



**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: Daniel Phillipus Botha**

Heard: May 6-7, 2019 in Calgary, Alberta  
Decision: May 7, 2019  
Reasons for Decision: July 10, 2019

**REASONS FOR DECISION**

Hearing Panel of the Prairie Regional Council:

Shelley L. Miller QC  
Adam Dudley  
Greg Wiebe

Chair  
Industry Representative  
Industry Representative

Appearances:

Justin Dunphy	)	Enforcement Counsel for the Mutual Fund
	)	Dealers Association of Canada
	)	
	)	
Shiv Ganesh	)	Counsel for the Respondent
	)	
	)	
Daniel Phillipus Botha	)	Respondent, in person
	)	
	)	

1. By Notice of Hearing dated March 23, 2018 (“NOH”), the Mutual Fund Dealers Association of Canada (the “MFDA”) commenced a disciplinary proceeding against Daniel Phillipus Botha (the “Respondent”) pursuant to ss. 20 and 24 of MFDA By-law No. 1

2. The NOH set out the following allegations:

Allegation #1: between March 2014 and March 2015, the Respondent falsified and used to process transactions, four account forms in respect of two clients by altering information on the account forms without having the clients initial the alterations, contrary to MFDA Rule 2.1.1.

Allegation #2: between January 2011 and January 2016, the Respondent obtained, possessed, and in some instances, used to process transactions, 40 pre-signed account forms in respect of 26 clients, contrary to MFDA Rule 2.1.1; and

Allegation #3: between March 2014 and August 2015, the Respondent:

- a) on eight occasions, submitted client Limited Trading Authorization forms to the Member for processing on which he falsely indicated that he had witnessed clients signatures; and
- b) on four occasions, submitted client Limited Trading Authorization forms to the Member for processing that did not meet the Member’s signature verification requirements,

contrary to the Member’s policies and procedures, and MFDA Rules 2.5.1, 1.1.2, and 2.1.1.

### **Positions of Counsel**

3. At the outset of the hearing, Enforcement Counsel advised as regards Allegations 1 and 2, that it would proceed on the basis of 3 altered account forms and 41 pre-signed forms in violation of MFDA Rule 2.1.1. He conceded that the essence of the violation with respect to Allegation 3 was whether there was compliance with the Member’s policies and procedures, (sometimes hereafter referred to as “policies”) and accordingly proof of policies in place as to Limited Trading Authorization (“LTA”) forms and whether Sun Life advisors had access to those policies was relevant.

4. Respondent’s Counsel advised that the Respondent took no position as to whether MFDA had Rules in place and whether they were communicated to him. Despite this concession, the Respondent contended that a hearing was necessary because the MFDA was further obliged to

prove that (a) Sun Life Financial Investment Services (Canada) Inc. (“Sun Life”) had policies and procedures in place, (b) that those policies and procedures were communicated to the Respondent or, (c) that he should have known about them. He disputed he should have known about an internal policy that was never communicated to him. The Respondent would give evidence in respect of 7 of the 56 forms referenced in the Allegations.

5. Enforcement Counsel contended in response that it was sufficient for MFDA to prove that Approved Persons, including the Respondent, had the means to inform themselves of the content of those policies and lack of knowledge did not amount to a defence to the Allegations.

### **Issues in Dispute**

6. The issues in dispute in this case were:

- a) whether MFDA had proven on a balance of probabilities that:
  - i) Sun Life had policies and procedures (“policies”) in place,
  - ii) Sun Life made those policies available to Approved Persons, including the Respondent,
- b) whether MFDA was required to further prove that those policies were communicated to the Respondent or that he should have known about them,
- c) whether the Respondent’s dispute over the 7 forms constituted defences to any of the Allegations,
- d) whether there was evidence to prove the forms presented in evidence breached the MFDA Rules and Sun Life policies and procedures prohibiting use of pre-signed or altered forms, or guidelines pertaining to witnessing of LTA forms,
- e) whether the Respondent could be exonerated by reason of additional defences the Respondent raised as to:
  - i) the lack of sufficient reliability of the evidence of a witness from Sun Life,
  - ii) whether an adverse inference should be drawn due to the failure of MFDA to present a Sun Life employee with actual knowledge of the communications of the policies during the times material to the allegations,

- iii) the lack of evidence presented to establish the Respondent was bound by contract to comply with the policies, and
- iv) whether the MFDA proved the Allegations on the requisite standard of proof.

7. A summary of the evidence, findings on the evidence, applicable law and reasons for conclusions on the issues of liability are set out below in turn, followed by reasons for conclusions as to penalty.

**Summary of Evidence as to whether Sun Life had policies in place and made those policies available to Approved Persons, including the Respondent**

Testimony of Howse, MFDA investigator

8. Allison Howse (“Howse”) testified that she had been engaged as a senior investigator at MFDA since January 2006 to investigate allegations of misconduct of Approved Persons and Members.

9. With agreement of both counsel, the Affidavit of Howse was entered as Exhibit 2, and the exhibits to her affidavit were entered collectively as Exhibit 3. In her affidavit, Howse used the term “Staff” and “MFDA” to refer to MFDA.

10. Howse testified that after receiving information from Sun Life of a finding of use of pre-signed forms in the Respondent’s client files, she then undertook her own investigation.

11. Howse examined the original documents and found forms that appeared to be pre-signed or altered and 12 LTAs that did not appear to be witnessed by the Respondent or have the client’s signature guaranteed.

12. Howse testified to her knowledge and belief that Sun Life had a policies and procedures manual (“PPM”) with respect to pre-signed forms since at least 2010. One such policy, a copy of which was provided to her by Sun Life, prohibited use of pre-signed forms.

13. Attached to Howse’s affidavit, among other documents, was a list of the Respondent’s comments pertaining to the forms and the transcript of his interview on January 9, 2017.

14. Howse adopted the contents of her affidavit in her oral testimony.
15. Howse's affidavit addressed specifics of Sun Life policies and procedures pertaining to pre-signed forms and LTAs, including the following:

*Sun Life's Policies and Procedures Regarding Pre-Signed Forms and Limited Trading Authorization Forms*

1. Staff has copies of the excerpts of Sun Life's Policies and Procedures Manual (the "PPM") that were in force during the material time period where the pre-signed forms were found. In the PPM, Sun Life prohibits its approved persons, including the Respondent, from using pre-signed account forms.
2. From February 2010 onwards, Sun Life's PPM states as follows with respect to pre-signed forms:

***Use of pre-signed forms***

*In keeping with the MFDA's position on the use of pre-signed forms, Sun Life Financial Investment Services (Canada) Inc. prohibits advisors from obtaining pre-signed forms from their clients. You may only use forms that are duly executed by the client after information on the form has been properly completed. Use of pre-signed trade order forms may be evidence of fraud, forgery, discretionary trading or other illegal or improper conduct.*

*Under MFDA Rule 2.3.2, you may obtain a limited trading authorization (LTA) from a client for the express purpose of facilitating trade execution and thereby avoid the requirement to obtain a client signature for all trade orders placed for the client. To verify that trade instructions executed under an LTA were initiated by the client, you must document and retain all details of the trade instructions, since an LTA does not give you the ability to perform discretionary trading.*

*Note that the prohibition on the use of pre-signed forms is not limited to mutual fund related forms; the policy applies to all forms, whether insurance or wealth related. For mutual funds, uncovering use of pre-signed forms is an event reportable to the Mutual Fund Dealers Association (MFDA).*

3. Attached as **Exhibit 12** is a copy of the excerpt of Sun Life's PPM with respect to pre-signed account forms.
4. In addition, as of March 2015, Sun Life had additional guidance in their PPM on pre-signed forms in the section titled "Advisor obligations for maintaining client files", as follows:

***Important reminders***

*Advisors must never have a client sign a blank form before it has been completed. Pre-signed blank forms must never be maintained in client files. Blank signed forms are viewed as discretionary transactions and are therefore not allowed.*

5. Attached as **Exhibit 13** is a copy of the excerpt of Sun Life's PPM from March 2015 onwards.

6. Sun Life also provided direction in its PPM with respect to the witnessing requirements for LTA forms. Sun Life's PPM stated as follows as of September 2011:

***Limited Trade Authorization (LTA) guidelines***

***Meeting 'face to face' with your client and completing form E4119***

*When you meet with your client, you need to do the following:*

*[...]*

3. *Complete or review the following sections on the form:*

- *Review the Additional Information on the reverse side of the form with your client*
- *You complete section A.*
- *Your client signs section C,*
- *You witness the client(s) signature. Note: A guarantor is not necessary if you are meeting with the client when the form is signed.*

***Mailing the LTA form to your client for completion***

*[...]*

*Call your client and do the following:*

1. *Authenticate the identity of your client over the phone, following the Voice authentication guidelines for Limited Trade Authorizations.*
2. *Review the form with your client, including the Additional Information on the reverse side of the form.*
3. *Reassure your client that the Limited Trade Authorization does not allow you to trade in your client's account without first receiving specific instructions from your client for each transaction.*
4. *Once the form has been reviewed, your client must have their signature witnessed and guaranteed with a stamp by a bank, trust company, notary, or commissioner of oaths. The witness and guarantor can be the same person.*

*[...]*

Attached as **Exhibit 14** is a copy of the PPM with respect to LTAs as of September 2011.

