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: Brien Ingram Robertson Marshall, Blair Robert Cooper and Tradex Management Inc.

Heard: December 20, 2017 in Toronto, Ontario
Decision: December 20, 2017
Reasons for Decision: March 19, 2018

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

John Lorn McDougall, QC	Chair
Brigitte J. Geisler	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

David Babin	)	Counsel for the Mutual Fund Dealers Association of Canada
Brien Marshall	)	Respondent Officer, by teleconference
Blair Cooper	)	Respondent Officer, by teleconference

I. INTRODUCTION

1. By Notice of Settlement Hearing dated October 27, 2017, a Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada ("MFDA") was convened on December 20, 2017 to consider whether, pursuant to Section 24.4 of By-law No. 1 of the MFDA, the Hearing Panel should accept a settlement agreement dated October 24, 2017 ("Settlement Agreement") entered into between Staff of the MFDA ("Staff") and the Respondents, Brian Ingram Robertson Marshall ("Mr. Marshall"), Blair Robert Cooper ("Mr. Cooper") and Tradex Management Inc. ("Tradex").

2. Staff conducted an investigation of the Respondents' business activities. That investigation disclosed that the Respondents had engaged in activity for which they could be penalized on the exercise of the discretion of the Hearing Panel and pursuant to s. 24.1 of By-law No. 1.

3. In the result of that investigation, and as is recorded in paragraph 29 of the Settlement Agreement, the Respondents have admitted that:

a) between August 14, 2003 and January 28, 2015, Mr. Cooper, Mr. Marshall and/or other Approved Persons at Tradex acting on their behalf, obtained, possessed and, in some instances, used to process transactions approximately 81 pre-signed account forms in respect of 39 clients, contrary to MFDA Rule 2.1.1;

b) between June 15, 2006 and February 21, 2014, Mr. Cooper, Mr. Marshall and/or other Approved Persons at Tradex acting on their behalf, altered information on 9 account forms in respect of 9 clients after the clients had signed the account form without obtaining the clients' initials to acknowledge the altered information, contrary to MFDA Rule 2.1.1; and

c) between August 14, 2003 and January 28, 2015, Tradex failed to supervise the activities of its Approved Persons in order to ensure compliance with MFDA requirements and failed to establish, implement and maintain adequate policies and procedures that prohibited its Approved Persons from collecting, maintaining

or using pre-signed or altered account forms, contrary to MFDA Rules 2.5, 2.9, 2.10, and 2.1.1, and MFDA Policy No. 2.

4. Further, as is also recorded in the Settlement Agreement at paragraph 30, the Respondents agreed to the following penalties:

a) The Respondents shall pay a fine of $40,000 pursuant to s. 24.1.2(b) of MFDA By-law No. 1;
b) The Respondents shall pay costs of $5,000 pursuant to s. 24.2 of MFDA By-law No. 1;
c) The Respondents shall in the future comply with MFDA Rules 2.1.1, 2.5, 2.9, 2.10, MFDA Policy No. 2, and all applicable securities legislation; and
d) Mr. Cooper and Mr. Marshall will attend via teleconference on the date set for the Settlement Hearing.

5. Staff indicated that the present case is unique in that it appears to be the first time that a Member has been subject to MFDA disciplinary proceedings centred on the use of pre-signed forms. This is significant because a central role of a Member and the senior officers of a Member is the administration of the MFDA self-regulatory regime.

6. At the opening of the case, the Hearing Panel expressed concern about having jurisdiction to grant the order accepting the settlement. The specific issue was whether there was jurisdiction to impose a global fine on the Respondents when they each were not alleged to have been responsible for all the contraventions.

7. After adjourning to allow the parties to consider the matter, we heard arguments from both counsel for Staff, Mr. Babin and Mr. Toth. The main thrust of these arguments was that we are dealing with a contractual matter. The MFDA finds its jurisdiction in the agreement of the parties to be bound by the regulatory process. That argument is buttressed by the fact that there is an agreement, embodied in the order accepting the Settlement Agreement, binding each of the Respondents jointly and severally to the global fine imposed. In the result, the Hearing Panel was satisfied it had jurisdiction.

8. We also considered a joint Motion by Staff and the Respondent to move the proceedings "in-camera". This Motion was brought pursuant to Rule 15.2(2) of the MFDA Rules of Procedure, which provides as follows:

> "(2) A Hearing Panel may, on its own initiative or at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8".

