



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: Zohar (Michael) Barak

Heard: June 23, 2016 in Toronto, Ontario
Reasons for Decision: September 9, 2016

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Honourable P. T. Galligan, Q.C.	Chair
Brigitte J. Geisler	Industry Representative
Selwyn Kossuth	Industry Representative

Appearances:

Sarah Glickman)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
)	
Larry Elliott)	Counsel for the Respondent (by conference call)
)	

1. Staff of the Mutual Fund Dealers Association (the “MFDA”) and Zohar (Michael) Barak (the “Respondent”) entered into a settlement agreement (the “Settlement Agreement”) which they had negotiated pursuant to s. 24.4.1 of MFDA By-law No. 1. They submitted the Settlement Agreement to this Hearing Panel, pursuant to Rule of Procedure 15.1, for approval or rejection. After considering the Settlement Agreement, the other material filed and upon hearing the submissions made by Enforcement Counsel and by counsel for the Respondent, we issued an order accepting the Settlement Agreement. These are our reasons for making that order.

THE CONTRAVENTION

2. The Respondent admits that:

between June 6, 2004 and May 7, 2014 the Respondent, or his assistant for whom he was responsible, obtained, possessed, and in two instances, used to process transactions, 54 pre-signed account forms in respect of at least 28 clients, contrary to MFDA Rule 2.1.1.

TERMS OF SETTLEMENT

3. Staff and the Respondent agree and consent to the following terms of settlement:

- a) the Respondent shall pay a fine in the amount of \$9,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
- b) the Respondent shall pay costs in the amount of \$2,500 pursuant to s. 24.2 of MFDA By-law No. 1;
- c) the fine shall be payable in 12 monthly installments in the amount of \$750 each, the first of which shall be paid on the final business day of the month that follows the date of the acceptance of the settlement agreement by the Hearing Panel;
- d) the Respondent shall in the future comply with MFDA Rule 2.1.1; and
- e) the Respondent will attend by teleconference, on the date set for the Settlement Hearing.

THE CIRCUMSTANCES

4. The circumstances are set out in detail in paragraphs 7 - 13 inclusive of the Settlement Agreement which is attached as Appendix A to these reasons for decision. The following is a brief summary of them.

5. Over a ten-year period the Respondent, or an assistant for whom he was responsible, obtained 54 pre-signed account forms on behalf of 28 clients and in two instances used the forms to process transactions. There were no client losses.

SERIOUSNESS OF THE CONTRAVENTIONS

6. The use of pre-signed account forms is serious misconduct. Their use adversely affects the integrity and reliability of account documents, leads to the destruction of the audit trail, has a negative impact upon Member complaint handling and has the potential for misuse in the form of unauthorized trading, fraud and misappropriation. The Hearing Panel in *Price (Re)* [2011], MFDA File No. 200814, at p. 22, has spoken authoritatively about the use of pre-signed forms:

122. Pre-signed forms present a legitimate risk that they may be used by an approved Person to engage in discretionary trading. As will be discussed more fully *infra*, the Respondent, in this case, did not have the proper authority to engage in discretionary trading of any nature or kind on behalf of his clients.

123. At its 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. While there is absolutely no suggestion that the Respondent engaged in any of these activities, the rationale for the prohibition on pre-signed forms becomes clear.

124. Pre-signed forms also subvert the ability of a Member to properly supervise trading activity. They destroy the audit trail. The presence of the client's signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client

complaint concerning the propriety of trading activity in his or her account.

CIRCUMSTANCES OF MITIGATION

7. In determining an appropriate remedy it is always necessary to consider mitigating circumstances. The circumstances of mitigation which we take into account are:

- a) There is no evidence that the Respondent received any financial benefit from engaging in the misconduct described above beyond the commissions and fees that he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.
- b) There is no evidence of client harm.
- c) The Respondent has not previously been the subject of MFDA proceedings.
- d) By entering into this Settlement Agreement, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a full hearing on the allegations.
- e) There were no client complaints.
- f) The Respondent was placed under close supervision by his employer for a period of six months.

THE DUTY OF A PANEL AT A SETTLEMENT HEARING

8. It is well settled that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties in their settlement agreement. Rather, our duty is to determine whether the penalty is a reasonable one and whether it meets the objectives of the disciplinary process, which are to maintain the integrity of the Investment Services Industry and to protect the public. In *Re Professional Investments (Kingston) Inc.*, [2009] LNCMFDA 9 at paragraph 13 the following appears:

13. In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into

account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. As has been said: “The settlement process is one of negotiation and compromise and the penalty imposed following a settlement will often be less onerous than one imposed following a Hearing where similar findings are made.”