7. Sun Life updated their PPM with respect to LTAs in March 2015, which is attached as **Exhibit 15**. The requirements to witness the client's signature in person, or to have the signature guaranteed if the LTA is not completed in the advisor's presence, remains the same as in the September 2011 PPM.

8. Staff was also provided documentation by Sun Life compliance staff with respect to other efforts to advise approved persons of the prohibition against pre-signed forms. Attached hereto as **Exhibit 16 (1-11)** is a copy of various materials that contain guidance with respect to pre-signed account forms, as follows:

1. Sun News – December 9, 2011
2. Sun News – April 13, 2012
3. Sun News – October 26, 2012
4. Sun News – April 23, 2013
5. On the Radar: regulatory news for your business – July 29, 2013
6. Sun News – October 29, 2013
7. Sun News – June 3, 2014
8. On the Radar: regulatory news for your business – June 25, 2015
9. On the Radar: regulatory news for your business – August 6, 2015
10. MFDA Compliance Bulletin – October 30, 2015
11. On the Radar: regulatory news for your business – December 21, 2015

16. Howse testified that:

- a) Sun Life informed her it had in place an advisor business centre, (“ABC”) which was an internal computer site through which their Approved Persons could access the Sun Life policies and procedures, including the prohibition against pre-signed forms.
- b) in addition to the ABC, Sun Life compliance staff provided to MFDA at its request copies of various “news bulletins” and “newsletters” which range in dates from December 9, 2011 to December 21, 2015, to display other efforts Sun Life made to warn its advisors about the prohibition against pre-signed forms.
- c) she was provided with, and reviewed a summary of the Sun Life investigation of concerns and a chart of the documents including comments on behalf of Sun Life personnel and comments of the Respondent.

17. Under cross-examination, Howse admitted that:

- a) she had no personal knowledge to corroborate that Sun Life sent the 16 newsletters referenced in her affidavit to their advisors.
- b) she had no information as to whether any of the forms in dispute were generated by a certain Sun Life SVI application (“SVI app” or “app”),
- c) she did not recall if Sun Life informed her some of the information was provided by the app,
- d) she had no information as to whether the Respondent could not have printed out forms unless they were completed in the SVI app or if it sometimes printed forms with errors or gaps.

### **Testimony of Diane Jaspers**

18. Diane Jaspers (“Jaspers”) is currently employed as Director of Regional Supervision of Sun Life and had been so engaged for 2 years and three months. Her role is to ensure employees are executing policies as required.

19. Jaspers testified, *inter alia*, that:

- a) she had informed herself of Sun Life’s historical policies and procedures,
- b) policies prohibiting possession or use of pre-signed or altered documentation were communicated to advisors in the field in 2008 initially through a communication sent to the sales force,
- c) she believed in 2008 all policies and procedures were posted to the ABC, an intranet resource tool Sun Life makes available to all its advisors and other staff,
- d) the ABC is accessible “24/7” and
- e) any time an advisor wanted to find Sun Life’s policy on any subject, one could go to ABC, find it and print a copy.

20. Jaspers admitted in cross examination that:

- a) she had no personal knowledge of the Allegations,
- b) her information pertaining to this case derived from an email that she received from one Teri Ryan, an alternate chief compliance officer at Sun Life, including bulletins and emails included in the Howse exhibits,

- c) she did not review any other records,
- d) she did not speak to Teri Ryan or any of the investigators,
- e) she had no knowledge whether the Respondent knew about the policies and procedures,
- f) she did not produce any of the emails referenced in the Howse affidavit or testimony, and
- g) she could not testify from personal knowledge that:
  - i) Sun Life had policies or procedures in place or on the ABC at relevant times other than by observing the computer-generated dates on the documents containing policies and procedures she read prior to giving her testimony, or
  - ii) advisors know all the information contained on the ABC.

21. Jaspers further testified under cross-examination that:

- a) she also believed the policy at Tab 12 Exhibit 3 was uploaded to the ABC by reference to the electronic audit trail notation indicating “updated February 25, 2010.” Since it also stated it was published on May 12, 2008, and from the other indicia shown on the document such as the Sun Life logo, and the header indicating it was printed from the ABC, she took that to be the date it was uploaded to the ABC and considered that information to support a stronger conclusion than an assumption.
- b) she was told by a person at Sun Life that the policies were sent out via emails to the sales force and she assumed that assertion was accurate.
- c) it would be unrealistic to expect advisors to be aware of everything on ABC but Sun Life expected advisors to know there was information there about policies and procedures and they could access ABC for that information.
- d) the SVI app was a front-end version of the Univeris back office system used for opening accounts and executing trades and to complete mutual fund account forms. She said one could print the form with part of the information and complete the rest of the form in person with the client.

## **Evidence of the Respondent**

22. The Respondent testified that he had been in the mutual funds industry for about 17 years. He denied he was experienced. He said he did not really know he was required to be registered with MFDA. He never asked anyone why he was not receiving updates to the Sun Life policies because he thought Sun Life was doing everything required to be compliant. He would conduct his practice by calling Sun Life if he had a question or Sun Life would advise the way to do it. His understanding was that Sun Life would help him sort out if he did not understand.

23. The Respondent denied any knowledge before 2016 of Exhibit 3 Tab 12, the policy pertaining to use of pre-signed forms. He said he had never seen it before June 2016, and never received any emails or memoranda from Sun Life directing him to it. Although working with 60 or 70 people in the Sun Life office, including 7 or more managers, he had no communications about it.

24. The Respondent denied any knowledge before 2016 of Advisors Obligations for Maintaining Client Files at Tab 13 or Limited Trade Authorization Guidelines at Tab 14.

25. The Respondent testified that although he used the ABC from time to time, he never used it regularly, he had never been trained on how to use it and never received any Sun Life communications or emails advising that the policies were on ABC.

26. The Respondent testified he never received any email advising the policies had been updated on ABC nor was he aware of the policies he was required to know. He said he never received any of the newsletters. Even after the investigation commenced, his managers did not direct him to the policy.

27. The Respondent asserted that if Sun Life had a policies and procedures manual, it should tell, show and give information to advisors about it and should tell him what not to do. In his mind, Sun Life policies and procedures (manual) did not exist, since he was not aware of it because no one produced it to him, even in 2016.

28. Despite not being trained on how to use the ABC, the Respondent admitted he was familiar with it, had access to, and used it during his employment between 2010-2016. He admitted he

could use the ABC directly if he wished, but did not do so, because there were great numbers of documents on the ABC and he found the search engine unhelpful. He said that after trying for 20-30 minutes and not finding the information he wanted, it was faster, and his practice was to ask the office manager to send him a link to the information he wanted.

29. As regards emails from Sun Life, the Respondent admitted that he had a Sun Life email address at which he received emails from whoever sent them to him. He would receive multiple emails per day. He would look first at emails from clients, and then he would look at the rest of emails. If he could not look at them all during the day, he would read them by end of day. If he missed something, his assistant would remind him.

30. Despite his earlier unqualified denial that he never received emails from Sun Life about the pre-signed forms policy, the Respondent later testified that he did not recall if he saw any emails or memos from Sun Life directing the policies to this attention. He denied knowledge of receiving emails advising these policies were updated.

31. As regards training sessions, the Respondent testified that sales advisors would receive emails at the beginning of each year about monthly branch meetings and could identify which training meetings they would attend. Certain of these meetings were mandatory to attend, and if a sales advisor missed a mandatory meeting, he would be prompted. To the best of his recollection, he had no recall of ever discussing pre-signed forms and to the best of his recollection, there was no training as to these policies.

### **Respondent's interview answers in transcript attached to Howse's affidavit**

32. Respondent's Counsel's position at the hearing was that he had no issue with the Howse affidavit and no mention was made at the hearing about the Respondent's interview dated January 9, 2017. In the presence of a previous legal counsel, the transcript disclosed (at page 5 lines 11-14) that the Respondent was informed at the outset of the interview that MFDA seeks information pertaining to its investigation, that he is required to answer their questions and the investigation may result in disciplinary action pursuant to section 20 of By-law No. 1.

