy involved both the U.S. dollar denominated version and the Canadian dollar denominated hedged version of the Fidelity North Star Fund ("North Star") and the Fidelity American Equity Funds ("American Equity").

32. All of the Respondent's clients held their accounts in nominee name. This meant that, while the Respondent did not need to obtain client signatures on account forms, when submitting trades for processing, he did require either oral or written instructions from each and every affected client.

33. The Respondent made use of "template notes" to record his client meetings and contacts. According to the Respondent, the use of these notes was rare and only used in scenarios where the agenda was common to all clients. In addition, the Respondent testified that specific individual matters arising with each client were incorporated into the base notes to ensure that the notes encompassed each client's instructions.

(d) <u>The Member's Policies and Procedures</u>

34. At all material times, the IPC's National Policies & Procedural Manual ("NPPM") stated as follows:

> "No Discretion Granted

> A Mutual Fund Advisor does not have "Discretionary Trading" authority, and is required to obtain specific client instruction for each and every trade. No discretion in relation to the investments nature, size, or timing is allowable. Failure to obtain and record client instructions for a transaction is a serious offence that it may result in internal disciplinary procedures being initiated, which may include suspension or termination of the Advisor's registration. Such actions could also be considered grounds for dismissal."
>
> Record-Keeping for Trading Authorizations
>
> Advisors must be in the habit of recording and retaining good quality notes, in written or electronic format, of conversations they have with their clients. Advisors must record and maintain evidence of client instructions for all trades in accordance with MFDA Rule 5.1(b). Records of client trade instruction should include the date and time of the discussion, particulars of the securities to be purchased, redeemed or switched, and a note as to how the instructions were given (e.g. by telephone, in person, by e-mail or by fax). These notes should be maintained for a seven year period in accordance with MFDA Rule 5.6."

35. Matthew Onyeaju ("Onyeaju"), the Director of Compliance at IPC at the relevant time and, later, IPC's Chief Compliance Officer, testified before us that this section of the NPPM "means there's an expectation to confirm the date for which the order will be placed with the client. It can't be left ambiguous. It needs to be a specific date." (Transcript July 12, 2021, p. 52, lines 6-9)

36. When further questioned whether this meant the day, month or year, Mr. Onyeaju replied "the day". (Transcript July 12, 2021, p. 52, line 13)

37. When the Respondent joined IPC in 2015, he executed a New Advisor Principal/Agent Agreement. (Joint Book of Documents – Tab 2). In this Agreement, he undertook to "comply with all of the Principal's mandatory policies and procedures including, but not limited to" the NPPM.

38. The Hearing Panel was also presented with an Affirmation Report (Joint Book of Documents – Tab 1), in which the Respondent affirmed that he had read the requirements outlined in the NPPM.

39. In cross-examination, the Respondent testified that he had only perused the NPPM but had provided the affirmation because: "If I didn't say I read it, I wouldn't have been approved to go to IPC . . ." (Transcript, July 15, 2021, p. 75, line 21 to page 78, line 4).

40. In our view, this type of answer provides no excuse for not complying with the provisions of the NPPM.

41. On November 29, 2016, the Respondent completed a further Affirmation which stated: "I have read, fully understand and will comply with the contents of the Manual. I hereby agree to take any and all steps necessary, including but not limited to reviewing the most recent version of the Manual and subsequent compliance notices to ensure that both the spirit and intent of Securities Regulations and IPPI's Policies are complied with." (Joint Book of Documents, Tab 4)

42. In his written argument, the Respondent does not deny his execution of the Principal/Agent Agreement or the two Affirmations but takes the position that the various policies do not apply as they are confined to Limited Authorization Form ("LAF") accounts, which specifically exclude Nominee Accounts.

43. In response, Staff argues that the subsections quoted above in paragraph 34 (i.e. "No Discretion Granted" and "Record Keeping for Trading Authorizations") are self-contained subsections under the broader section entitled "Mutual Fund Processing Procedures" (see page 109 of the NPPM). We agree with Staff that, while the "Limited Authorization Form" ("LAF") subsection precedes the two subsections quoted above, there is no basis to conclude that it, in any way, circumscribes these subsections. Further, there is no language within those subsections that expressly excludes nominee accounts from their ambit.