Re Clark, [1999] I.D.A.C.D. No. 40 at page 3.

9. See also *Re Raymer*, [2009] LNCMFDA 15 at paragraph 4:

4. It is generally agreed that hearing panels should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness given the conduct of the Respondent. (See, for instance, *Re Rodney Jacobson*, June 11, 2007, Prairie Regional Council, No. 200712; *Re Clark*, [1999] I.D.A.C.D. No. 40, and *Re Milewski*, [1999] I.D.A.C.D. No. 17.)

10. The courts have addressed the importance of settlements and have approved of their place in the disciplinary process. See *B.C. Securities Commission v. Seifert*, [2006] BCJ No. 225, where the following appears at p. 49:

Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing...

11. Finally we refer to the comments of an IIROC Hearing Panel in the case of *Re Vorstadt*, [2012] IIROC at p. 4:

Before leaving this case we wish to stress the importance of respect for the settlement process. Settlement leads to fair, efficient and

economical resolution of disciplinary matters. The settlement process should be encouraged and supported. In *Re Clarke*, [1999] I.D.A.C.D. No. 40, the Hearing Panel stated, at p. 3:

The panel must be cognizant of the importance of the settlement process and should not interfere lightly in a negotiated settlement. [Emphasis added.]

12. We subscribe to that view.

GUIDELINES AND OTHER DECISIONS

13. In determining whether a settlement is a reasonable one, a hearing panel is entitled to look at regulatory guidelines and other decisions. Guidelines are not binding upon a hearing panel and cannot derogate from its responsibility to decide what might be an appropriate penalty in a given case. However guidelines are useful in that they show what penalties Members of the industry consider to be generally appropriate. The fine agreed to is higher than the minimum fine suggested by the Penalty Guidelines.

14. Decisions in other cases can often be of some assistance in helping to indicate what might be a reasonable range of penalties. It is always necessary to be cautious about relying too heavily on decisions in other cases because no two cases are ever the same.

15. Ms. Glickman has referred us to three helpful decisions respecting penalty. They are *Ding (Re)* [2015], MFDA File No. 201518; *Wilson (Re)* [2016], MFDA File No. 201562; and *Hounscome (Re)* [2015], MFDA File No. 201411. It is not necessary to review those decisions. They show, however, that the penalties agreed to in this case fall within the range of penalties shown in them.

IMPACT OF THE PENALTY

16. Monetary penalties are imposed to act as specific and general deterrence. The Respondent is an individual. He is not a large organization. The penalty composed of a fine of

\$9,000 and costs of \$2,500 is a significant penalty to him. The penalty imposed, in our opinion, is sufficient to act as a specific deterrent to this Respondent and should be sufficient to alert all Approved Persons that similar conduct will attract significant consequences.

DECISION

17. At the conclusion of the hearing we withdrew from the hearing room. We considered the circumstances of this case and reached the conclusion that the settlement was a reasonable one. Therefore we accepted it.

DATED this 9th day of September, 2016.

The Hon. P. T. Galligan, Q.C.
Chair

Brigitte J. Geisler
Industry Representative

Selwyn Kossuth
Industry Representative



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**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: Zohar (Michael) Barak

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. Staff of the Mutual Fund Dealers Association of Canada ("Staff") and the Respondent, Zohar (Michael) Barak, consent and agree to settlement of this matter by way of this agreement (the "Settlement Agreement").

2. Staff conducted an investigation of the Respondent's activities which disclosed activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

II. JOINT SETTLEMENT RECOMMENDATION

3. Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement.

4. The Respondent admits to the following violations of the By-laws, Rules or Policies of the MFDA:

a) between July 6, 2004 and May 7, 2014 the Respondent, or his assistant for whom he was responsible, obtained, possessed, and in 2 instances, used to process transactions, 54 pre-signed account forms in respect of at least 28 clients, contrary to MFDA Rule 2.1.1.

5. Staff and the Respondent agree and consent to the following terms of settlement:

(a) the Respondent shall pay a fine in the amount of \$9,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

(b) the Respondent shall pay costs in the amount of \$2,500 pursuant to s. 24.2 of MFDA By-law No. 1;

(c) the fine shall be payable in 12 monthly installments in the amount of \$750 each, the first of which shall be paid on the final business day of the month that follows the date of the acceptance of the settlement agreement by the Hearing Panel;

(d) the Respondent shall in the future comply with MFDA Rule 2.1.1; and

(e) the Respondent will attend by teleconference, on the date set for the Settlement Hearing.

6. Staff and the Respondent agree to the settlement on the basis of the facts set out in Part III herein and consent to the making of an Order in the form attached as Schedule "A".