33. The Respondent's transcripts include the following questions and answers pertinent to the above topics and his oral testimony:

**a) As to Sun Life policies:**

*Q. "...so this advisor business centre...it's ABC, it's their centralized online system?" (P 21-lines 11-12)*

*The Respondent: "It's a central system that has all the product information, everything you want to recall..." (P 21-line 14)*

*Q "And it has the member's policies and procedures on it as well, from your recollection*

*The Respondent. "I think so." (P 21-line 17)*

**b) As to the Sun Life policy regarding pre-signed forms:**

*Q. This is Sun-Life's policy regarding the use of pre-signed forms. Do you recognize this document at all or have you ever seen... (P 21- line 1)*

*The Respondent: Yes, I remember this because this refers to pre-signed. But it doesn't say anything about altered. (P 21 Line 4-6)*

**c) As to email information pertaining to pre-signed forms guidance:**

*Q. "and it has the member's policies and procedures on it as well, from your recollection?*

*(P 21 line 17)*

*The Respondent. "I think so. Okay. This note I didn't see on ABC. This was sent to us."*

*Q. "By email?" (P 21 Line 18)*

*The Respondent: "By email, by Lotus Notes, yes." (P 21 Line 19)*

**d) As to the Sun Life policy regarding altered forms:**

*Q. Again, the same thing, completed forms sent to them, they sent back the signature page? (P 35 lines 7-8)*

*The Respondent: "well, they are supposed to send back everything." (P 35 lines 7-8)*

## Evidence as to policies pertaining to LTA Forms

34. As regards the LTA forms referenced in the Allegations, the Respondent admitted under cross-examination that he signed as witness even though the client was not present. He said he did so because it was an existing client.

35. In particular reference to the LTA form at Exhibit 5 -11 of the Howse affidavit, the Respondent testified he was unaware of the policy pertaining to witnessing of such forms. He said if he thought the client signature needed to be witnessed, he would have done so. In cross examination, he agreed, now this has been explained to him, the witness needs to see the client sign the document in order to be a witness to the signature.

36. The answers the Respondent gave at his interview on this topic are set out below:

### *As to the Sun Life policy regarding LTA guidelines:*

*Q. "Now, going to Tab H it's another ABC note regarding limited trading authorization guidelines. Does this look familiar to you?" (P 21 Line 20-1)*

*The Respondent: "You know I can see this is coming directly from ABC. I wouldn't say I've seen that. You know, if you think ...let's just take the position of an advisor, he has to know everything. If you think about it. And whenever we ask a question, if head office doesn't know, it may take two or three days for them to get back to you, to give an answer. By then, you've moved on, you either find the information or you have just moved on. So asking me to look on ABC and look for this is a humongous task, it's a very big program, it's a complicated program and normally if you want to try it, find something, you go to Mary George or you call somebody at head office try to find it. **Even though I haven't seen it, I am aware of how LTAs work. Because I mean, you see an LTA form in front of you, you read the thing, you say, okay this is the purpose of it.**" (P 21 lines 22-25, P 22 lines 1-5) (emphasis added)*

37. Howse's affidavit attached the LTA forms, all of which have printed at the bottom of Section C Investors/Acknowledgement and Consent the following wording:

*Note: The Dealer Representative may witness the signature/s of the Investor/s but he/she may not guarantee the signatures/of the Investor/s.*

### **Whether the Respondent's dispute as to the 7 forms constituted defences to all or any part of the Allegations**

38. Evidence was given by Howse as to certain charts prepared in response to her requests to Sun Life and, through Sun Life, to the Respondent. The two charts contained certain comments from Sun Life personnel and the Respondent in adjacent columns regarding the forms which were the subject of the investigation. These two charts were marked in chronological sequence as Exhibits 4 and 6. It appeared from the evidence that Exhibit 6 was created in order to comply with a request that the Respondent supplement the responses initially provided in Exhibit 4.

39. In her testimony, giving some examples, Howse noted that as regards the form contained at 4-1 Tab 6, the Respondent had commented, *inter alia*, "We have since changed the way we do this. We now send completed forms to the client."

40. Howse testified that form 4-4 showed blue ink that appeared to cover other information, thus appearing to be an altered form. In form 4-8 she noted "White-out" used on the date of the client's signature, indicating it was altered. Howse noted that the Respondent had commented, *inter alia*, "We have since changed the way we do this".

41. Howse testified that form 5-1 showed an LTA form on which the Approved Person signed as witness as well as "dealer rep" on the form in blue ink and signed a copy of the client's signature (page) and the clients were not present at the time.

42. Howse testified that form 5-4 showed an LTA form with a client signature that appeared to be a copy, with information added in blue ink and witnessed by another individual without a signature-guarantee stamp. She said that other forms followed this format.

43. The Respondent's testimony indicated he should not be held to the responses he wrote on the charts marked as Exhibits 4 or 6. For example, he testified:

- a) he did not understand he was being investigated until he received a spreadsheet through Sun Life email telling him to complete the form,
- b) when he received Exhibit 4 from Sun Life with instructions to complete the form, he did not understand how to complete the form,

- c) on June 2, 2016 when he asked how to fill out the form, the compliance officer told him it was not her duty to train him how to fill out the form,
- d) he had his assistant help him locate the forms in question,
- e) one SF (from Sun Life) looked at the forms and advised him he required “wet” signatures and this was his first knowledge that it was not proper to send scanned forms to the client, and when received back, to send them in,
- f) from that moment he realized everything in his practice was not done the right way,
- g) at this point it was 3-4 days before the deadline to return his comments to MFDA, and he was stressed, didn’t have time, didn’t know how to do it, didn’t get guidance and didn’t even look at all the forms,
- h) instead, he just looked at the comments and then tried to figure out what might be wrong,
- i) a week later he received a call from a member of the Sun Life compliance department who told him he completed the form wrong, but would not give him guidance as to how to complete the form,
- j) he needed more guidance on how to complete his comments. At a subsequent appointment with his manager, he learned that he had to provide more comprehensive information and to return the completed form within 2 or 3 days,
- k) he provided over 130 responses by email in that time period, 56 of which are shown in Exhibit 6, and
- l) he felt rushed in completing both the initial and second form, which asked for comments about the complaints, and he was denied a request for an extension, so he did not have time to think about the forms and his comments on the final statement may not be accurate.

44. The Respondent’s testimony in support of his denial that 7 specific forms constituted possession or use of pre-signed forms is summarized as follows:

**a) *As regards Howse affidavit exhibit 3/4-6:***

- i) The way the Respondent understood the SVI app is that it required him to enter all the information on the computer, then to submit it to Sun Life before he could print the form. He would discuss the information with the

client by telephone, enter it into the computer. But the computer program does not print all the information, so he would have to add his information by hand. He would send the form to the client by email or fax and the client would sign and return it. He would then add the office copy to the client signature and sign and add his name because he already had signatures on file so he would signature-verify the form. He said this practice was allowed by Sun Life at the time.

- ii) Under cross-examination, the Respondent admitted he sent the form in full to the client but thought he received back from the client only the signature page. He said his standard method was to have the client send all the documents back but in this instance he could not confirm that occurred. He said his assistant did this. His practice was to take the signature page, sign off at the end and then combine it with the rest of the forms.

**b) *As regards Howse affidavit exhibit 3/4-9:***

- i) The form produced by the SVI app was printed but the spousal information was not completed. Once that was done, it was sent out to the client who signed and returned it. The Respondent then signed it and then verified the signature. He said this practice was allowed by Sun Life.
- ii) Under cross examination, the Respondent admitted that original ink on the form as to Savings means it must have been added after the client sent the form back. While his general practice was to complete the form information before sending it to the client, in this case he must have “missed this one” and so added information after the form was sent back.

**c) *As regards Howse affidavit exhibit 3/4 -10***

- i) This exhibit contained two forms. The Respondent said he did not have a practice to re-use signature pages and thought this instance was a mix-up at his office. He thought one of them was not a pre-signed form.
- ii) Under cross examination, the Respondent admitted it was not his practice to use the same signature page for two different back forms, and that it appears that is what occurred. He offered the possibility that it may be that the other signature page is somewhere else, so only one of the forms was pre-signed.

**d) *As regards Howse affidavit exhibit 3/4-12***

- i) The Respondent denied this was a pre-signed form because the form pertained to a tax-free savings account, he had already entered the information into the software as he discussed the form with the client. As the program did not print that information during the discussion, he had to enter that information by hand. He took his office copy and attached it to

the signature and sent it in, which was an acceptable practice (at Sun Life) at that stage.

- ii) Under cross-examination, the Respondent admitted original ink pertaining to source of income was used on the form after the client signed.

**e) *As regards Howse affidavit exhibit 3/4 -14***

- i) The Respondent added the “Know Your Client (KYC)” information to the document in blue ink after the client signed and returned the signature page because the software did not print the information provided by the client. After the client signed it and sent it back, he added his signature. He said Sun Life allowed advisors to use this practice at this stage.
- ii) Under cross examination, the Respondent confirmed after the third page was faxed back information as to income was added by him after the client had signed the form.