44. Further, as Staff argues, that while LAF's do not apply to nominee name accounts, the reason is that nominee name accounts effectively have an embedded LAF. Both LAF and nominee name accounts permit an Approved Person to submit trades for processing without obtaining a client's signature on the trade form.

45. The Respondent either knew or ought to have known of this parallel and understood that IPC's policies concerning discretionary trading and the need for adequate record keeping applied to him.

46. MSN-0035, dated December 10, 2004, makes this similarity between LAF's and nominee name accounts clear in its direction that client notes are particularly important in circumstances where an Approved Person relies on a limited trading authorization or the instructions for a nominee name account.

47. MSN-0042 states, in part: "Members and Approved Persons are reminded of the requirement to record and maintain evidence of client instructions for all trades in accordance with MFDA Rule 5.1(b). The requirement to record and maintain evidence of client instructions includes trades made pursuant to an LFA and trades made for accounts in nominee names."

48. The Respondent also took issue with the testimony of Mr. Onyeaju, as he said Mr. Onyeaju took "broad license" with his answers. Instead, the Respondent would have us accept his alternative opinions. We are not prepared to do so. As indicated, Mr. Onyeaju was Director of Compliance at the material time and, consequently, well placed to explain IPC's NPPM.

(e) Bulk Trades #1 and #2

49. In October of 2015, the Respondent transferred his business from Investia to IPC. After consulting with his currency experts, he had come to the conclusion that the Canadian dollar was going to reach the lower level of its limit (i.e. the U.S. dollar was reaching the higher end of its limit). As a result, he intended to recommend to a large number of his clients that they switch from the U.S. dollar version of North Star and American Equity to the currency neutral (i.e. hedged) version of the same two mutual funds (i.e. Bulk Trade #1). On July 28, 2015, he had sent an email to his clients recommending the switch.

50. The Respondent was also of the view that the Dynamic Dividend Advantage Fund A ("Dynamic Fund"), that was held in his "model portfolios" had become volatile. Consequently, he intended to recommend to his clients that they redeem the Dynamic Fund and purchase the Mackenzie Global Strategic Income Fund F (Bulk Trade #2).

(f) The Concept of a Bulk Switch

51. The Respondent was aware of the large amount of work that would be required to complete Bulk Trades #1 and #2.

52. The Respondent contacted the Executive Vice-President of Operations and Information Services at IPC and asked whether the processing of a bulk trade would be possible. He did not contact the Compliance Department as he wanted to know whether IPC was capable of doing a bulk switch. He was told that a bulk switch was possible. It is unfortunate, and somewhat inexplicable, that the Operations Department did not check with the Compliance Department before advising that a bulk switch was, technically, possible.

53. On September 26, 2015, the Respondent wrote to Mark Santos ("Santos"), who was to be his Branch Manager when he transferred to IPC. He referred to "the mass switch to currency neutral versions of the non-hedged versions of the identified funds."

(g) Instructions Concerning the Timing of the Bulk Trades

54. In October 2015, the Respondent began to meet with his clients to have them execute the paperwork to transfer to IPC and, *inter alia*, to obtain instructions concerning Bulk Trades #1 and #2.

55. At the Hearing on the Merits, the Respondent testified that, on account of the need to wait for the clients' investments to transfer from Investia to IPC, he advised his clients that the trades would be delayed for approximately 45 days, plus, potentially, a little more time to set up the Bulk Trades.

56. On October 26, 2018, the Respondent attended a taped compelled Interview with Staff ("Interview") pursuant to the provisions of section 22 of By-law No.1. At the commencement of the Interview, he was advised that "you are required to answer our questions truthfully." (Interview Transcript, page 6, line 9)

57. At the Interview, the Respondent stated, in part, as follows:

> "When we're making a switch from one fund to another, it will have an impact on you, it could be positive or negative, very minimal. I'm not saying timing doesn't count, timing does count. When we met with clients, and perhaps it doesn't say in here, but we explain to clients that there is an awful lot we got to do here, this won't be happening immediately, it'll be happening in the next while. Technically, that should be in the notes. If I knew I'd end up here, we would have made sure those were all in the notes at the time.
>
> . . .
>
> But in any event --- I don't know what to say. I mean, they were --- there was a gap in time."

