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: Wayne Brian Charlton

Heard: November 17, 2021 by electronic hearing in Toronto, Ontario
Decision (Penalty) and Reasons: December 10, 2021

DECISION (PENALTY) AND REASONS

Hearing Panel of the Central Regional Council:

Martin Friedland, C.C., Q.C.	Chair
Brigitte Geisler	Industry Representative
Matthew Prew	Industry Representative

Appearances:

Brendan Forbes	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Wayne Charlton	)	Respondent

Background

1. This is a Hearing under Sections 20 and 24 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The Hearing was held as an electronic hearing on November 17, 2021. Wayne Brian Charlton (the "Respondent") was in attendance and not represented by counsel.

2. The Respondent has been registered in the securities industry since October 1996. Since August 4, 2017, he has been registered in Ontario and British Columbia as a dealing representative with Investia Financial Services, Inc., a Member of the MFDA (the "Member"). He is currently registered in the securities industry with the Member. At all material times, the Respondent conducted business in the Oakville, Ontario, area.

3. By a Notice of Hearing dated April 30, 2021, the MFDA commenced a disciplinary proceeding against the Respondent pursuant to sections 20 and 24 of MFDA By-law No. 1.

4. The Notice of Hearing set out the following allegations:

> **Allegation #1:** Between October 3, 2017 and November 26, 2018, the Respondent engaged in discretionary trading when he processed 7 redemptions for 3 clients without obtaining instructions from the clients with respect to the mutual funds to be redeemed in the clients' accounts, contrary to MFDA Rules 2.3.1(b) and 2.1.1; and
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> **Allegation #2:** Between October 3, 2017 and November 26, 2018, the Respondent failed to record and maintain evidence of client trade instructions with respect to 4 redemptions in 4 client accounts, contrary to the Member's policies and procedures and MFDA Rule 1.1.2, 2.5.1 and 5.1(b).

5. An Agreed Statement of Facts, attached to these reasons as Schedule "1", was agreed to by the Respondent and the MFDA on September 17, 2021. The Respondent admits (in para. 4) that the facts set out in the Agreed Statement of Facts "constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

6. The task of the Hearing Panel, the Agreed Statement of Facts states (para. 5), is to "determine, on the basis of this Agreed Statement of Facts, the appropriate penalty to impose on the Respondent."

Agreed Facts

7. Unlike most disciplinary cases, the facts are not set out in detail in the Notice of Hearing or the Agreed Statement of Facts. Allegation 1, which deals with discretionary trading, refers to 7 redemptions from 3 clients and allegation 2, relating to not keeping proper records, refers to 4 redemptions in 4 client accounts. We cannot go beyond the Agreed Statement of Facts without the consent of staff of the MFDA and the Respondent. (See *Re Vickers* 2015 ONSEC 13.) We do not know, for example, who the clients were or the sums involved or the securities redeemed or the circumstances relating to the transactions. Nor are we told whether the clients referred to in allegation 1 are some of the same clients referred to in allegation 2. This makes it somewhat difficult for us to compare the present case with other cases to determine what is an "appropriate penalty."

8. Paragraph 15 of the Agreed Statement of Facts simply states with respect to discretionary trading: "Between October 3, 2017 and November 26, 2018, the Respondent obtained written communications from 3 clients requesting redemptions from their client Member accounts. The written communications from the clients specified the amount of the redemption and when the redemption was to occur, but did not specify which mutual funds to sell to fulfill the redemption request. Using his own discretion, the Respondent selected which mutual funds would be redeemed without obtaining those instructions from the client." We were told that the Respondent's clients typically had only two or three different funds from which redemptions could be made.

9. With respect to the second allegation concerning failure to record and maintain evidence of client instructions, paragraph 18 of the Agreed Statement of Facts states: "Between October 3, 2017 and November 26, 2018, the Respondent processed 4 redemptions in the accounts of 4 clients, pursuant to Letters of Direction that had been executed by clients." "Letters of Direction" referred to written email correspondence. Paragraph 19 goes on to say: "The Respondent states that he received verbal instructions from the clients with respect to the mutual funds to be redeemed, but failed to make a written record of the clients' instructions."

Improper Conduct

10. There is no question that Respondent's conduct was improper. The MFDA rules are clear that approved persons, with certain exceptions, cannot engage in discretionary trading. As stated above, the Respondent admits that he improperly engaged in discretionary trading. MFDA Rule 2.3.1(b) states that "[N]o Member or Approved Person shall engage in any discretionary trading."

