



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: Winston Castle

Heard: January 15, 2020 in Toronto, Ontario

Decision: January 15, 2020

Reasons for Decision: February 4, 2020

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, CC, QC
Selwyn B. Kossuth
Joseph Yassi

Chair
Industry Representative
Industry Representative

Appearances:

David Barbaree)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
Greg Temelini)	Counsel for the Respondent
)	
)	
Winston Castle)	Respondent, by teleconference
)	
)	

Background

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the “MFDA”). The hearing was held on January 15, 2020. The full Settlement Agreement, dated November 28, 2019 (“Settlement Agreement”), entered into between Staff of the MFDA and Winston Castle (the “Respondent”) is available on the MFDA website. The Respondent appeared at the hearing by teleconference and was represented by counsel.

2. The Hearing Panel accepted the proposed Settlement Agreement at the conclusion of the hearing, with reasons to follow. These are our reasons for our decision to accept the Settlement Agreement.

3. The Respondent was registered in Ontario as a mutual fund salesperson (now known as a dealing representative), commencing in 1995. From December 3, 1997 to December 31, 2018, the Respondent was registered in Ontario as a mutual fund salesperson with Keybase Financial Group Inc., a Member of the MFDA (the “Member”). At all material times, the Respondent carried on business in the Virgil, Ontario area.

4. The Respondent is not currently registered in the securities industry in any capacity.

5. A Notice of Settlement Hearing was issued by the MFDA on November 25, 2019, alleging that the Respondent:

- a) between October 23, 2014 and October 2, 2015, engaged in personal financial dealings with a client when he purchased foreign currency from a client in a manner that favoured his interests over those of the client, thereby giving rise to a conflict or potential conflict of interest, which the Respondent failed to disclose to the Member, or failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the Member’s policies and procedures, and MFDA Rule 2.1.4 and 2.1.1;
- b) commencing June 20, 2016, failed to comply with the Member’s policies and procedures pertaining to accounts where the Approved Person receives instructions

from a third party appointed by a client as a Power of Attorney, contrary to MFDA Rules 2.5.1, 1.1.2, and 2.1.1; and

- c) between January 2011 and October 2017, altered and used to process transactions 95 account forms, by altering information on the account forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1.

The Settlement Agreement

6. In Paragraph 35 of the Settlement Agreement, the Respondent admits to the violations alleged in paragraph 5 above.

7. In Paragraph 36 of the Settlement Agreement, the Respondent agrees to the following terms of settlement:

- a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of 12 months from the date that this Settlement Agreement is accepted by a Hearing Panel, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
- b) the Respondent shall pay a fine in the amount \$20,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1, which shall be payable in certified funds on the date this Settlement Agreement is accepted by a Hearing Panel;
- c) the Respondent shall pay costs to the MFDA in the amount of \$2,500, pursuant to section 24.2 of MFDA By-law No. 1, which shall be payable in certified funds on the date that this Settlement Agreement is accepted by a Hearing Panel;
- d) If the Respondent becomes registered again in the future, he shall comply with MFDA Rules 2.1.4, 2.1.1, 1.1.2, 2.5.1; and
- e) the Respondent will attend in person or participate by teleconference on the date set for the Settlement Hearing.

Agreed Facts

8. The agreed facts are set out in detail in paragraphs 10 to 30 of the Settlement Agreement and will not be repeated in full here.

9. There were three allegations. The first involved one client, Client ET, an 83-year-old senior who became a client of the Member on June 4, 2013. At all material times, the Respondent was responsible for servicing Client ET's account.

10. The first allegation dealt with the Respondent purchasing foreign currency from Client ET. In October 2014, the Respondent met with Client ET to review her accounts and agreed to purchase US dollars which the client no longer needed. Two transactions subsequently took place. In the first, Client ET gave the Respondent a cheque or bank draft for \$10,000 American dollars and received in exchange \$10,800 in Canadian funds. In the second, Client ET gave the Respondent \$8,500 in American funds and received \$10,370 in Canadian funds.

11. The exchange rates were lower than market exchange rates, and therefore favoured the Respondent who obtained a profit of approximately \$1,286 Canadian.

12. The funds did not flow through the Member and the Member was not notified of the transactions.

13. At all material times, the Member's policies and procedures did not allow its Approved Persons to accept cash from clients. The Member's policies and procedures also required that monetary benefits flow through the Member and that the Member be notified of any such arrangements so that it can determine the significance of the benefit and determine whether there is a conflict of interest.

14. The second allegation was the Respondent's failure to inform the Member and to prepare and submit to the Member the required forms when Client ET gave a power of attorney over his property to his son. Such action was contrary to the Member's Rules and Regulations that required notification of a material change in a client's account.

15. The third allegation was that the Respondent altered client account forms without the clients' initials. In August 2016, the Member conducted an audit of a sample of files maintained by the Respondent between June 2014 and July 2016. The Member found that the Respondent had made changes to 7 client account forms without having the client initial the changes, often by using liquid correction fluid. The Respondent undertook that he would not alter a client account form

without obtaining the client signature, and that he would comply with the Member's policies and procedures.