58. In his Written Submissions, counsel for the Respondent agreed that there was a discrepancy in the Respondent's explanations for the delayed timing but submitted as follows:

> "At the time of his MFDA interview the Respondent gave a non-sensical reason to explain 2015 trade delays. If it is accepted that the Respondent is of reasonably sound mind, the answer he gave at

> his interview corroborates the fact that he not only didn't prepare for his interview (to which he testified), but that he was emotionally affected at that time (to which he testified). His testimony at the Hearing, together with the testimony of his Assistant, confirmed the detailed discussions they had with clients to explain the reasons for the trade delays. It is incredulous to believe that the Respondent and his assistant would have deliberately misled his clients about the reasons for the delays – or failed to address the issue whatsoever with them, and then misled the Panel. What reason on earth would an advisor have to withhold routine, but very important information as such from his clients? The evidence given under oath at the Hearing is the correct and true version of events. The Respondent went through a troubling and painful time."

59. The Respondent used a template note with respect to Bulk Trades #1 and #2. The note is silent on the issue of timing. Both the Respondent and his Assistant testified that fulsome explanations for the trade delays were provided in the meetings with clients in the Fall of 2015.

60. The Respondent's Assistant, Ms. Horsman-Benoit, testified that dealer-to-dealer transfers "could take anywhere from two to four weeks" and that was discussed with clients. (Transcript of July 14, 2021, page 17, lines 12-21)

61. In his testimony, the Respondent said that his Assistant was incorrect in her testimony as: "At IPC, there were a couple that took 60 days. Most took between 35 and 50 days, or thereabouts." (Transcript of July 14, 2021, page 93, lines 15-20).

62. It is impossible to tell from the template notes what information, if any, as to timing, was conveyed to the clients.

63. Bulk Trade #1, which involved 610 switches, was processed between December 11 and 15, 2015. Bulk Trade #2, which involved a total of 308 trades, was processed between December 11 and 18, 2015.

64. The Respondent provided to Staff a copy of his notes for his client, Diane Pomeroy, as a sample for all of the client notes. (Joint Book of Authorities, Tab 27)

65. According to the note, the Respondent met with the client on October 6, 2015, and obtained instructions for the two Bulk trades. The client's investments were received by IPC on October 28, 2015. For this client, Bulk Trades #1 and #2 were processed on December 11, 2015 and December 16, 2015, respectively, 66 and 71 days respectively, after the client consented to the Respondent's recommendation to process those trades.

(h) The Branch Manager's Review of Bulk Trades #1 and #2

66. Bulk Trades #1 and #2 appeared on the trade blotter of Santos, the Branch Manager, for review. Santos testified that he was, initially, alarmed at the large amount of switches as he had not, in his words, been given a "heads up". He also noticed that Bulk Trade #1 was done "off-book", in that they had not been processed through IPC.

67. He then spoke with the Operations Department and discovered that they had been involved in the processing of the trade. He then reviewed the Bulk Trades and satisfied himself as to their suitability, following which he approved the trades.

68. Mr. Santos did not contact the Respondent or review the Respondent's notes concerning client authorization of the Bulk Trades.

69. Mr. Santos received a warning letter from the MFDA for:

a) in connection with Bulk Trade #1, relying on communications with IPC's Operations Department only, a department with no compliance functions, and failing to contact the Respondent to query the trades and review the Respondent's notes, and
b) in connection with Bulk Trade #2, making no inquiries with IPC or the Respondent.

(i) Bulk Trade #3

70. In October of 2016, the Respondent recommended to his clients that they redeem a portion of the North Star and American Equity Funds what they held and purchase the Manulife Bundle Series F fund (Bulk Trade #3).

71. The Respondent believed that "it wasn't a switch that had to be made right away". He testified that he advised his clients that the trades would be processed in November.

72. The Respondent claims that he kept a running log of the dates of his communications with his clients concerning the trades. He testified that his computer crashed and, consequently, is unable to produce any contemporaneous notes of his communications with his clients.

73. In November of 2016, after he says he had communicated with all of his clients, he drafted a template note (Joint Book of Documents, Tab 28). The note is silent on the issue of the timing

of the Trade. In addition, the note does not indicate the date when the Respondent met with any particular client.