**f) *As regards Howse affidavit exhibit 3/4-22***

- i) The Respondent testified that this was a form that displayed another example of adding the KYC information in blue ink after the client signed and sent the signature page back because the computer did not print it. Blue marks were put in before the client signed.
- ii) Under cross-examination, the Respondent confirmed that information on the third page was added after the client signed.
- iii) In his testimony on this point, the Respondent referenced one of the newsletters entitled “On the Radar” in exhibit 16 of the Howse affidavit. He said that he had not understood the distinction in that newsletter between administrative and material changes but now at the hearing date, he finally understands the newsletter related to altered forms. He restated that he had never received the news bulletin from Sun Life and it was a hard process to understand. He never made himself aware of MFDA Rules or bulletins in respect to any regulatory requirements, as he did not know where to look for them. He did not know how to go on the MFDA website, so he never visited it.

**g) *As regards Howse affidavit exhibit 3/4-11***

- i) The Respondent completed the front page and sent it to the client who signed and sent it back. The Respondent admitted he had added an office copy of the signature page to the document. He claimed it was a practice allowed by Sun Life at the time and so it was not a pre-signed form.

**h) *As regards Howse affidavit Exhibit 5-1***

- i) The Respondent did not raise a dispute about this form and admitted he had sent the form to the client and when it was sent back, he signed at Section D dated and Section E after the form was completed. Although he said a person must witness the signature, in this case although he did not see the witness sign, he knew the client's signature because it was an existing client and he could verify it from the file.

**Evidence on the issue of whether, even if Sun Life had policies in place and the Respondent knew about them, they were of no contractual force such that he was bound by them.**

45. Evidence touching on this issue in the transcript of the Respondent reads as follows:

***As to the Sun Life compliance practices:***

*The Respondent said he began employment as a Sun Life advisor in 2000 and remained in that role for 16 years. (P 6 line 25; p 7 lines 1-2) Kevin Wiens appointed him in 2000 and had been his branch manager ever since. (p 9 lines 7-11)*

*Q. "Did you ever sign annual attestation forms with Sun Life?"... (P 11 lines 12-13)*

*The Respondent: "Yes that I know about. I keep copies of this kind of stuff." (P 11 lines 14-15)*

*Q. "Do you recall if those annual attestations included if you reviewed and signed ...or if you reviewed their policies and procedures manual?"*

*The Respondent: "Yes I signed the contract in 2010, which is..." (P 11, line 18)*

*Q. "Did you meet regularly with the branch manager at the Sun Life location, did he hold regular meetings?" P12 lines 4-5)*

*The Respondent: "No. We would have once a year a meeting, but that is more budgeting purposes to determine our sales goals for the year, **I think, with the go-to manager, I would say two times a year just to complete the forms to make sure that the basic compliance routine that you have to sign and he sits in your office and asks these questions that you are talking about, like politically exposed people, ...I mean I have copies of it, I can show you that.** (Line 8-9) (emphasis added)*

46. Before making findings of fact on the evidence presented, this Hearing Panel considered submissions of both counsel as to the law applicable to this aspect of deliberations, which are summarized below.

**Applicable law pertaining to receipt of evidence**

47. MFDA Rule of Procedure 1.6 specifically permits hearsay statements to be admitted:

*(1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.*

*(2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.*

48. Likewise, MFDA Rule of Procedure 13.4 permits evidence to be adduced by way of sworn statements:

*The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.*

49. The case of *Tonnies (Re)*, MFDA File No. 200503, Hearing Panel of Prairie Regional Council, Decision and Reasons dated June 27, 2005 (“*Tonnies*”) at paras.10-12 is authority for MFDA hearing panels to consider and rely on hearsay and affidavit evidence in making findings of fact.

50. While Respondent’s Counsel had no issues with the evidence of Howse, he contended the evidence of Jaspers was unreliable due to her lack of personal knowledge of the facts in issue. He further contended that MFDA had the obligation to produce a prepared, knowledgeable Sun Life employee of the facts and circumstances surrounding the Respondent’s knowledge of the policies, Sun Life’s education, training, information and communication of the same to him and the contractual circumstances pertaining to his requirement to comply with the policies.

51. In support of this proposition, Respondent’s Counsel cited *Re Brauns*, 2013 CarswellNat 4397, a decision of an MFDA hearing panel, and an excerpt of the reasons states:

*“Under our Rules of Procedure, we are permitted to admit relevant evidence such as certain kinds of hearsay evidence which would be inadmissible in civil proceedings. We often exercise our discretion to receive such evidence. However where the veracity of that evidence was challenged, particularly by the Respondent, we carefully considered whether the evidence was shown to be reliable and whether the respondent had a meaningful opportunity to test that evidence. These considerations were relevant to the weight to the given (sic) to the evidence.”*

### **The evidence considered in determining its Findings of Fact**

52. This Hearing Panel concluded from review of the above-cited provisions of the MFDA Rules and the case authorities that it may admit as evidence any testimony, document or other thing, including hearsay, which it considered to be relevant to the matters before it and is not bound by the technical or legal rules of evidence. It further concluded it may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.

53. This Hearing Panel concluded that since no evidence other than that of Howse was tendered by way of a sworn statement, and as she gave additional oral testimony and attended for cross-examination, as regards her evidence, Procedure 13.4 was not relevant.

54. This Hearing Panel concluded on the authority of *Tonnies, supra*, it could consider and rely on the Howse testimony, including the contents of her affidavit, even if some portions of it were based on information and belief. Accordingly, it proceeded to make the following findings.

### **Findings of Facts on the Evidence**

#### **i) Whether Sun Life had policies in place**

55. It was evident from the Howse testimony that MFDA used the term “Approved Persons” and Sun Life used the term “Advisors” to refer to persons such as the Respondent who were subject to the MFDA Rules under consideration at this hearing. Also, at the hearing, sometimes the terms ‘sales advisor’ and ‘registrant’ were also referenced. In these reasons, the terms “Approved Persons”, “Advisors”, “sales advisors” and “registrants” are used interchangeably.

56. This Hearing Panel found Howse’s evidence on this issue to be both credible and reliable. In particular, it accepted her evidence that after receiving information from Sun Life as to non-compliant forms in the files of one of its advisors, she conducted her own independent investigation, including review of the Sun Life policies and procedures manual, documents purporting to come from the ABC, each of the impugned forms presented in evidence, comments on the forms provided by Sun Life and the Respondent and an interview with the Respondent.

57. This Hearing Panel accepted Howse’s testimony, although based on information and belief from Sun Life, as reliable evidence that Sun Life had policies and procedures pertaining to pre-

signed forms and LTAs at the material times and that Sun Life had in place a computer service (“ABC”) by reference to which Sun Life advisors could read and inform themselves of the policies.

58. The testimony of Jaspers related mainly to the history of Sun Life’s practices of conveying the information in its policies and procedures to its sales advisors. Given that she had not been employed by Sun Life in any capacity at any of the material times, her testimony was based on information and belief from another Sun Life employee, from review of documentation contained in the ABC and from inferring that the dates of documents that the contents of those documents were conveyed to or available to Sun Life sales advisors at those dates.

59. In particular, Jaspers could not testify from personal knowledge that Sun Life had policies or procedures in place or on the ABC at relevant times other than by reference to observing the computer-generated dates on the documents containing policies and procedures she read prior to giving her testimony.

60. However, under cross-examination Jaspers maintained she was told by a person at Sun Life that the policies were sent out via emails to the sales force and she assumed that assertion was accurate.

61. Jaspers could not testify as to whether advisors know all the information contained on the ABC but said it would be unrealistic to expect the same from advisors. She said however, Sun Life expected advisors to know there was information there about policies and procedures and they could access ABC for that information. As regards the SVI app, she disagreed that the form had to be completed before the document could be printed.

62. Although this Hearing Panel found her evidence to accord with the Howse evidence as to Sun Life’s policies and procedures being in place and available to advisors through ABC, it found it unnecessary to rely on any aspect of her testimony alone in making any findings of fact.

63. Considering the Respondent’s oral testimony, as well as responses he gave in his interview in January 2017, this Hearing Panel did not find his evidence in response to the Allegations to be either clear or convincing.

64. Specifically, this Hearing Panel concluded that all of the evidence taken together did not

substantiate the Respondent's oral testimony that Sun Life did not have policies or procedures in place in respect of pre-signed and altered forms, or procedures as to witnessing of LTA forms.

65. The Hearing Panel noted that the Respondent's denial of the existence of the Sun Life policies was premised on the foundation that since he did not know about them, in his mind they did not exist. However, the Respondent's answers from his interview to the effect that he thought the ABC had the Member's policies and procedures on it, (P 21 lines 14-17), that he remembered the Sun-Life's policy regarding the use of pre-signed forms (P 21 line 17) and a note about member's policies and procedures had been sent by email, by Lotus Notes (P 21 Line 19) served to corroborate Howse's evidence on this issue.