16. In 2017, the Member conducted a full audit of the Respondent's files and found additional forms where the Respondent made alterations to information on the forms without having the client initial the alterations. Three of these altered account forms occurred after the 2016 audit when the Respondent had provided his undertaking not to alter a client's account form without obtaining the client's signature.

The Misconduct

17. MFDA Hearing Panels have consistently held that altering account forms (as well as using pre-signed forms) constitutes a contravention of the standard of conduct under MFDA Rule 2.1.1. See, e.g., *Re Pollon* 2018 LNCMFDA 54; *Re Lewis* 2018 LNCMFDA 59; and *Re Brenchley* MFDA File No. 2018102.

18. Using these forms are proscribed because their use adversely affects the integrity and reliability of account documents, leads to the destruction of the audit trail, has a negative impact on Member complaint handling, and has the potential for misuse in the form of unauthorized trading, fraud, and misappropriation. See *Re Brenchley* MFDA File No. 2018102.

19. For a number of years, the MFDA has been warning Approved Persons against the use of pre-signed, altered, and re-used account forms. See MFDA Staff Notice, MSN-0066, dated October 31, 2007 (updated January 26, 2017); and MFDA Staff Notice MSN-035, dated December 10, 2004 (updated March 4, 2013); MFDA Bulletin #0661 – E (October 2, 2015).

20. Engaging in personal financial dealings with a client without notifying the Member is also wrong because it prevents the Member from adequately supervising the conduct of the Approved Person. MFDA Rule 2.1.4 requires that Approved Persons be aware of actual or potential conflicts of interest, disclose such conflicts to the Member, and, together with the Member address all such conflicts by the exercise of responsible business judgment influenced only by the best interest of the client. See *Re Gaunt* 2013 LNCMFDA 63; *Re Wang* MFDA File No. 201762

21. The Respondent's failure to notify the Member of the granting of a power of attorney, as required by the Member's policies and procedures, also hinders the Member's ability to supervise the Approved Person's conduct and protect the interest of the Member's clients and the public.

Acceptance of the Settlement Agreement

22. As stated above, the Panel accepted the terms of the Settlement Agreement. A Panel can either accept or reject a Settlement Agreement. It cannot modify it.

23. The conduct in the present case is serious. Altered forms are especially serious because, unlike pre-signed forms that the client knows are blank when he or she signs the form, an alteration may be done without the client's knowledge.

24. This is not an isolated case. The conduct went on for years with many clients.

25. The conduct is particularly serious because, as set out in paragraph 16, the Respondent had been warned about his conduct and undertook not to alter forms without the clients' initials.

26. There are, however, a number of mitigating factors. In January 2018, the Member sent letters to clients whose accounts the Respondent serviced to determine whether the Respondent had ever asked the clients to sign blank or incomplete account forms, and whether the clients had ever conducted personal business with the Respondent. No clients responded to the Member with any concerns.

27. None of the transactions processed through the use of altered forms were unauthorized.

28. The Respondent has not previously been the subject of MFDA disciplinary procedures.

29. Although the Respondent benefitted from purchasing foreign currency from a client in a manner that favoured his interest over that of the client, there is no evidence that the Respondent received any benefit from altering forms beyond any commissions and fees that he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.

30. The Respondent has cooperated fully with Staff during the course of the investigation, and by entering into the Settlement Agreement, the Respondent has saved the MFDA the time,

resources, and expenses associated with conducting a full hearing on the allegations, and by entering into a Settlement Agreement has accepted responsibility for his actions.

31. The penalty of \$20,000 is not out-of-line with the new Sanctions Guidelines as well as the cases cited to us by counsel: see, for example, *Re Doyle* MFDA File No. 201651; *Re Williams* MFDA File No. 201864; and *Re Smith* MFDA File No. 201960.

32. The monetary penalty and the twelve-month prohibition provide a significant measure of specific and general deterrence.

33. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal affirmed the British Columbia Supreme Court's statement with respect to a settlement by the British Columbia Securities Commission at paragraph 49 of *British Columbia Securities Commission v. Seifert* [2006] BCJ No. 225, aff'd [2007] BCCA No. 484:

“Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation.”

34. Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel. Respecting settlements is particularly desirable in cases, such as this one, where experienced counsel were involved.

35. As a Panel stated (*Re Keshet*, File No. 201419 at paragraph 7), to take one of many such cases: “It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness.” There are many similar statements

by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated:

“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.”

36. The penalty and the costs agreed to in this case fall within “a reasonable range of appropriateness.”

37. For the above reasons the Panel accepted the Settlement Agreement.

DATED this 4th day of February, 2020.

“Martin L. Friedland”

Martin L. Friedland, CC, QC
Chair

“Selwyn B. Kossuth”

Selwyn B. Kossuth
Industry Representative

“Joseph Yassi”

Joseph Yassi
Industry Representative

DM 721543