74. At the Hearing on the Merits, the Respondent did not present evidence from any of his clients as to any of the matters at issue herein.

75. Bulk Trade #3 involved a total of 309 trades which were processed between November 16 and 30, 2016.

(j) Bulk Trade #4

76. Beginning in June of 2017, the Respondent had general discussions with clients concerning currency movements of the Canadian dollar against the U.S. dollar. He advised his clients that if the Canadian dollar continued to rise, he would be looking to implement the tactical currency strategy.

77. As the Respondent testified:

> "I explained to them that, look, we can't give you date that this trade will happen because it's a – the situation with the dollar is fluid, so the recommendation was that if the Canadian continued to rise, that we would shift it to U.S. by the end of August. And got their consent.
>
> Now my intent was to speak to them again the first part of August to confirm a trade date and formalize our notes with the date of conversation . . ."
>
> (Transcript of July 14, 2021, page 136, lines 8-18)

78. The Respondent admitted that he was fully aware that his notes were non-compliant. He agreed that he did not take formal notes of his calls. It was, he said, more of a "roll call" to ensure that the clients were onside. He planned to formalize his client notes with dates when he spoke with them in the first week of August. The Respondent agrees that, apart from a very few, he did not speak again with his clients in early August.

79. In early August 2017, after checking with his currency consultants, the Respondent became convinced that he needed to have Bulk Trade #4 processed quickly before the Canadian dollar dropped again. The Respondent was aware that to do so immediately would mean that he was proceeding without fully compliant client consents.

80. The position of the Respondent is that his decision to proceed with the switch, notwithstanding that he did not have "dated" consents, and without speaking to his clients as he had intended, was based solely on protecting client positions. He described it as a "judgment" call.

81. On August 3, 2017, at 4:37 p.m., the Respondent sent an email (Joint Book of Documents, Tab 29) to his clients, which advised of his intention to proceed with Bulk Trade #4 unless the clients advised the Respondent or his Assistant that they disagreed with the Respondent's recommendation. The email concluded, as follows: "If we do not hear from you by Friday, August 11th, we will process the switches to remove the hedge."

82. Eighteen minutes later, understanding that IPC's Operations Department could have Bulk Trade #4 processed shortly, the Respondent sent a second email, identical to the first, with the exception that the time to object to the trade was reduced from August 11th to August 4th. (Joint Book of Documents, Tab 30) The clients were given 24 hours to respond.

83. A small number of clients did respond. They are not the subject of this proceeding.

84. Bulk Trade #4, which involved 545 switches, was processed on August 9, 2017.

85. On or about August 1, 2017, the Respondents and/or his Assistant drafted a template note to record his client contacts. The note gave a range of June 16, 2017 to August 1, 2017, for these contacts, not the date of any particular contact. (Joint Book of Documents, Tab 16, last page) This note was, subsequently, updated, to incorporate the two emails sent to the clients on August 3, 2017.

86. On August 8, 2017, the Respondent's Assistant sent an email to his Branch Manager, Sam Jahshan ("Jahshan"), providing him a "heads up" that the Respondent was doing a "mass switch" for "2 of our Fidelity Funds". The email further stated that "likely you will see the switches on your daily blotter" and "clients were all made aware that this would be happening". (Joint Book of Documents, Tab 6)

87. When the trades appeared on his blotter, Jahshan became concerned, in light of the much higher than expected trade volume, as to whether the Respondent had properly obtained client authorizations for each trade. Consequently, he escalated the matter to the Director of Compliance and asked the Respondent for the rationale for the trades and requested a sample of the client note. (Joint Book of Documents, Tab 16)

88. When Jahshan received the note, he became concerned. He testified:

> ". . . it's not a typical note that I would see, given my experience. It's not a usual note that I would see with respect to a trade in a client file. There would be other details. You know, time of call, method of communication, how they discussed it. This is pretty generic and I assumed it to be the note for all the trades on the account." (Transcript of July 13, 2021, p. 17, lines 16-25)

89. Mr. Onyeaju immediately commenced an internal review to determine the appropriateness of Bulk Trade #4. On August 16, 2017, IPC submitted a report on the MFDA's Member Event Tracking System ("METS"), reporting that it had concerns that the Respondent had potentially engaged in discretionary trading and kept inadequate client notes.