**ii) Whether Sun Life made those policies available to Approved Persons, including the Respondent**

66. This Hearing Panel concluded that Howse's testimony, although based on information and belief from Sun Life, provided some reliable evidence that Sun Life had in place a computer service ("ABC") by reference to which Sun Life advisors could access, read and inform themselves of the policies.

67. Similarly, this Hearing Panel concluded that Howse's testimony, although based on information and belief from Sun Life, as to the provision by Sun Life compliance staff to MFDA copies of various "news bulletins" and "newsletters" between December 9, 2011 to December 21, 2015, provided some evidence that Sun Life in addition to the ABC made efforts to warn its advisors about the prohibition against pre-signed forms.

68. Although the Respondent denied receipt of any emails in his oral testimony, at his interview over two years prior, he admitted to receiving at least one email pertaining to the pre-signed forms policy.

69. While this Hearing Panel did not find it necessary to its finding on this issue to be satisfied that all the newsletters or bulletins were sent to all advisors, the fact that the Respondent acknowledged receiving at least one on the topic of pre-signed forms goes to show that Sun Life made efforts in addition to loading its policies onto the ABC to bring their policies to the attention of its advisors, including the Respondent.

70. All of the foregoing evidence of the Respondent taken together established that at the hearing at best that he did not remember seeing the Sun Life policies at the times material to the Allegations.

71. Accordingly, this Hearing Panel rejected the Respondent's testimony and instead found as a fact that the Sun Life policies were in place at the material times and had been uploaded to the ABC for access by all Sun Life Approved Persons, including the Respondent.

**(iii) Whether the evidence established that those policies were communicated to the Respondent or that he should have known about those Sun Life policies**

72. Without here pronouncing on whether MFDA was required to further prove that those policies were communicated to the Respondent or that he should have known about those Sun Life policies, had this Hearing Panel concluded such a burden of proof was warranted, it would have found on the evidence that those policies were communicated to the Respondent and he should have known about those Sun Life policies.

73. First, the Respondent was familiar enough with the ABC that he could have undertaken or had other of his staff undertake searches to inform himself as to the existence of, locate and read Sun Life policies on the ABC that were there to be seen.

74. Second, the Respondent's failure to have pursued his own searches on ABC more diligently at the times material to the Allegations appear due solely to his own choice.

75. Third, the Respondent could have, but chose not to, inform himself through inquiries of head office that may have brought to his attention the specifics of the Sun Life policies pertaining to pre-signed, altered forms and guidelines for witnessing LTA forms. Once again, the Respondent's failure to have pursued his own inquiries more diligently prior to, or at the times material to the Allegations, appear due solely to his own choice.

76. Finally, from comparing the Respondent's answers at his interview to his answers at the hearing, it appeared that his memory of relevant elements of the Allegations was better in January 2017 than the date of the hearing.

77. In summary, all the foregoing circumstances satisfied this Hearing Panel that there were

ample opportunities and avenues presented to the Respondent at the material times that would have permitted him, had he exercised reasonable due diligence, to have informed himself as to their existence or contents.

### **Findings of Fact as to the Respondent's dispute over the 7 forms**

78. The charts marked as Exhibits 4 and 6 were accepted by this Hearing Panel as evidence of compliance by Sun Life with the MFDA investigator's request for comments on the forms under investigation by producing charts displaying in each column a list of the forms, a list of comments on behalf of Sun Life as a Member of MFDA, and comments on behalf of the Respondent.

79. The Respondent's oral testimony was that for various reasons listed, his comments on the final statement might not be accurate.

80. Despite the complaints of the Respondent as regards preparation of the charts in response to the investigator's request, this Hearing Panel found no fault with the conduct of the Sun Life personnel vis-à-vis the Respondent. It is understandable that those Sun Life supervisors or compliance officers might consider that any guidance they were to offer the Respondent in providing his comments could be later viewed as compromising the investigation.

81. However in finding facts in this case, this Hearing Panel did not take into consideration any of the comments of the Respondent set out in either Exhibits 4 or 6.

82. This Hearing Panel found the Respondent's testimony disputing that 7 specific forms constituted possession or use of pre-signed forms, was unreliable. Under cross examination, as to exhibit 3/4-6, the Respondent could say only he thought he received back from the client only the signature page and although his standard method was to have the client send all the documents back in this instance, he could not confirm that occurred.

83. Under cross examination as to exhibit 3/4-9, the Respondent admitted that while his general practice was to complete the form information before sending it to the client, in this case he must have "missed this one" and so added information after the form was sent back.

84. Under cross examination as to exhibit 3/4-10, the Respondent admitted that it was not his practice to use the same signature page for two different back forms, but that it appears that is what

occurred.

85. Under cross-examination as to exhibit 3/4-12, the Respondent admitted original ink pertaining to source of income was used on the form after the client signed.

86. Under cross examination as to exhibit 3/4-22 the Respondent confirmed that information on the third page was added after the client signed.

87. This Hearing Panel rejected the Respondent's testimony that Sun Life allowed the practices he performed on these forms. First, since the Respondent contended he was unaware of Sun Life policies, there was found no support for any contention by him of what practices or variations Sun Life allowed at all material times. Second, he admitted in some of these instances that what occurred was contrary to his general practice, but could not provide clear or convincing explanations for why the discrepancies occurred in these cases.

88. While the Respondent claimed the SVI app would not allow him to print the form when he tried to populate it with client information, in the view of this Hearing Panel this answer was unconvincing, since he could have found other ways to carefully document in each case that the client agreed to all the information in the form before affixing a signature.

89. In summary, this Hearing Panel found no reliable evidence that:

- a) Sun Life allowed the practices described by the Respondent in respect of those 7 forms,
- b) Sun Life misled the Respondent into the reasonable belief that his practices in these cases were permissible,
- c) the SVI app prevented the Respondent from complying with Sun Life policies or MFDA Rules.

### **Findings in respect of LTA Forms**

90. Howse's affidavit displayed wording of the LTA guidelines contained in the Sun Life policies and procedures manual as of September 2011.

91. This Hearing Panel concluded that the testimony of Howse, although based on information

and belief from Sun Life, provided reliable evidence that Sun Life had policies pertaining to LTAs at the material times and that Sun Life had in place the ABC by reference to which Sun Life advisors could read and inform themselves of those policies.

92. As regards the LTA forms referenced in the Allegations, the Respondent admitted he signed as witness even though the client was not present. He did so because it was an existing client.

93. In particular reference to the LTA form at Exhibit 5 -11 of the Howse affidavit, the Respondent testified he was unaware of the Sun Life policy pertaining to witnessing of such forms. He said if he thought the client signature needed to be witnessed, he would have done so. In cross examination, he agreed, now this has been explained to him, the witness needs to see the client sign the document in order to be a witness to the signature.

94. However, at his interview the Respondent said that despite not seeing the LTA guidelines he was aware of how LTAs work. He said he would see an LTA form in front of him, would read it and say, "okay this is the purpose of it."

95. Given the answer given at his interview that he thought he recalled the Sun Life policies on the ABC, this Hearing Panel concluded that the Respondent's evidence that he was unaware of the LTA guidelines was not convincing or reliable.

96. Accordingly, this Hearing Panel concluded that there existed a Sun Life policy pertaining to witnessing of LTA forms, and the said policy had been made available to the Respondent during the times material to the Allegations. This Hearing Panel rejected his testimony that he did not understand he was to personally witness the client's signature at the time of signing. This Hearing Panel further rejected his evidence that Sun Life should have explained to him what in these circumstances he was supposed to do.

97. It remains to now consider whether on the facts found by this Hearing Panel, the MFDA has proven the Allegations according to the required standard.

## **Whether the Evidence on the Facts Found proved the Allegations**

### **Law Applicable to proof of Allegations**

98. MFDA Rule 1.1.2 requires each Approved Person who participates in any securities related business in respect of a Member to comply with the By-laws and Rules as they relate to the Member or the Approved Person. Accordingly, as an Approved Person, the Respondent was required to comply with the policies and procedures that were established, implemented and maintained by the Member, under MFDA Rule 2.5.1.

99. In *Franco (Re)*, MFDA File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011, the hearing panel stated that “[t]he obligation of Approved Persons to comply with the policies and procedures of the Members that they are registered with is a cornerstone of the self-regulatory system. MFDA Members are expected to be aware of their regulatory obligations and to implement policies and procedures to ensure compliance. 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.”

100. Other MFDA Hearing Panels have similarly held that an Approved Person’s failure to comply with a Member’s compliance directive, or its policies and procedures, is conduct contrary to MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

*Irwin (Re)*, MFDA File No. 200915, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 28, 2010

*Boldt (Re)*, MFDA File No. 201649, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 6, 2017 at paras. 6-7

### **Applicable Law as to Pre-signed and Altered forms**

101. Hearing panels have held that obtaining or using pre-signed forms is a contravention of the standard of conduct under MFDA Rule 2.1.1.