9. Rule 1.8(2) provides as follows:

> "(2) A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public."

10. We granted the Motion on the condition, which was agreeable to both Staff and the Respondent that, should the Hearing Panel accept the Settlement Agreement, we would provide Reasons for our Decision which, along with the Record of the Settlement Hearing, would be available to the public. This is consistent with Rule 15.2(3) of the MFDA Rules of Procedure.

11. After considering the Settlement Agreement, together with the full submissions made by counsel for the MFDA, as well as having received satisfactory answers to the questions posed by Panel members, the Hearing Panel unanimously accepted the Settlement Agreement. The Hearing Panel made an order to this effect and indicated that Reasons for Decision would follow in due course. These are those Reasons for Decision.

II. AGREED FACTS

12. The whole of the Agreed Facts contained in Part IV of the Settlement Agreement which are relevant to these Reasons for Decision are reproduced in what follows:

IV. AGREED FACTS

Registration History

6. Tradex is registered in Ontario, Quebec, and British Columbia as a mutual fund dealer. Tradex's head office is located in Ottawa, Ontario. Tradex has been a Member of the MFDA since April 4, 2002.

7. Since August 21, 2000, Mr. Cooper has been registered in Ontario as a mutual fund salesperson (now known as a dealing representative[1]) with Tradex. Mr. Cooper is also currently registered as a mutual fund salesperson with Tradex in Quebec and British Columbia. Mr. Cooper is the Ultimate Designated Person ("UDP"), Chief Executive Officer and Chief Financial Officer of Tradex.

8. Since June 9, 1992, Mr. Marshall has been registered in Ontario as mutual fund salesperson with Tradex. Mr. Marshall is also currently registered as a mutual fund salesperson with Tradex in Quebec and British Columbia. Mr. Marshall is the Chief Compliance Officer ("CCO") and Senior Vice-President of Tradex.

9. At all material times, between four to seven Approved Persons, including the Respondents, were registered with Tradex. The Approved Persons used a joint representative code with Mr. Cooper and/or Mr. Marshall, and collectively serviced all Tradex clients on behalf of them.

10. At all material times, Mr. Cooper and Mr. Marshall conducted business at Tradex's head office.

Background

11. On or about September 15, 2015, MFDA Compliance Staff completed a compliance examination of Tradex which covered the period October 1, 2011 to April 30, 2014. During this compliance examination, MFDA Compliance Staff identified evidence of the misconduct described in greater below [sic].

12. On October 28, 2015, MFDA Enforcement Staff conducted an unannounced on-site inspection of Tradex's head office. During this inspection, MFDA Enforcement Staff identified further evidence of the misconduct described in greater below [sic].

Pre-Signed Account Forms

13. Between August 14, 2003 and January 28, 2015, Mr. Marshall, Mr. Cooper and/or other Approved Persons at Tradex acting on their behalf, obtained, possessed and, in some instances, used to process transactions at least 81 pre-signed account forms, in respect of 39 clients.

14. To the extent that other Approved Persons engaged in the conduct described in paragraph 13 above, Mr. Marshall and/or Mr. Cooper were responsible for the handling of the client accounts and were aware of, permitted or condoned the activities pertaining to the pre-signed and altered account forms.

15. The pre-signed account forms consisted of Trade Forms, Know-Your-Client ("KYC") Forms and New Account Application Forms ("NAAFs").

Altered Account Forms

16. Between June 15, 2006 and February 21, 2014, Mr. Marshall, Mr. Cooper and/or other Approved Persons at Tradex acting on their behalf, altered information on 9 account forms in respect of 9 clients after the clients had signed the account forms without obtaining the clients' initials to acknowledge the altered information.

17. To the extent that other Approved Persons engaged in the conduct described in paragraph 16 above, Mr. Marshall and/or Mr. Cooper were responsible for the handling of the client accounts and were aware of, permitted or condoned the activities pertaining to the actively falsified account forms.

18. The altered account forms consisted of eight Trade Forms and one KYC form.

Failure to Supervise

19. As stated above, between August 14, 2003 and January 28, 2015, Mr. Marshall, Mr. Cooper and/or other Approved Persons at Tradex acting on their behalf, collected, maintained or used pre-signed and altered account forms.