90. The METS filing stated, in part, as follows:

> "These concerns were first identified on August 10, 2017, pursuant to a mass switch executed at the fund company resulting in over 800 trades being placed. IPCIG has placed Mr. Attis under close supervision." (Joint Book of Documents, Tab 22)

91. On August 18, 2017, IPC issued a Compliance Notice to the Respondent which identified a number of concerns, including that the Respondent had engaged in discretionary trading and failed to keep adequate client notes. (IPC Compliance Notice, Joint Book of Documents, Tab 7)

92. IPC then commenced a more in-depth investigation. This resulted in a Final Investigation Report, dated January 15, 2018. (Joint Book of Documents, Tab 7)

93. It was the view of the investigation that the Respondent, *inter alia*, had engaged in discretionary trading and that individual client signatures or client consents had not been received or obtained for each trade.

94. On October 19, 2017, the Respondent resigned from IPC. (Joint Book of Documents, Tab 11)

(k) <u>The Respondent's Inconsistent Statements</u>

95. A very troubling aspect of the Hearing on the Merits was the attempt by the Respondent to resile from repeated inculpatory statements which he had made, both orally and in writing, over a lengthy period of time to the Member, IPC, and his regulator, the MFDA. He took the position that "these admissions and misstatements were not compatible with the actual facts, but rather

were attuned to the Respondent's misguided and confused thinking at the time." He provided no medical or psychiatric evidence at the Hearing on the Merits to support his contention that his numerous inculpatory statements, made over a lengthy period of time, were incorrect.

96. The Respondent is an intelligent, articulate, well-educated individual, who first became registered in the securities industry in 2003. The inculpatory statements were made in circumstances that he knew or ought to have known they would be relied upon.

97. At the Hearing on the Merits, the Respondent asserted that he had not contravened the discretionary trading rules, and that he had obtained client authorizations for Bulk Trade #4. He testified that his August 3, 2017, emails were not an attempt to obtain "negative consent" from clients, but rather an attempt to find if any clients had any objections to the switches under Bulk Trade #4 to which they had already consented.

98. This is to be contrasted with his previous admissions, a sample of which follows:

A. On August 24, 2017, the Respondent wrote a letter to IPC's Chief Compliance Officer, responding to the IPC Compliance Notice. In the letter, he stated:

> "I wish to confirm the following for the record:
>
> i) I understand and appreciate the need for structure and rules and the role of enforcement to preserve the integrity of the industry and ensure client protection.
>
> iii) I did not mean to violate the rules.
>
> v) I was always aware that trades must be supported by Client Notes reflecting communication with the client, with date and time. However, strict application of these specific rules renders a mass switch impossible, as one cannot meet these requirements in the short timeframe allowed between the date/time of the meeting/approval and the date of the switch." (Joint Book of Documents, Tab 32)

B. On September 28, 2017, the Respondent sent an email to IPC's Ultimate Designated Person in which he stated, as follows:

> "I will accept fault for making by using a "reply if you do not want to proceed" option as opposed to a confirmed verbal or written response. I acknowledge that this mistake constitutes a violation of the discretionary trading rules." (Joint Book of Documents, Tab 62)

C. Between October 2017 and February 2018, the Respondent met with his clients and had them sign Ratification Letters which stated, in part, as follows:

> "One of the restrictions that applies to my registration (as an MFDA representative) is that I am not permitted to make "discretionary" trades on behalf of clients. A discretionary trade is where a trade is made on behalf of a client without having first obtained the client's verbal or written consent.
>
> . . .
>
> You will note in my referred email that I asked you to "let us know if you did not want us to proceed with the recommended switches". This was not in conformity with the regulations. The regulations require me to obtain verbal or written confirmation or client acceptance of my recommended switches. This is the crux of the issue." (Joint Book of Documents, Tab 91)

D. On November 10, 2017, after being notified that the MFDA was investigating him for unauthorized trading, the Respondent wrote to the MFDA Case Assessment Officer, in part, as follows:

> "Regardless as to whether the trade was processed, I failed to follow proper protocol by not obtaining specific confirmations for the trade, instead of relying on an "opt-out" in my email recommending the trade." (Joint Book of Documents, Tab 53)