*Byce (Re)*, MFDA File No. 201311, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 4, 2013

*Price (Re)*, MFDA File No. 200814, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 18, 2011

102. As the hearing panel explained in *Price (Re) (supra)*, at paras. 122-124:

*Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading....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...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.*

103. As the hearing panel explained in *Byce (Re) supra* at para. 8:

*The prohibition on the use of pre-signed forms applies regardless of whether:*

- (a) *the client was aware, or authorized the use, of the pre-signed forms; and*
- (b) *the forms were actually used by the Approved Person for discretionary trading or other improper purposes.*

104. The reasoning in *Price (Re)*, above, at paragraph 18, as to why pre-signed account forms affect the integrity and reliability of account documents, also applies to altered and falsified forms where in particular, there also exists the possibility that the changes are made to the forms without the clients' knowledge or consent.

### **Approved Persons are Presumed to Know MFDA Rules**

105. Securities commission hearing panels have held that registrants are presumed to know their regulatory requirements, and cannot rely on the position that others should have advised them of those requirements.

*Zeiben (Re)*, 2014 ABASC 167, at paras. 87, 139

*Huckerby (Re)*, 2004 LNONOSC 268, at pp. 6-7

### **Conclusions**

- (i) **Whether Sun Life had policies in place and made those policies available to Approved**

### **Persons, including the Respondent**

106. As the Respondent admitted ability to use the ABC, but would instead ask the office manager to find information for him, as he could say only “to the best of his recollection” there was no training or discussions there concerning pre-signed forms, as he gave priority to emails from clients and depended on his assistant to remind him if he missed reading other emails at the end of the day, yet remembered receiving at least one email from Sun Life as to pre-signed forms, this Hearing Panel rejected his evidence that Sun Life did not have policies in place and that Sun Life did not make those policies available to him.

107. This Hearing Panel was satisfied by the evidence of Howse that Sun Life had policies in place and made those policies available to the Respondent. It concluded that if the Respondent was unaware of them and failed to inform himself of their contents, it was due to his own lack of diligence.

**(ii) whether MFDA was required to further prove that those policies were communicated to the Respondent or that he should have known about those Sun Life policies and whether the evidence established that those policies were communicated to the Respondent or that he should have known about those Sun Life policies**

108. This Hearing Panel concluded that it was not necessary for MFDA to also prove on a balance of probabilities that those policies were communicated to the Respondent or that he should have known about those Sun Life policies.

109. Had this Hearing Panel determined it was necessary to make a finding on this issue, it would have concluded on all the evidence at the material times that the Respondent should have known about the policies and that in fact they had been communicated to him.

**(iii) 7 disputed forms**

110. This Hearing Panel was satisfied from the Respondent’s evidence on these forms that his admissions were inconsistent with compliance with Sun Life policies at the material times and rejected his contention that Sun Life should have explained to him what in these circumstances he was supposed to do.

111. In signing as witness for 8 forms when the client was not present, the Respondent's conduct, constituted in all cases a violation of the MFDA Rules. This would apply to the same conduct when exercised in respect of other forms or documents that a client must sign. Compliance with the MFDA Rules requires that the Approved Person, if he or she purports to witness the signature, must in fact see the individual client sign his or her name even if the Respondent did not engage in discretionary trading nor did his conduct result in any actual harm to any client.

112. Similarly, where the Approved Person is permitted by the MFDA Rules to send a fully completed form to a client for signature and return, if the client returns only the final signature page instead of the completed form together with the signature page, the Approved Person may not be able to later verify if the signature page returned matches or lines up with the original completed form. It also gives rise to the possibility that the signature page could be used for multiple transactions. As a result, the practice could amount to a Rule 2.1.1 violation as the audit trail has been skewed.

113. Further, such conduct constituted a violation since the Rules and Sun Life policies intend and expect when a witness to a client's signature is required, the Approved Person or some specified alternate designate will see the client sign before confirming the document has been properly witnessed.

114. MFDA issued specific warnings to Approved Persons against the use of pre-signed forms including MFDA Staff Notice #MSN-0066, dated October 31, 2007 (updated March 4, 2013), and MFDA Bulletin #0661-E, dated October 2, 2015. The obtaining and using of pre-signed and altered account forms occurred after MFDA Staff published MSN-0066 in 2007, and after Sun Life specifically set out in its policies and procedures that pre-signed forms were prohibited.

115. The Respondent also failed to comply with MFDA Rules 2.1.1, 2.5.1, and 1.1.2, as well as the Member's policies and procedures, with respect to the witnessing requirements of LTA forms. LTA forms, policies and procedures embody requirements from MFDA that an Approved Person must witness or have a guarantor witness the client's signature on the original trading instructions. LTA forms provide a limited authority to Approved Persons to execute client trades upon client authorization, without having to obtain a client's signature on an order execution form. In such cases, it is critical for Approved Persons and Members to ensure that a client has given proper

authority to the Approved Person to execute trades without prior signed authorization for individual transactions. The requirement of the Member is to either:

- a) have the Approved Person witness the client's signature when setting up an LTA; or
- b) in instances where the LTA is not signed by the client in the presence of the Approved Person, have the client's signature witnessed and guaranteed by a bank, trust company, notary, or commissioner of oaths;

either of which option ensures that the client has provided proper authorization for the Approved Person to act pursuant to an LTA.

**(iv) Additional Defences Raised by Respondent**

116. Since it was not necessary for this Hearing Panel to rely on Jaspers' evidence in finding facts or arriving at its conclusions, this Hearing Panel rejected the below listed additional defences:

- a) There should be no reliance placed on the uncorroborated evidence of Jaspers that was crucial and central to the issue whether Sun Life policies and procedures were in place at the material times, such that he was informed or should have been informed of their existence and content and been aware of his obligation to comply with the same.
- b) There should be no reliance placed on the uncorroborated evidence of Jaspers, which that lacks sufficient evidence or reliability to be given any weight because no one with personal knowledge testified to those facts and MFDA lacked documentation to corroborate.
- c) Jaspers' testimony is either conjecture or hearsay, and on the basis of procedural fairness, it should not be accepted if it is not reliable.
- d) the hearing panel should have preferred the Respondent's evidence over her uncorroborated evidence that the Sun Life policies and procedures were not in place at the material times, such that he was informed or should have been informed of their existence and content and been aware of his obligation to comply with the same.
- e) the evidence of Jaspers should not be accepted because whereas MFDA had an

opportunity to cross examine the Respondent and to provide evidence to contradict his testimony, the Respondent did not have a meaningful opportunity to test evidence presented on behalf of Sun Life.

117. This Hearing Panel considered the remaining defence arguments:

- f) MFDA should have produced a Sun Life employee, such as the person named on its witness list who could present personal direct evidence of having worked directly with the Respondent to prove that he had actual knowledge of the existence and content of Sun Life policies and procedures alleged to have been breached and that, at the material times, the Sun Life policies were on the ABC or that the Respondent had access to them, or was aware of the entirety of documents loaded onto the ABC.
- g) the Respondent was denied the right to cross-examine that witness on the evidence he or she would have given.
- h) the MFDA deprived the Respondent of the opportunity and the right to cross-examine such witness on such evidence as would have been presented on those points.
- i) an adverse inference should be drawn because a witness named on the witness list was not called that could have presented direct and reliable evidence on these points and should give no weight to the evidence of the Sun Life witness who was called but unprepared to testify on these points
- j) the Respondent did not have a meaningful opportunity to test evidence (that should have been) presented on behalf of Sun Life.

118. As regards (f) above, this Hearing Panel concluded that MFDA was not obligated to produce a Sun Life employee, such as the person named on its witness list, who could possibly present personal direct evidence of having worked directly with the Respondent to prove that he had actual knowledge of the existence and content of Sun Life policies and procedures alleged to have been breached.

119. The governing case authority makes clear that Approved Persons are presumed to know MFDA Rules. Securities commission hearing panels have held that registrants are presumed to

know their regulatory requirements, and cannot rely on the position that others should have advised them of the same.

*Zeiben (Re)*, 2014 ABASC 167, at paras. 87, 139

*Huckerby (Re)*, 2004 LNONOSC 268, at pp. 6-7

120. Other MFDA Hearing panels have similarly held that an Approved Person's failure to comply with a Member's compliance directive, or its policies and procedures, is conduct contrary to MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

*Irwin (Re)*, MFDA File No. 200915, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 28, 2010

*Boldt (Re)*, MFDA File No. 201649, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 6, 2017 at paras. 6-7

121. The governing case authority further makes clear that as a cornerstone of the self-regulatory system, the obligation of Approved Persons to comply with the policies and procedures of the Members that they are registered with rests with the Approved Person.

