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: Kenneth Ray Clark

Heard: February 2, 2021 by electronic hearing in Toronto, Ontario
Decision: February 2, 2021
Reasons for Decision: July 21, 2021

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Frederick W. Chenoweth	Chair
Samuel Mah	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

Justin Dunphy	)	Senior Enforcement Counsel for the Mutual Fund Dealers Association of Canada
	)	
	)	
	)	
Kenneth Ray Clark	)	Respondent
	)	
	)	

I. BACKGROUND

1. By Notice of Settlement Hearing dated January 7, 2021, a Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada (the "MFDA") was convened to consider whether, pursuant to s. 24.4 of By-law No. 1 of the MFDA, the Panel should accept a settlement agreement dated January 5, 2021, ("Settlement Agreement") entered into by the Staff of the MFDA ("Staff") and the Respondent.

2. At the outset of the proceeding, the Panel considered a joint motion by Staff and the Respondent to move the proceedings "in camera". The Panel granted the motion. The Panel then considered the provisions of the Settlement Agreement, aided by submissions as to the applicable law, which should guide the Panel in determining whether or not to accept or reject the Settlement Agreement. The Panel unanimously accepted the Settlement Agreement and issued an Order accordingly. These are the Panel's reasons for doing so.

II. THE CONTRAVENTIONS

3. In the Settlement Agreement, the Respondent admits that:

   a) Between May 2014 and November 2018, the Respondent altered and used to process transactions, 37 account forms in respect of 31 clients by altering information on the account forms without having the clients initial the alterations, contrary to MFDA Rule 2.1.1.

III. THE FACTS

4. In the Settlement Agreement, Staff of the MFDA and the Respondent agreed to the existence of a series of facts, which are set out in Part III of the said Agreement. The Settlement Agreement is attached as Appendix "1" to these Reasons.

5. As set out in the Settlement Agreement, the Respondent, was registered in the securities industry since October 1992. From September 2002 to March 2020, the Respondent was registered in Ontario as a dealing representative with FundEX Investments Inc. (the "Member"), a member of the MFDA. At the time of the Hearing, the Respondent was not registered in the securities industry in any capacity. At all material times, the Respondent conducted business in Brooklin, Ontario.

IV. DISCUSSION

6. The Panel was aware that prior to accepting a Settlement Agreement, a Hearing Panel must be satisfied that:

a) The facts admitted by the Respondent constitute misconduct in contravention of the By-law, MFDA Rules or policies, or provincial securities legislation; and

b) The penalties contemplated in the Settlement Agreement fall within a reasonable range of appropriateness, bearing in mind the nature and extent of the misconduct and all the circumstances.

7. The Panel accepted that the role of a Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing. As stated by the MFDA Hearing Panel in *Sterling Mutuals Inc. (Re),* citing the I.D.A. Ontario District Council in *Milewski (Re)*:

> We also note that while in a contested hearing the Panel attempts to determine the correct penalty, in a settlement hearing the Panel "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 <u>not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness</u>." [Emphasis added].

Sterling Mutual Inc. (Re), MFDA File No. 200820, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 21, 2008 at para. 37.

Milewski (Re), [1999] I.D.A.C.D. No. 17 at p. 12, Ontario District Council Decision dated July 28, 1999.

8. The Panel also considered the principle that a Hearing Panel will not reject a settlement agreement unless the proposed penalty clearly falls outside the reasonable range of appropriateness. Settlements are necessary to assist the MFDA to fulfill its regulatory objective of protecting the public. Settlements advance this regulatory objective by proscribing activities that are harmful to the public, while enabling the parties to reach a flexible remedy tailored to address the interests of both the regulator and a respondent.

British Columbia (Securities Commission) v. Seifert, [2006] B.C.J. No. 225 at paras. 48-49 (S.C.), aff'd, [2007] B.C.J. No. 2186 at para. 31 (C.A) ["*British Columbia (Securities Commission)*"].

9. In the Settlement Agreement, the Respondent agreed with facts set out in Part III of the Settlement Agreement and admitted that he violated MFDA Rule 2.1.1, including the

contravention alleged against him in the Notice of Settlement Hearing. Accordingly, the Panel concluded that the alleged contravention had been proven and that the Respondent had contravened MFDA Rule 2.1.1.

V. PENALTY

10. The primary goal of securities regulation, whether in the context of a settlement hearing or a contested hearing, is protection of the investor.

> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (SCC) at paras. 59, 68.
>
> *Breckenridge (Re)*, MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para. 74.

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

> *Pezim v. British Columbia (Superintendent of Brokers), supra,* at paras. 59, 68.

12. Hearing Panels 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 activity;
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 activity to those who are permitted to participate in the capital markets; and
k) Previous decisions made in similar circumstances.

Breckenridge, *supra*, at para. 77 and the decisions cited therein.

13. The Respondent's misconduct is serious: he altered and used to process transactions, 37 account forms in respect of 31 clients by altering information on the account forms without having the clients initial the alterations.

14. The Panel considered the MFDA Sanction Guidelines which were drafted 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. The MFDA Sanction Guidelines are not mandatory, but are intended to provide guidance to a Hearing Panel.

15. The MFDA made it clear to Approved Persons since October 31, 2007, in both MFDA Staff Notices and Bulletins, that possessing and using either pre-signed and altered account forms is contrary to the obligations of Rule 2.1.1.

Member Staff Notice 0066, Pre-Signed Forms dated October 31, 2007 (updated January 16, 2017).

MFDA Bulletin #0661-E, Signature Falsification, dated October 2, 2015.

16. On the basis of the foregoing, by obtaining and using altered account forms as described in Part III of the Settlement Agreement, the Respondent engaged in conduct prohibited by MFDA Rule 2.1.1 and therefore engaged in misconduct that should be regarded as serious.

17. The Panel noted that in this matter, 18 account forms were obtained after the MFDA issued MFDA Bulletin #0661-E on October 2, 2015. The Hearing Panel considered this to be an aggravating factor.

Owen (Re), MFDA File No. 201784, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated December 7, 2017, at para 35.

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

18. The Hearing Panel is also mindful that:

a) The Respondent had been registered in the securities industry for a significant period of time, commencing in October 1992 until March 2020;

b) By entering into the Settlement Agreement, the Respondent had accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring additional time and expense of a full contested hearing;

c) The evidence did not reveal any evidence of unauthorized trades or client losses, nor was there any evidence to suggest that the Respondent received a financial or other benefit through his conduct. There had been no client complaints with respect to this matter;

d) The Respondent had not been the subject of prior MFDA disciplinary proceedings.

19. The Panel considered a fine of $13,500 and costs of $2,500 to be a serious penalty which will be sufficient to achieve the goals of specific and general deterrence, having regard to the factors described above.

20. In coming to its decision, the Panel considered the unique facts of this case, the Sanction Guidelines and the substantial case law to which it was referred.

VI. RESULT

21. For all the above reasons, the Panel concluded that the Settlement Agreement was reasonable and proportionate. Accordingly, the following penalties were imposed upon the Respondent:

1. The Respondent shall pay a fine in the amount of $13,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.1.1(b) of MFDA By-law No.1.
2. The Respondent shall pay costs in the amount of $2,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to s. 24.2 of MFDA By-law No.1.
3. The Respondent shall in the future comply with MFDA Rule 2.1.1.
4. If at any time a non-party to this proceeding, with the exception of the bodies set out in s. 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 21st day of July, 2021.

"Frederick W. Chenoweth"

Frederick W. Chenoweth
Chair

"Samuel Mah"

Samuel Mah
Industry Representative

"Joseph Yassi"

Joseph Yassi
Industry Representative

Appendix "1"

Settlement Agreement

File No. 202070

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: Kenneth Ray Clark

SETTLEMENT AGREEMENT

I. INTRODUCTION

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

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

II. JOINT SETTLEMENT RECOMMENDATION

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

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

a) Between May 2014 and November 2018, the Respondent altered and used to process transactions, 37 account forms in respect of 31 clients by altering

information on the account forms without having the clients initial the alterations, contrary to MFDA Rule 2.1.1.

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

a) the Respondent shall pay a fine in the amount of $13,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to section 24.1.1.(b) of MFDA By-law No. 1;

b) the Respondent shall pay costs in the amount of $2,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to section 24.2 of MFDA By-law No. 1;

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

d) the Respondent will attend in person or via video-conference, on the date set for the Settlement Hearing.

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

III. AGREED FACTS

Registration History

7. Since October 1992, the Respondent was registered in the securities industry.

8. From September 2002 to March 2020, the Respondent was registered in Ontario as a dealing representative with FundEX Investments Inc. (the "Member"), a Member of the MFDA.