E. On November 13, 2017, the Respondent sent a further email to the MFDA Case Assessment Officer in which he repeated certain earlier admissions and added certain others, as follows:

> "I would like to state the following for the record:
>
> (i) I understand and appreciate the need for structure and rules – and I respect the role of compliance and enforcement to preserve the integrity of the industry, and ensure client protections.
>
> (ii) I acknowledge that I made a request of IPC to effect the subject switches.
>
> (iii) I further acknowledge that I was remiss in not having acquired specific client consent to the recommended switches, and that such omission constitutes a violation of the discretionary trading rules.
>
> (iv) I did not mean to violate the rules, however in hindsight I must have been wearing blinders. I am sincerely sorry for the inconvenience I have caused.

> (v) I was much better practiced, experienced and informed in placing trades, and was aware that trades must be I [sic] supported by client notes reflecting communication with the client, pertinent discussion points, the client's confirmation or decline, and a record of the date and time of our communication.
>
> (vi) I unequivocally accept responsibility for my failure to obtain proper client consent, and I unequivocally accept the enforcement role of the MFDA to investigate and levy penalties for the resultant violation of the discretionary trading rules."

F. In an attachment to the November 13, 2017 email, the Respondent provided a number of specific responses to the questions from Staff. With respect to the August 2017 Bulk Trade, the Respondent wrote:

> "I did not obtain specific client authorizations from the vast majority of clients for the bulk trades in August 2017. I acknowledge this omission fully and completely and I accept full responsibility for such."

G. On November 13, 2017, the Respondent sent a second email to the MFDA, in connection with a complaint he was submitting against IPC. He wrote, in part, as follows:

> "I am not in any manner whatsoever relying on this complaint to lighten my burden with respect to the investigation you currently have underway on me with respect to breaching the discretionary trading rules. I accept full responsibility for the matter." (Exhibit 11)

H. Almost one year later, on October 26, 2018, at his Interview with Staff, the Respondent confirmed that what he wrote on November 13, 2017, was accurate.

I. During the Staff Interview, the Respondent answered Staff's questions, in part, as follows:

> "MS. ALFENORE: So in this case [Bulk Trade #4] were you basing the client's authorization on a negative confirmation basis?
>
> MR. ATTIS: From the perspective of the MFDA and the fact I have no client notes to reflect the communications I had and I did not have communications with virtually everybody, my answer to your question would have to be yes.
>
> MS. ALFENORE: Yes, I was just going to ask before I conclude, is there anything that you wanted to add?
>
> MR. ATTIS: I have made some notes, so I'm just going to read through some of them. . . . I unconditionally accept fault for failing to comply with the discretionary trading rule in the August 2017

> bulk switch; however, all other bulk switches were done, I believe, in compliance and within the spirit of the rules.
>
> . . .
>
> MR. ATTIS: . . . Maybe it comes down to my background, I adopted the fiduciary standard the first day I became an advisor, notwithstanding I appreciate and I accept that I violated the discretionary trading rule last August. I was stupid and deserve to be reprimanded. I am ashamed. I worked very hard to build a positive reputation. That's it." (Interview Transcript, Joint Book of Documents, Tab 20, p.86, line 21; p.87, line 13; p.108, line 16; p.109, line 20; p.110 lines 22-25)

III. THE LAW

(a) The Burden of Proof and the Standard of Proof

99. It is undisputed that the burden of proof in these proceedings is on Staff. The standard of proof is the civil standard of the balance of probabilities. Although there is no objective standard to measure sufficiency, the evidence must always be clear, convincing and cogent to satisfy the test.

(b) Notice of Hearing

100. It is important to remember that the Notice of Hearing alleged that the Respondent engaged in discretionary trading and failed to maintain adequate records of the clients' authorization for trades, contrary to the Member's policies and procedures and certain MFDA Rules.

101. Staff did not make any allegations with respect to the suitability of the investments, client losses or gains or the motives of the Respondent. It would also appear that the Respondent did not engage in the alleged impugned activities for direct personal gain.

(c) Discretionary Trading

102. Both former MFDA Rule 2.3.1(a) and the current 2.3.1(b) expressly prohibit discretionary trading by Approved Persons.