*Franco (Re)*, MFDA File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011

122. As noted, the governing case authority states that MFDA Members are expected to be aware of their regulatory obligations and to implement policies and procedures to ensure compliance. Also, as noted, Enforcement Counsel agreed it had the burden of proof to establish that in this case Sun Life did implement policies and procedures as to LTA guidelines to ensure compliance. (*Franco (Re) (supra)*)

123. This Hearing Panel concluded that without the necessity of hearing from a Sun Life employee, such as the person named on its witness list who could possibly present personal direct evidence of having worked directly with the Respondent at the material times, there was sufficient evidence presented at the hearing to satisfy itself on a balance of probabilities that the Sun Life policies were in place at the material times, they were on the ABC and that the Respondent had access to them.

124. Based on the foregoing case authority, this Hearing Panel concluded that there was no requirement of the MFDA to prove, either through a Sun Life employee with personal direct knowledge, or otherwise, that the Respondent was aware of the Sun Life policies and procedures or of the entirety of documents loaded onto the ABC.

125. The Respondent's arguments in 117 (g)-(i) above were to the effect that:

- a) the Respondent was denied procedural fairness in not having the right to cross examine that Sun Life witness on the evidence he or she would have given on those points, and
- b) the Respondent did not have a meaningful opportunity to test evidence (that should have been) presented on behalf of Sun Life, and so the hearing panel should draw an adverse inference because a witness named on the witness list was not called that could have presented direct and reliable evidence on these points.

126. Respondent's Counsel contended that MFDA, by disclosing a witness list prior to the hearing represented it would call a certain Sun Life employee who was a compliance officer at the times material to the Allegations, but instead called Jaspers who had no personal direct knowledge of the then prevailing circumstances at Sun Life.

127. Respondent's Counsel contended MFDA should have called the listed witness to corroborate whether:

- a) Sun life sent the 16 newsletters referenced in the Howse affidavit to advisors of Sun Life
- b) that any of the forms in dispute were generated by the Sun Life SVI app
- c) the Respondent could not have printed out forms unless they were completed in the SVI app
- d) or if the SVI app sometimes printed forms with errors or gaps
- e) the Respondent knew about the policies and procedures
- f) that witness could produce any of the emails referenced in the Howse affidavit or testimony
- g) that advisors know all the information contained on the ABC.

128. Since this Hearing Panel concluded that MFDA was not obligated to prove the Respondent knew about the policies, it concluded MFDA is not obligated to produce a Sun Life employee to give evidence on that point.

129. Further, since this Hearing Panel concluded that MFDA was not obligated to prove the Respondent knew about the policies, it did not base any of its findings on the evidence as to the content of the newsletters or emails purportedly issued by Sun Life to its sales advisors, other than the one email acknowledged by the Respondent. Accordingly, it concluded that MFDA was not obligated to produce a Sun Life employee to give evidence on that point.

130. This Hearing Panel rejected the contention that MFDA should have produced a Sun Life witness who could corroborate whether:

- a) certain of the forms in dispute were generated by the Sun Life SVI app,
- b) the Respondent could not have printed out forms unless they were completed in the SVI app, or
- c) the SVI app sometimes printed forms with errors or gaps.

131. Jaspers under cross-examination disputed that the Respondent could not have printed incomplete forms from the SVI app. However, without relying on her evidence on this point, this Hearing Panel does not accept that any deficiencies that may have existed with the SVI app precluded an advisor including the Respondent from ensuring his conduct in completing any forms complied on their face with the Approved Person's obligations under the MFDA Rules.

132. As stated in *(Franco (Re) (supra)*, registrants are presumed to know their regulatory requirements, and cannot rely on the position that others should have advised them of the same. *(Zeiben (Re), (supra), and Huckerby (Re), supra.)* Accordingly, the Respondent could not rely on the position that others should have provided him with more effective electronic devices to ensure compliance with the regulatory requirements. Therefore, this Hearing Panel found that MFDA was not obligated to produce a Sun Life employee to give evidence on that point.

133. This Hearing Panel concluded there is no sufficient basis to draw an adverse inference because a witness named on the witness list was not called or because a Sun Life witness who was called was unprepared to testify on these points.

134. On the issue of whether even if Sun Life had policies in place and even if the Respondent knew about them, there was no evidence offered by Jaspers that they were of contractual force such that they bound him, this Hearing Panel found that MFDA was not obligated to present any such evidence.

135. The governing case authority makes sufficient clear that the Respondent was bound to comply with the MFDA rules and the Member's policies and procedures not by virtue of his employment contract but by virtue of the requirements of his self-regulating industry. Moreover, failing to comply with those MFDA Rules and the Member's policies and procedures constituted a breach even without reference to any of his employment contractual obligations.

136. Had this Hearing Panel decided it was relevant to determine whether the Respondent had entered into a contract with Sun Life which thereby bound him to comply with those policies, it would have concluded on the Respondent's evidence that:

- a) he had signed a contract with Sun Life.
- b) he understood he had to meet some regular Sun Life compliance testing and sign to evidence he had passed the said testing.

137. In the result, this Hearing Panel rejected all the Respondent's arguments presented at the hearing.

138. This Hearing Panel concluded that the Respondent's non-compliance, as explained in *Price (Re) (supra)*, at paras. 122-124, subverted the ability of Sun Life to properly supervise trading activity. His non-compliant forms in each case destroyed the audit trail. The effect was that the presence of the client's signature on a trade form could no longer be taken as confirmation that the client authorized a particular trade. Further, his noncompliance compromised Sun Life's ability to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account.

## **Summary**

139. This Hearing Panel considered all the evidence and concluded, for the above reasons, the forms in evidence did not comply with the MFDA Rules and Sun Life policies and procedures

prohibiting use of pre-signed or altered forms, or guidelines pertaining to witnessing of LTA forms and that MFDA had proven the Allegations according to the required standard.

### **Considerations as to Penalty**

140. After hearing the conclusions on the liability issues, both counsel were prepared to, and did make submissions as to penalties. This Hearing Panel adjourned to deliberate and then returned to deliver its decision as to fine, costs and conditions pertaining to payment by instalment.

141. Enforcement Counsel sought for penalties against the Respondent a fine in the range of \$17,500-\$25,000.00 pursuant to s. 24.1.1(b) of MFDA By-law No. 1 and costs of \$5,000.00 - 7,500.00, pursuant to s. 24.2 of MFDA By-law No. 1. He provided a draft bill of costs at the hearing showing costs in the range of \$13,250.00, which did not include all items such as counsel telephone discussions, without prejudice discussions and various disbursements, such as venue expenses.

142. The Respondent's Counsel's submissions as to penalty were that the fine should fall in the range of \$9,000.00-13,000.00 and that costs should be imposed in the range of \$2,500.00.

### **Previous Decisions Made in Similar Circumstances**

143. Enforcement Counsel cited *Tonnies (re)* supra, which (at para 45) was a reminder that the role of a hearing panel is not to punish past conduct, but to restrain as best as it can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. *Tonnies, supra*, at para. 46 stated that the hearing panel should consider the following factors:

- 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.

144. Hearing panels also frequently consider the following factors when determining whether a penalty is appropriate:

- a) The seriousness of the allegations proved against the Respondent;
- b) The Respondent's past conduct, including prior sanctions;
- c) The Respondent's experience and level of activity in the capital markets;
- d) Whether the Respondent recognizes the seriousness of the improper activity;
- e) The harm suffered by investors as a result of the Respondent's activities;
- f) The benefits received by the Respondent as a result of the improper activity;
- g) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- h) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- i) 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;
- j) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and
- k) Previous decisions made in similar circumstances.

*Breckenridge*, MFDA File No. 200708, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para. 77

145. MFDA Sanction Guidelines, which provide guidance to hearing panels, reference certain factors that are relevant to the penalty determination in this case, including:

- a) General and specific deterrence;
- b) Seriousness of the allegations;
- c) Public confidence; and
- d) Whether the Respondent recognizes the seriousness of the misconduct.

146. Enforcement Counsel cited the following cases:

- a) *Nash (Re)*, MFDA File No. 2018113, Hearing Panel of the Atlantic Regional Council, Decision and Reasons dated February 7, 2019

- b) *Duffey (Re)*, MFDA File No. 201686, Hearing Panel of the Central Regional Council, Decision and Reasons dated March 27, 2017
- c) *Dick (Re)*, MFDA File No. 201818, Hearing Panel of the Central Regional Council, Decision and Reasons dated July 20, 2018

147. Enforcement Counsel submitted that the cited cases involved settlement agreements, where the penalties were negotiated between the parties, and did not involve the time and expense of a hearing. In addition, he pointed out that one of the forms occurred post bulletin, which is typically regarded as an aggravating factor in penalty. He also noted that given the contents of the Respondent's filed Reply, he demonstrated no remorse, which was a further aggravating factor.