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

10. At all material times, the Respondent conducted business in Brooklin, Ontario area.

Altered Account Forms

11. Between May 2014 and November 2018, the Respondent altered and used to process transactions, 37 account forms in respect of 31 clients by either crossing out information on the account forms and altering them, or by using liquid correction fluid to alter information on the account forms, all without having the clients initial the alterations.

12. The altered account forms consisted of:

a) 5 account application forms;

b) 1 client change form;

c) 12 Know Your Client ("KYC") update forms,

d) 3 new client application forms;

e) 6 order entry forms;

f) 1 RESP educational assistance payment form;

g) 6 systematic instruction forms;

h) 2 trade tickets; and

i) 1 withdrawal request form.

13. The alterations the Respondent made to the account forms included alterations to clients' net worth, time horizon, employment information, and fund codes.

The Member's Investigation

14. In November 2018, during the course of a file review, the Member identified altered account forms in client files maintained by the Respondent. The Member subsequently commenced a review of all of the client files maintained by the Respondent and identified the remaining altered account forms that are the subject of this Settlement Agreement.

15. On or about July 26, 2019, the Member sent letters to all of the clients serviced by the Respondent, including those clients where the Member identified the use of altered account forms. The Member also provided the clients with their transaction history for a three year period in order to determine whether the transactions in the clients' accounts were authorized. The Member requested that the clients review the information to confirm that all trading activity had been completed as directed by the clients. No clients reported any concerns in response to the Member's letters.

16. On or about August 26, 2019, the Member issued a warning letter to the Respondent for the conduct that is the subject of this Settlement Agreement.

Additional Factors

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

18. There is no evidence of any client loss, complaints, or that any transactions were unauthorized.

19. The Respondent has not been the subject of prior MFDA disciplinary proceedings.

20. By entering into this Settlement Agreement, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a full hearing of the allegations.

IV. ADDITIONAL TERMS OF SETTLEMENT

21. This settlement is agreed upon in accordance with section 24.4 of MFDA By-law No. 1 and Rules 14 and 15 of the MFDA Rules of Procedure.

22. The Settlement Agreement is subject to acceptance by the Hearing Panel which shall be sought at a hearing (the "Settlement Hearing"). At, or following the conclusion of, the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement. MFDA Settlement Hearings are typically held in the absence of the public pursuant to section 20.5 of MFDA By-law No. 1 and Rule 15.2(2) of the MFDA Rules of Procedure. If the Hearing Panel accepts the Settlement Agreement, then the proceeding will become open to the public and a copy of the decision of the Hearing Panel and the Settlement Agreement will be made available at www.mfda.ca.

23. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately, and any suspensions, revocations, prohibitions, conditions or other terms of the Settlement Agreement shall commence, upon the effective date of the Settlement Agreement.

24. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel:

a) the Settlement Agreement will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter;

b) the Respondent waives any rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction;

c) Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the facts and contraventions described in this Settlement Agreement. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any facts and contraventions that are not set out in this Settlement Agreement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations;

d) the Respondent shall be deemed to have been penalized by the Hearing Panel pursuant to section 24.1.2 of By-law No. 1 for the purpose of giving notice to the public thereof in accordance with section 24.5 of By-law No. 1; and

e) neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against the Respondent.

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

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

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

DATED this 5th day of January, 2021.

"Kenneth Ray Clark"
Kenneth Ray Clark

"AC"
Witness – Signature

AC
Witness – Print Name

"Charles Toth"

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

Schedule "A"

Order

File No.

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: Kenneth Ray Clark

ORDER

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

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

AND WHEREAS the Hearing Panel is of the opinion that between May 2014 and November 2018, the Respondent altered and used to process transactions, 37 account forms in respect of 31 clients by altering information on the account forms without having the clients initial the alterations, contrary to MFDA Rule 2.1.1;

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

1. The Respondent shall pay a fine in the amount of $13,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to section 24.1.1.(b) of MFDA By-law No. 1;

2. The Respondent shall pay costs in the amount of $2,500 in certified funds upon acceptance of the Settlement Agreement, pursuant to section 24.2 of MFDA By-law No. 1;

3. The Respondent shall in the future comply with MFDA Rule 2.1.1; and

4. If at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

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

Per: _____

[Name of Public Representative], Chair

Per: _____

[Name of Industry Representative]

Per: _____

[Name of Industry Representative]

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