103. Previous MFDA Hearing Panels have clearly stipulated what an Approved Person is required to do with respect to each and every trade. For example, in *Garries (Re)* 2016 LNCMFDA 174, the Panel stated as follows:

"An Approved Person is required to obtain express client instructions from a client with respect to each of the elements of every trade (including purchases, redemptions and switches) that are processed in a client account including:

> the specification of which security is to be traded;
>
> the amount of the trade (either in dollar value or the number of units to be traded);
>
> the timing of the trade; and
>
> the specific details of any costs for fees associated with executing the trade."
>
> Smilestone (Re), [2013] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201129, Panel Decision dated August 8, 2013.
>
> O'Brien (Re), [2008] Hearing Panel of the Atlantic Regional Council, MFDA File No. 200809, Panel Decision dated November 25, 2008.

If an Approved Person fails to obtain instructions from a client with respect to one or more elements of the trade and exercises his or her own discretion with respect to any elements of the trade in order to process the trade, the Approved Person has engaged in discretionary trading.

If a trade is processed without the knowledge of the client (even if it can be shown that the trade was processed with good intentions and even if the client benefits financially or otherwise) the trade is unauthorized and the processing of such a trade constitutes a contravention of the regulatory obligations of the Approved Person who processed it.

Even if prior to the processing of the trade, the client has expressed a clear intention to delegate authority to the Approved Person to exercise discretion with respect to one or more elements of the trade, such a trade is still a discretionary trade and an Approved Person is not permitted to accept authority to engage in discretionary trading.

104. See also:

(a) *Price (Re)*, CanLII 72458 at para. 143 (MFDA).

(b) *Rhodes (Re),* 2019 LNCMFDA 125 at paras. 12-18, 37.

(c) *Arena (Re)*, 2020 LNCMFDA 117 at paras. 35, 37.

105. As the evidence detailed above unequivocally demonstrates, the Respondent failed to obtain sufficient instructions from his clients with respect to the timing for Bulk Trades #1 to #3.

106. With respect to Bulk Trade #4, the Respondent relied on his two negative consent emails. He relied, *inter alia*, on his clients' failure to object to the trade within 24 hours as authorization for the trade. This is clearly not permissible. The Respondent submitted the trades for processing without the knowledge or valid consent of his clients. He engaged in discretionary trading.

107. As was stated by the Hearing Panel in *Rounthwaite (Re)*, 2012 LNCMFDA 60 at paras. 7 – 8.

> "Discretionary trading is fundamentally wrong. . . Member Rule 2.3.1 absolutely prohibits it. It:
>
> (i) undermines the client's right and ability to make informed decisions about their financial affairs;
>
> (ii) subverts the ability of a Member to properly supervise trading activity; and
>
> (iii) destroys the integrity of the audit trail.
>
> Jurisprudence emanating from MFDA Hearing Panels is consistent that even when an Approved Person fully apprises a client of the details of a transaction, after it has been made, a discretionary trade is still wrong."
>
> See *Re O'Brien*, [2008] LNCMFDA 17 and *Re Price, supra*.

108. Thus, as stated above, good intentions and financial loss or gain are irrelevant. Likewise, the post-trade Ratification Letters are irrelevant to the issue before us as to whether the Respondent engaged in discretionary trading. As submitted by Staff:

> "The Respondent cannot cure a contravention of his regulatory obligations by obtaining client consent after a trade is completed."

(d) Obligation to Keep Adequate Records of Client Instructions

109. The obligation on an Approved Person to keep adequate records of client instructions is crystal clear:

a) MFDA Rule 5.1(b) requires every Member to maintain "an adequate record of each order, and of any other instructions, given or received for the purchase or sale of securities, whether executed or unexecuted." There then follows a lengthy list of what such records must show.

b) MFDA Rule 1.1.2 requires that an Approved Person comply with the MFDA Rules as they relate to his or her Member.

c) MFDA Staff Notice 0035 was issued on December 10, 2004, and updated on March 4, 2013 and is entitled "Recording and Maintaining Evidence of Client Trade Instructions". It states, in part: "It is particularly important for . . . Approved Persons to record trade instructions received from clients where trades are placed . . . for a nominee name account as there is no written authorization from the client in such cases to verify the trade. Where trades are placed for a nominee name account, records of client trade instructions should also include a note as to how the instructions were given (i.e. by telephone, in person or by facsimile.)"