III. AGREED FACTS

Registration History

7. Since July 2004, the Respondent has been registered in Ontario as a mutual fund salesperson (now known as a Dealing Representative) with Investors Group Financial Services Inc. ("Investors Group"), a Member of the MFDA.

8. At all material times, the Respondent conducted business in the Ottawa, Ontario area.

Pre-Signed Account Forms

9. Between July 6, 2004 and May 7, 2014, the Respondent, or his assistant for whom he was responsible, obtained, possessed, and in 2 instances, used to process transactions, 54 pre-signed account forms in respect of at least 28 clients.

10. The pre-signed account forms included transfer authorization forms, pre-authorized contribution agreement forms and client application forms.

Investors Group's Investigation

11. Investors Group's compliance staff detected the conduct that is the subject of this Settlement Agreement during a routine branch audit on May 7, 2014 and subsequent follow-up investigation.

12. As part of its investigation, Investors Group sent letters to all clients serviced by the Respondent in order to determine whether the Respondent had engaged in any unauthorized trading in their accounts. No clients reported any concerns to Investors Group.

13. On August 11, 2014, Investors Group placed the Respondent under close supervision for a period of six months.

Additional Factors

14. There is no evidence that the Respondent received any financial benefit from engaging in the misconduct described above beyond the commissions and fees that he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.

15. There is no evidence of client harm.
16. The Respondent has not previously been the subject of MFDA proceedings.
17. By entering into this Settlement Agreement, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a full hearing on the allegations.

IV. ADDITIONAL TERMS OF SETTLEMENT

18. This settlement is agreed upon in accordance with section 24.4 of MFDA By-law No. 1 and Rules 14 and 15 of the MFDA Rules of Procedure.
19. The Settlement Agreement is subject to acceptance by the Hearing Panel which shall be sought at a hearing (the "Settlement Hearing"). At, or following the conclusion of, the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
20. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately, and any suspensions, revocations, prohibitions, conditions or other terms of the Settlement Agreement shall commence, upon the effective date of the Settlement Agreement.
21. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel:
 - a) the Settlement Agreement will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter;
 - b) the Respondent waives any rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction;

- c) Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the facts and the contraventions described in this Settlement Agreement. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any facts and contraventions that are not set out in this Settlement Agreement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations;
- d) the Respondent shall be deemed to have been penalized by the Hearing Panel pursuant to s. 24.1.2 of By-law No. 1 for the purpose of giving notice to the public thereof in accordance with s. 24.5 of By-law No. 1; and
- e) neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against the Respondent.

22. If, for any reason, this Settlement Agreement is not accepted by the Hearing Panel, each of Staff and the Respondent will be entitled to any available proceedings, remedies and challenges, including proceeding to a disciplinary hearing pursuant to sections 20 and 24 of By-law No. 1, unaffected by the Settlement Agreement or the settlement negotiations.

23. Staff and the Respondent agree that the terms of the Settlement Agreement, including the attached Schedule “A”, will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.

24. The Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement. A facsimile copy of any signature shall be effective as an original signature.

DATED this 8th day of June, 2016.

“KS”

Witness – Signature

“Zohar (Michael) Barak”

Zohar (Michael) Barak

KS

Witness – Print name

“Shaun Devlin”

Staff of the MFDA
Per: Shaun Devlin
Senior Vice-President,
Member Regulation – Enforcement



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ORDER

WHEREAS on [date], the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Settlement Hearing pursuant to section 24.4 of By-law No. 1 in respect of Zohar (Michael) Barak (the "Respondent");

AND WHEREAS the Respondent entered into a settlement agreement with Staff of the MFDA, dated [date] (the "Settlement Agreement"), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

AND WHEREAS the Hearing Panel is of the opinion that between July 6, 2004 and May 7, 2014, the Respondent, or his assistant for whom he was responsible, obtained, possessed, and in 2 instances, used to process transactions, 54 pre-signed account forms in respect of at least 28 clients;

IT IS HEREBY ORDERED THAT the Settlement Agreement is accepted, as a consequence of which:

1. The Respondent shall pay a fine in the amount of \$9,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1;
2. The Respondent shall pay costs in the amount of \$2,500 pursuant to s. 24.2 of MFDA By-law No. 1;
3. the fine shall be payable in 12 monthly installments in the amount of \$750 each, the first of which shall be paid on the final business day of the month that follows the date of the acceptance of the settlement agreement by the Hearing Panel;
4. The Respondent shall in the future comply with MFDA Rule 2.1.1; and
5. If at any time a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of, this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this [day] day of [month], 20[].

Per: _____
[Name of Public Representative], Chair

Per: _____
[Name of Industry Representative]

Per: _____
[Name of Industry Representative]