Prior disciplinary hearings have made it clear that an Approved Person is required to obtain express instructions from a client with respect to *each* of the elements of every trade, including the specification of which security is to be traded. The failure to receive specific instructions from clients in relation to even one element of the trade from a client constitutes discretionary trading. (See, for example, *Re Wenzel* 2005 LNABSC 60 at paras. 47-49; *Re Garries* 2016 MFDA File No. 201605 at para. 45; and *Re Showalter* 2019 MFDA File No. 201906 at 11.) The Panel in *Re Garries* stated (at para. 47):

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

11. Other panels have held that such conduct also constitutes a contravention of Rule 2.1.1. (See *Re Mahendran* 2019 MFDA File No. 201911; and *Re Arena* 2020 MFDA File No. 202047.)

12. The rules are also clear that Members must keep a record of a client's transactions. MFDA Rule 5.1(b) states that this includes "an adequate record of each order, and of any other instruction, given or received for the purchase or sale of securities…" The Member requires records be kept of clients' instructions. Approved Persons must comply with the Member's policies and procedures. (See *Re Stutz* 2019 MFDA File No. 2018129; *Re Sawwaf* 2019 MFDA File No. 201888).

The Appropriate Penalty

13. What is the appropriate penalty on the agreed facts of this case? Staff of the MFDA proposes that the Respondent (a) pay a fine of at least $15,000, pursuant to s. 24.1 of MFDA By-law No. 1 and (b) costs in the amount of $5,000, pursuant to s. 24.2 of MFDA By-law No. 1.

14. If this was a Settlement Hearing, we would have no hesitation in accepting the proposed penalty. But this is not a Settlement Hearing and we must carefully determine what penalty we think would be appropriate.

15. There are many forms of discretionary trading, including cases involving pre-signed forms, cases of altered forms, and cases of forged signatures. And, of course, there are cases where there are a large number of clients involving a great many transactions. And there are cases where there is other improper conduct along with discretionary trading.

16. Discretionary trading in its various forms has been a concern of the MFDA for decades. It accounts for by far the single most frequent category of disciplinary proceedings. An MFDA Staff Notice entitled "Recording and Maintaining Evidence of Client Trade Instructions" was issued in 2004 and updated in 2013, which stated (MSN-0035):

> "During compliance examinations performed to date, MFDA staff has noted that many Members and their Approved Persons are not recording and maintaining adequate records of client trade instructions for trades. In reviewing client files during compliance examinations, MFDA staff has also found pre-signed trade order forms, forged client signatures and photocopied client signatures. MFDA Rules and securities legislation prohibit mutual fund dealers and their salespersons from having discretionary trading authority over a client account."

17. Previous panels have explained why discretionary trading is not permitted. In *Re Rownthwaite*, for example, the Panel stated (file No. 201123 at para. 7): "Subject to certain exceptions, which are not applicable here, MFDA Rule 2.2.1 absolutely prohibits it… It…undermines the client's right and ability to make informed decisions about their financial affairs; subverts the ability of a Member to properly supervise trading activity; and destroys the integrity of the audit trail."

18. A later Panel, *In Re Wallace* (MFDA File No. 201683), put the reason somewhat differently, stating (at para. 13): "The prohibition on discretionary trading advances investor protection in two principal respects. First, it guards against potential abuses by ensuring that a client must give clear and complete directions to an Approved Person prior to a trade being executed in a client's account. Second it seeks to prevent clients from being victimized by poor investment decisions being made on their behalf by those who do not possess the necessary proficiencies, training and experience to exercise discretionary trading authority over a client's investments."

19. Although it is clear that authorization from the client should be obtained in the *redemption* of securities, it is the Panel's view that in general it is not as serious as cases of the initial *purchase* of securities in that the client is not, as stated in the previous paragraph, in danger of "being victimized by poor investment decisions being made on their behalf." Redemptions can, however, have a negative impact on the client.

20. Discretionary trading is serious, but the present case is at the low end of seriousness of the many cases we examined. In the present case the redemptions were properly authorized, but not

the specific securities that were to be sold. There were only 7 transactions, involving 3 clients. With respect to allegation 2, concerning failure to record evidence of the redemptions, there were only 4 redemptions in 4 client's accounts.

21. These were the only cases of improper redemptions by the Respondent. The Agreed Statement of Facts (para. 23) describes the Member's investigation of the possibility of other similar transactions: "On May 1, 2019, the Member contacted and sent transaction histories for a 3 year period to all clients whose accounts were serviced by the Respondent. The letters requested that the clients review their transaction histories to ensure that all trading activity was executed accurately and to advise the Member…if the trading activity within the client accounts was not accurate. No clients reported any concerns to the Member in response to its letters."