110. In the case before us, the Respondent's records of client instructions, such as they were, were completely inadequate. He sought to use the same template note to record the specific instructions of up to 100 different clients. There are no dates or details for any of the individual conversations. In the case of the November 2016 Note and the August 2017 Note, there was evidence before us that the notes were created after the Respondent had met with all his clients. These notes do not constitute a reliable record of the details of any of the discussions.

111. The client notes for Bulk Trades #1 to #3 lacked any description of when the trades were to be processed. The August 2017 Note mentioned the month of August but lacked any note of when the meetings took place where the instructions were received. With respect to the November 2016 Note, the Respondent testified that a computer crash wiped out any record of his meetings.

112. The failure to keep adequate records was not insignificant. The agreed upon number of trades was 1782 affecting 407 clients, although some clients were involved in more than one of the trades.

113. As was stated by the Hearing Panel in *Garries (Re):*

> "The failure by an Approved Person to document a client's authorization of a trade may give rise to ramifications that are similar to those that result from the use of pre-signed account forms. Such ramifications include the destruction of the audit trail and the frustration of the Member's ability to respond to inquiries and complaints from clients concerning the propriety of trading activity in their accounts."
>
> *Garries (Re)*, *supra* at para. 54.

Price (Re), supra at para. 124.

(e) MFDA Rule 2.1.1

114. MFDA Rule 2.1.1 provides, in part, as follows:

> "2 RULE NO. 2 – BUSINESS CONDUCT
>
> 2.1 GENERAL
>
> 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
>
> . . ."

115. MFDA Panels have repeatedly found that discretionary trading and the failure to keep adequate records of client instructions to be a contravention of MFDA Rule 2.2.1.

(a) *Wallace (Re)*, 2017 LNCMFDA 7

(b) *Arena (Re)*, *supra*

(c) *Carney (Re)*, 2017 LNCMFDA 100

(d) *Martell (Re)*, 2018 LNCMFDA 234

(e) *Garries (Re)*, *supra*

116. It is also clear that IPC, through its NPPM, had policies and procedures which both prohibited discretionary trading by Approved Persons and required them to keep adequate notes. Approved Persons, such as the Respondent, have an obligation, pursuant to Rule 1.1.2, to comply with these policies and procedures.

117. As stated by the Hearing Panel in *Franco (Re)*:

> "The obligation of Approved Persons to comply with the policies and procedures of the Member that they are registered with is a cornerstone of the self-regulatory system. When Approved Persons disregard those obligations, the Member's ability to supervise the

> conduct of such Approved Persons and protect the interests of clients and the public is undermined."
>
> *Franco (Re)*, 2011 LNCMFDA 55 at para. 38.
>
> *Frank (Re)*, 2015 LNCMFDA 75 at paras. 56-58.

118. It is clear that the Respondent, by his conduct, contravened MFDA Rules 2.5.1 and 1.1.2.

IV. DECISION

119. After considering all of the evidence, both oral and documentary, as well as the extensive oral and written submissions of Counsel for both Staff and the Respondent, we have, unanimously, concluded that Allegations #1 and #2, in the Amended Notice of Hearing, have been established.

V. PENALTY HEARING

120. We have not, as yet, decided what, if any, penalty should be imposed upon the Respondent, pursuant to section 24 of MFDA By-law No. 1.

121. In this regard, we would request that the Hearings Coordinator consult with the parties in order to establish a convenient date for the holding of a Penalty Hearing. This Penalty Hearing will be held by way of videoconference.

122. If either or both parties believe that it would be of assistance, we are prepared to agree to a reasonable schedule for the filing of written submissions in advance of the oral Penalty Hearing.

123. If the Hearing Coordinator encounters any difficulties in establishing a reasonable schedule, we will convene a video conference call with the parties to make the appropriate Order.

DATED this 5th day of July, 2022.

"Thomas J. Lockwood"

Thomas J. Lockwood, Q.C.
Chair

"Edward Jackson"

Edward Jackson
Industry Representative

"Guenther W. K. Kleberg"

Guenther W. K. Kleberg
Industry Representative

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