148. Respondent's Counsel argued the penalties should each be lower by reason of various mitigating factors, including the following:

- a) The Respondent had no previous disciplinary history,
- b) The Respondent received no benefit from the non-compliant conduct,
- c) The Respondent attended at the hearing, and did not dispute a substantial number of forms in issue, and
- d) The Respondent worked at Sun Life for 16 years and since he was terminated in August of 2016, he has not been able to secure a license.

149. Respondent's Counsel referred to the following cases:

- a) *Chow (Re)*, 2018 CarswellNat 2925
- b) *Coehlo (Re)*, 2016 CarswellNat 1735
- c) *Barak (Re)*, 2016 CarswellNat 8358
- d) *Duffey (Re)* 2017 CarswellNat 1222
- e) *Chugh (Re)* 2018 CarswellNat 8448
- f) *Martin (Re)* 2018 CarswellNat 8447

## **Conclusions**

150. As stated in *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 (SCC), at paras. 59, 68, the primary goal of securities regulation is the protection of the investor.

In addition to protection of the public, the goals of securities regulation also include fostering public confidence in the capital markets and the securities industry.

151. The Hearing Panel in *Tonnies (Re)*, *supra*, at para. 45 stated that the role of a Hearing Panel, when imposing sanctions in furtherance of the above goals, is as follows:

*The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in Re Mithras Management Ltd. et al. (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:*

*...[T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.*

152. Sanctions imposed by a Hearing Panel should therefore be protective, preventative, and intended to be exercised to prevent likely future harm to the markets.

153. To determine whether a penalty is appropriate, the Hearing Panel should consider:

- 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.

*Tonnies, supra*, at para. 46

### **MFDA Sanction Guidelines**

154. This Hearing Panel noted that as of November 15, 2018, the MFDA has issued Sanction Guidelines to assist Staff and Respondents in conducting disciplinary proceedings and negotiating settlement agreements, as well as Hearing Panels in the fair and efficient imposition of sanctions

in settled or contested disciplinary proceedings. As stated in the heading “Purpose Of The Sanction Guidelines”:

*The Sanction Guidelines are not mandatory. The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. The Sanction Guidelines are intended to provide a summary of the key factors upon which discretion may be exercised consistently and fairly in like circumstances, but are not binding on Hearing Panels. The list of key factors in the Sanction Guidelines is not exhaustive, and Hearing Panels may consider other aggravating and mitigating factors as appropriate.*

*Hearing Panels should always exercise judgment and discretion, and consider appropriate aggravating and mitigating factors in determining appropriate sanctions in every case. In addition, Hearing Panels should identify the basis for the sanctions imposed in the Reasons for Decision.*

155. This Hearing Panel considered the following factors.

#### **Seriousness of the Misconduct**

156. The use of pre-signed and altered forms is a serious breach of MFDA Rule 2.1.1.

*Byce (Re), supra*

157. The failure to comply with a Member’s policies and procedures is a breach of MFDA Rules 2.1.1, 2.5.1, and 1.1.2.

*Irwin (Re), supra*

158. Account forms found after the MFDA issued MFDA Bulletin #0661-E on October 2, 2015 is considered an aggravating factor and in this case one such form was found.

*Lo (Re), MFDA File No. 201776, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 7, 2018, at paras. 16, 18*

### **Respondent's Past Conduct and Experience in the Capital Markets**

159. The Respondent had been registered as a mutual fund salesperson (now a mutual fund dealing representative) with Sun Life from 2001 to 2016. There was no evidence of any prior disciplinary history by the MFDA, and this is the Respondent's first offence. However, based on the Respondent's long registration history, he knew, or should have known of the requirements set out in MFDA Rules and Staff Notices.

### **Recognition by the Respondent of the Seriousness of the Misconduct**

160. Although the Respondent denied the Allegations in the Reply to the Notice of Hearing and at the hearing, which Enforcement Counsel contended were aggravating factors showing a lack of remorse, this Hearing Panel concluded that at earlier dates including the time of the interview and the hearing, the Respondent did recognize the seriousness of the misconduct and regretted his noncompliance.

### **Harm Suffered by Investors and Benefits Received by the Respondent**

161. There was no evidence of investor harm or that the Respondent received any benefits that he would normally be entitled to receive had he carried out the transactions in the proper manner.

### **Deterrence**

162. The Supreme Court of Canada in *Cartaway Resources Corp. (Re)*, [2004] 1 SCR 672 (SCC) at paras. 52 – 6, ("*Cartaway Resources*"), and MFDA hearing panels (*Tonnies, Re, supra* at para 47) have held that it is appropriate for deterrence to be among the factors taken into account when determining penalty.

163. The effect of general deterrence should advance the goal of protecting investors. As a result, the penalty levied should be sufficient so as to affirm public confidence in the regulatory system and ensure that the misconduct is not repeated by others in the industry. As the Supreme Court of Canada stated in *Cartaway Resources, supra*, at para. 61:

*A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general*

*deterrence as a factor, albeit not the only one, in imposing a sanction . . . The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged...*

164. Considering all the foregoing, this Hearing Panel concluded that a fine in the amount of \$15,000.00 was necessary on the facts of this case firstly, in order to communicate to other Approved Persons that the Respondent's conduct has no place in the mutual fund industry. It is a mistake for any Approved Person to assume that failure to know or understand his or her obligations under the MFDA Rules or a Member's policies and procedures pertaining to the same are an excuse for misconduct. This remains true even if the Approved Person's conduct is unintentional or inadvertent. Secondly, this Hearing Panel concluded that sum is reasonable and proportionate and will deter the Respondent and other Approved Persons from engaging in similar misconduct. Finally, this Hearing Panel concluded that a fine in this amount would 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.

165. On the costs issue, this Hearing Panel concluded that a costs award in the amount of \$6,000.00 was necessary on the facts of this case. While Respondent's counsel sought a costs award of \$2,500.00 and cited cases in support, hearing panels in the case of settlement agreements often impose the sum of \$2,500.00 where the parties have jointly proposed such amounts. In settlement agreement cases seeking approval of costs, all parties usually avoid substantial time and costs.

166. Moreover, Respondent's Counsel acknowledged that costs are normally determined in relation to the extent of success of the parties. Enforcement Counsel submitted a draft bill of costs, the total sum of which was over twice the amount of the award imposed in this case, even without amounts that could have been included. Respondent's counsel made no submissions with respect to the fee items listed or the calculations.

167. While no respondent should ever be punished with costs for seeking a hearing on the merits where he or she believes there is a *bona fide* defence, in this case the hearing required two days to present all the evidence and arguments of counsel resulting in considerable additional cost incurred in terms of both time and expense. Here, the amount sought by MFDA as a costs award was far

less that the actual amount it incurred. In the result, the Respondent was unsuccessful and even if his Counsel endeavored to narrow the issues to save time and costs, the contested hearing had cost consequences beyond what is seen at a settlement hearing.

168. In the view of this Hearing Panel, the MFDA submission as to costs was entirely reasonable. However, on the facts of this case, the decision was tempered by the conclusion that the Respondent was genuinely remorseful, that the violations in some instances were more technical than substantive, and because payment of all the sums imposed may be financially onerous in his present circumstances. For the foregoing reasons, this Hearing Panel also approved the Respondent's application to be permitted to make installment payments, the terms of which were acknowledged by both counsel.

169. In conclusion, this Hearing Panel made the following order as to penalties:

- a) The Respondent shall pay a fine in the amount of \$15,000 pursuant to s. 24.1.1. (b) of MFDA By-law No. 1;
- b) The Respondent shall pay costs in the amount of \$6,000 pursuant to s. 24.2 of MFDA By-law No. 1;
- c) The payment by the Respondent of the Fine and Costs shall be made to and received by MFDA Staff as follows:
  - i. \$1,750.00 on or before May 31, 2019;
  - ii. \$1,750.00 on or before June 28, 2019;
  - iii. \$1,750.00 on or before July 31, 2019;
  - iv. \$1,750.00 on or before August 30, 2019;
  - v. \$1,750.00 on or before September 30, 2019;
  - vi. \$1,750.00 on or before October 31, 2019;
  - vii. \$1,750.00 on or before November 29, 2019;
  - viii. \$1,750.00 on or before December 31, 2019;
  - ix. \$1,750.00 on or before January 31, 2020;
  - x. \$1,750.00 on or before February 28, 2020;
  - xi. \$1,750.00 on or before March 31, 2020;
  - xii. \$1,750.00 on or before April 30, 2020.

- d) If the Respondent fails to make any of the installment payments described in Paragraph c) above, any outstanding balance of the Fine and Costs owed by the Respondent shall become immediately due and payable to the MFDA.

**DATED** this 10<sup>th</sup> day of July, 2019.

“Shelley L. Miller”

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Shelley L. Miller, QC  
Chair

“Adam Dudley”

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Adam Dudley  
Industry Representative

“Greg Wiebe”

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Greg Wiebe  
Industry Representative

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