22. Apart from the survey, there is no evidence that any client complained about the Respondent's conduct. None of the clients suffered any loss. The Respondent did not profit from his conduct.

23. Moreover, entering into an Agreed Statement of Facts is a recognition by the Respondent of his wrongdoing.

24. We have also taken into account the fact that the Respondent paid an administrative fee of $755 to the Member for the costs associated with the client mailing.

25. Moreover, the Respondent was disciplined by the Member in that on March 8, 2019, he was placed on strict supervision.

26. The Respondent has been in the securities industry since 1996 and this is his first disciplinary proceeding.

27. The Panel has determined that an appropriate penalty in the circumstances of this case would be for the Respondent to pay a fine of $10,000.

28. The fine, coupled with the discipline imposed by the Member and his experience in facing inevitably trying disciplinary proceedings will provide a significant measure of specific deterrence to the Respondent and general deterrence to others.

29. We have also determined that the costs should be $2,500, half the costs requested by staff of the MFDA. A statement of costs was filed by staff of the MFDA. This is often the amount

provided in simple Settlement Hearings and because the Respondent agreed to a Statement of Facts, this saved the MFDA time and expenses. The Hearing in the present case was about the same length as most Settlement Hearings.

30. The penalty and costs are in line with two of the cases cited to us by counsel: *Re Wallace* MFDA File No. 201683 and *Re Mahendran* MFDA File No. 201911. Although both were Settlement Hearings, the Agreement of Facts in the present case makes this case not significantly different from a Settlement Hearing. The fine is also consistent with the MFDA Sanction Guidelines, which includes the possibility of a reprimand, without a monetary penalty. See *Re Fox-Revett* MFDA File No. 201706, where a panel accepted a Settlement Agreement that provided a reprimand (see By-law No. 1, s. 24.1.1) without a monetary penalty in a case where mutual funds were properly redeemed and then used to purchase other securities without the client selecting the securities to be purchased.

31. We therefore order that the Respondent be fined $10,000 and pay costs of $2,500.

DATED this 10th day of December, 2021.

"Martin Friedland"
Martin Friedland, C.C., Q.C.
Chair

"Brigitte Geisler"
Brigitte Geisler
Industry Representative

"Matthew Prew"
Matthew Prew
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Re: Wayne Brian Charlton

AGREED STATEMENT OF FACTS

I. INTRODUCTION

1. By Notice of Hearing dated April 30, 2021, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced a disciplinary proceeding against Wayne Brian Charlton (the "Respondent") pursuant to ss. 20 and 24 of MFDA By-law No. 1.

2. The Notice of Hearing set out the following allegations:

Allegation #1: Between October 3, 2017 and November 26, 2018, the Respondent engaged in discretionary trading when he processed 7 redemptions for 3 clients without obtaining instructions from the clients with respect to the mutual funds to be redeemed in the clients' accounts, contrary to MFDA Rules 2.3.1(b) and 2.1.1; and

Allegation #2: Between October 3, 2017 and November 26, 2018, the Respondent failed to record and maintain evidence of client trade instructions with respect to 4 redemptions in 4 client accounts, contrary to the Member's policies and procedures and MFDA Rule 1.1.2, 2.5.1 and 5.1(b).

II. IN PUBLIC / IN CAMERA

3. The Respondent and Staff of the MFDA ("Staff") agree that this matter should be heard in public pursuant to Rule 1.8 of the MFDA Rules of Procedure.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

5. Staff and the Respondent jointly request that the Hearing Panel determine, on the basis of this Agreed Statement of Facts, the appropriate penalty to impose on the Respondent.

IV. AGREED FACTS

6. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV, and no other information, facts or documents, subject to the content of this paragraph and paragraph 7 below.

7. In the event that the Hearing Panel advises one or both of Staff and the Respondent of any additional facts that it considers necessary in order to determine the issues before it, Staff and the Respondent agree that such additional facts may be provided to the Hearing Panel, either: (a) with the consent of both Staff and the Respondent if the additional facts are agreed upon; (b) if the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel; or (c) if the parties are both present at the hearing and are not in agreement about the additional facts requested by the Hearing Panel, the parties will be given a reasonable opportunity to lead evidence concerning the additional facts. In circumstances where a party leads evidence concerning additional facts requested by the Hearing Panel, the opposing party may cross-examine any witness tendered to lead such evidence and shall be given a reasonable opportunity to lead responding evidence if they wish to do so.

8. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

9. The Respondent has been registered in the securities industry since October 1996.

10. Since August 4, 2017, the Respondent has been registered in Ontario and British Columbia as a dealing representative with Investia Financial Services Inc., a Member of the MFDA (the "Member").

11. The Respondent is currently registered in the securities industry with the Member.

12. At all material times, the Respondent conducted business in the Oakville, Ontario area.

13. The Respondent has not previously been the subject of disciplinary proceedings

Facts

Allegation #1 – Discretionary Trading

14. At all material times, the Member's policies and procedures prohibited its Approved Persons from engaging in discretionary trading.

15. Between October 3, 2017 and November 26, 2018, the Respondent obtained written communications from 3 clients requesting redemptions from their client Member accounts. The written communications from the clients specified the amount of the redemption and when the redemption was to occur, but did not specify which mutual funds to sell to fulfill the redemption request. Using his own discretion, the Respondent selected which mutual funds would be redeemed without obtaining those instructions from the client.

Allegation #2 – Failure to Record and Maintain Evidence of Client Instructions

16. At all material times, the Member's policies and procedures required its Approved Persons to maintain a record of all client instructions and to make them available to the Member upon request.

17. In accordance with Member's policies and procedures, Approved Persons were required to maintain notes that included the following information:

(a) who gave the client instructions;
(b) the date and time the instructions were given;

(c) the location where the meeting took place (in person, on location, by phone or by email);

(d) what was discussed;

(e) what recommendations were made (whether the transactions were executed or not);

(f) any actions resulting from the meeting;

(g) particulars of the securities to be purchased, switched or redeemed and to which account;

(h) confirmation as to the discussion of any fees or charges to be paid on the transaction; and

(i) in the case of redemptions, instructions as to where the proceeds of the redemption are to be sent or whether they are to be reinvested and how they are to be reinvested.

18. Between October 3, 2017 and November 26, 2018, the Respondent processed 4 redemptions in the accounts of 4 clients, pursuant to Letters of Direction that had been executed by clients.

19. The Respondent states that he received verbal instructions from the clients with respect to the mutual funds to be redeemed, but failed to make a written record of the clients' instructions.

The Member's Investigation

20. On November 20, 2018, the Member identified potential discretionary trading activity during a branch audit.

21. On or about February 4, 2019, the Member conducted a full review of the client files maintained by the Respondent.

22. On March 8, 2019, the Member placed the Respondent on strict supervision during which the Member required that: all of the Respondent's trades be pre-approved by the corporate branch manager; the Respondent cease using Limited Trading Authorizations; and written instructions with an original client signature would be required to process transactions.

23. On May 1, 2019, the Member contacted and sent transaction histories for a 3 year period to all clients whose accounts were serviced by the Respondent. The letters requested that the clients review their transaction histories to ensure that all trading activity was executed accurately and to advise the Member of if the trading activity within the client accounts was not accurate. No clients reported any concerns to the Member in response to its letters.

24. The Respondent paid an administrative fee of $755 to the Member for the costs associated with the client mailing.

25. On July 22, 2019, the Member issued a Warning Letter to the Respondent for the conduct described herein and discontinued its strict supervision of his trading activity. The Respondent was also required to sign a Letter of Undertaking agreeing to abide by all Member policies and procedures, MFDA rules, and provincial securities regulations.

Additional Facts

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

27. There is no evidence of client loss or client complaints associated with the underlying transactions.

Misconduct Admitted

28. By engaging in the conduct described above, the Respondent admits that:

(a) between October 3, 2017 and November 26, 2018, the Respondent engaged in discretionary trading when he processed 7 redemptions for 3 clients without obtaining instructions from the clients with respect to the mutual funds to be redeemed in the clients' accounts, contrary to MFDA Rules 2.3.1(b) and 2.1.1; and

(b) between October 3, 2017 and November 26, 2018, the Respondent failed to record and maintain evidence of client trade instructions with respect to 4 redemptions in 4 client accounts, contrary to the Member's policies and procedures and MFDA Rules 1.1.2, 2.5.1 and 5.1(b).

Execution of Agreed Statement of Facts

29. This Agreed Statement of Facts may be signed in one or more counterparts which together shall constitute a binding agreement.

30. A facsimile copy of any signature shall be effective as an original signature.

DATED this 17th day of September, 2021.

"Wayne Brian Charlton"

Wayne Brian Charlton

"Charles Toth"

Staff of the MFDA
Per: Charles Toth
Vice-President, Enforcement

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