Reasons for Decision

File No. 201345

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: Orville Keith Carruthers

Heard: October 23, 2013 in Toronto, Ontario
Reasons for Decision: December 11, 2013

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.	Chair
Terrence Bourne	Industry Representative
Selwyn Kossuth	Industry Representative

Appearances:

Shelly Feld	)))	Enforcement Counsel, Mutual Fund Dealers Association of Canada
Orville Keith Carruthers	)))	Respondent – Unrepresented by Counsel

1. By Notice of Settlement Hearing dated October 2, 2013, a hearing panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada ("MFDA") was convened to consider whether, pursuant to section 24.4 of By-law No. 1 of the MFDA, the Panel should accept a Settlement Agreement, dated September 27, 2013, entered into by the Staff of the MFDA and the Respondent, Orville Keith Carruthers.

2. At the outset of the proceedings, we considered a joint motion by Staff and the Respondent to move the proceedings *in camera*. We granted that motion. We then considered the provisions of the Settlement Agreement aided by submissions as to the applicable law which should guide this Panel in determining whether to accept or reject the Settlement Agreement.

3. Mr. Carruthers, in response to a question from the Panel, confirmed that he did not need the advice of counsel and was content to proceed without counsel at the hearing.

THE ALLEGATIONS

4. The Respondent admits that between June 26, 2008 and August 20, 2012, he obtained, maintained and/or used approximately 170 account forms in 60 client accounts which were signed by the clients when the account forms were blank or only partially complete, or contained photocopies of client signatures, contrary to MFDA Rule 2.1.1.

FACTS

5. The Respondent, who has been registered in the mutual fund industry since March 19, 1996, has since April 14, 2000 been registered as a mutual fund salesperson with FundEX Investments Inc., a Member of the MFDA.

6. The Sales Compliance Staff of the MFDA conducted a sales compliance review of the Member and observed trade forms submitted by the Respondent which contained photocopied client signatures. The Member, having received this information, conducted a branch audit of the Respondent's office in July 2012.

7. During the branch audit, 170 account forms in 60 client accounts serviced by the Respondent were identified as having been signed by clients when the account forms were blank or only partially complete or contained a photocopy of the client's signature.

8. The account forms described above included order entry forms, trade tickets, systematic instruction forms, deregistration/withdrawal requests, and fund company client application forms. Approximately 166 of the 170 account forms described above had been used to process trades and conduct business on behalf of the Member.

9. When the Member questioned the Respondent about the forms he indicated he usually discussed trades with clients either at a face-to-face meeting or in telephone conversations. The Respondent's file notes and correspondence pertaining to 157 of the 166 account forms supported the Respondent's statement as to the process used. The Member did not find any information from the Respondent or from clients that indicated that discretionary or unauthorized trades were processed on behalf of the clients or that KYC information was recorded for clients using pre-signed or photocopied forms without the client's knowledge or authorization.

THE MEMBER'S RESPONSE

10. The Member sent letters to all clients enclosing a three-year account transaction history which they were asked to review. No concerns were communicated to the Member by these clients. On August 20, 2012, the Member obtained an undertaking from the Respondent confirming that he would discontinue the practice described above. He was also subject to 90 days of strict supervision and fined $500 per month during that period of time. It is clear the Respondent received no financial benefit from the conduct described above nor did he process any trades or changes without the knowledge and authorization of his clients. No clients suffered any financial harm nor have they complained about the Respondent's conduct.

ACCEPTANCE OF THE SETTLEMENT AGREEMENT

11. As a Panel, we are obviously concerned with this type of conduct, however we believe that the Settlement Agreement fairly addresses those concerns.

12. In determining whether the Settlement Agreement should be accepted, we have considered a number of factors. These include the following:

i. The public interest and whether the penalty imposed will protect investors.
ii. Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement.
iii. Whether the Settlement Agreement addresses the issues of both specific and general deterrence.
iv. Whether the proposed settlement will prevent the type of conduct, which is set out in the Settlement Agreement, from occurring again in the future.
v. Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets.
vi. Whether the Settlement Agreement will foster confidence in the integrity of the Mutual Fund Dealers Association of Canada.
vii. Finally, whether the Settlement Agreement will foster confidence in the regulatory process itself.

13. We believe that each and every one of these factors is dealt with in an appropriate fashion by the Settlement Agreement.

SUBMISSIONS AS TO PENALTY

14. Counsel for the MFDA confirmed a number of matters for the Panel: There was no evidence of material harm to any clients; no clients have complained; no clients have lost any funds or money; and, after his initial failure to disclose, the Respondent made a full and complete admission of his misconduct and cooperated with the MFDA investigators.

15. Enforcement Counsel submitted that there were a number of factors that should be

considered as to the acceptance of the Settlement Agreement:

i. The Respondent clearly admits his contraventions.

ii. The admissions by the Respondent reduced the cost and time involved in the process and led to certainty as to the procedures to be followed.

iii. The fine represents a substantial penalty to the Respondent having consideration of his financial income and resources.

iv. The Respondent has no past disciplinary history with the MFDA.

v. The Respondent's misconduct has not caused any financial loss to clients.

vi. The Respondent did not process any trades or changes to client information without the knowledge or authorization of his clients.

16. For all of these reasons, and notwithstanding the conduct of the Respondent, we have concluded that the Settlement Agreement is reasonable. In our considerations we have been mindful of the words found in *Re Milewski*, [1999] I.D.A.C.D. No. 17, decided on July 28, 1999. The Panel made these comments at page 9:

> Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

PENALTY

17. The following penalty and costs will be imposed upon the Respondent:

i. The Respondent will pay a fine in the amount of $5,000 pursuant to section 24.1.1(b) of MFDA By-law No. 1; and

ii. The Respondent shall pay costs in the amount of $2,500, pursuant to section 24.2 of MFDA By-law No. 1.

18. We were advised by Enforcement Counsel that the Respondent has tendered two bank drafts, one in the amount of $5,000 and one in the amount of $2,500, in payment of the fine and the costs to be held in escrow pending the acceptance of the Terms of Settlement.

19. After accepting the Settlement Agreement, we rescinded the *in camera* order and signed the order as prepared and presented by Enforcement Counsel. We advised counsel that we would prepare brief reasons for our approval of the Settlement Agreement, which are set forth herein.

DATED this 11th day of December, 2013.

"John B. Webber"
The Hon. John B. Webber, Q.C.,
Chair

"Terrence Bourne"
Terrence Bourne,
Industry Representative

"Selwyn Kossuth"
Selwyn Kossuth,
Industry Representative

DM 361051 v2