20. At all material times, Tradex did not have adequate policies and procedures in place that prohibited its Approved Persons from collecting, maintaining or using pre-signed or altered account forms

21. Tradex failed to supervise the activities of its Approved Persons in order to ensure compliance with MFDA requirements and failed to establish, implement and maintain adequate policies and procedures that prohibited its Approved Persons from collecting, maintaining or using pre-signed or altered account forms.

Additional Factors

22. Tradex has revised its policies and procedures, and implemented additional training for all Approved Persons, with respect to the prohibition on the collection or use of pre-signed or altered account forms.

23. The Respondents have no prior disciplinary history with the MFDA.

24. There is no evidence of misappropriation, unauthorized trading or client harm in this matter.

25. No client complaints were received by Staff in connection with the actions of the Respondents in this matter.

26. There is no evidence that the Respondents received any financial benefit from engaging in the misconduct. The Respondents state that they engaged in the conduct described in this Settlement Agreement for the convenience of clients.

27. The Respondents have cooperated fully with Staff during the course of the investigation and, by agreeing to this settlement, have avoided the time and expense necessary to conduct a full hearing on the merits.

28. The Respondents have expressed remorse for their misconduct.

III. DISCUSSION AND ANALYSIS

13. MFDA Rule 2.1.1 Standard of Conduct states:

Each Member and each Approved Person of a Member shall:

a) deal fairly, honestly and in good faith with its clients;
b) observe high standards of ethics and conduct in the transaction of business;
c) not engage in any business conduct or practice which in unbecoming or detrimental to the public interest; and
d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

Pre-Signed and Altered Account Forms

14. MFDA Rule 2.1.1 sets the standard of conduct to be followed by all Approved Persons. The Rule has been interpreted and applied in a purposive manner in a wide range of circumstances. As stated by the MFDA Hearing Panel in *Breckenridge (Re):* "The Rule articulates the most fundamental obligations of all registrants in the securities industry."

Breckenridge (Re), MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para. 71.
Price (Re), MFDA File No. 200814, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 18, 2011, at paras. 118 – 121.

15. MFDA Rule 2.1.1 requires that each Member and Approved Person, among other things: deal fairly, honestly, and in good with faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest.

16. "Pre-signed account form" is a generic term which is applies to a variety of situations where an Approved Person seeks to rely on a client's signature on a document when the signature was not provided by the client at the time the document was completed. Most commonly, an Approved Person obtains a client's signature on a partially or completely blank account form, completes the form, then uses the form to process transactions in the client's account.

17. Hearing Panels have consistently held that obtaining or using pre-signed account 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), supra.

18. Hearing Panels have also consistently held that altering client account forms after the client has signed the account forms without obtaining the client's initials to acknowledge the altered information is a contravention of the standard of conduct under MFDA Rule 2.1.1.

Byce (Re), supra.

Weller (Re), MFDA File No. 201544, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 19, 2016.

Lynn (Re), MFDA File No. 201537, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 21, 2015.

19. The dangers posed by pre-signed and altered account forms can be summarized as follows:

a) there is an adverse effect on the integrity and reliability of the documents
b) the audit trail is destroyed
c) the Approved Person's ability to produce valid documentation to support transactions that come into question is impacted
d) the client is prejudiced by making it appear as if the client has executed a particular document when this is not the case
e) the Member's supervisory personnel are misled as to the circumstances as to how the document was obtained
f) the Approved Person's credibility is negatively affected
g) Member complaint handling is negatively affected
h) The Approved Person uses the forms to facilitate further misconduct like unauthorized trading, fraud and misappropriation of monies

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

Price (Re), supra, at paras. 122 – 124.

20. As previously stated, in the present case, Mr. Cooper and Mr. Marshall admit that they, or other Approved Persons at Tradex acting on their behalf, obtained, possessed and, in some instances, used to process transactions approximately 81 pre-signed and 9 altered account forms, contrary to MFDA Rule 2.1.l.

Supervision of Client Accounts

21. MFDA Rules 2.5, 2.9 and 2.10, and MFDA Policy No. 2 require each Member to establish, implement and maintain policies and procedures, internal controls, and supervisory practices to ensure that its business is handled in accordance with the By-laws, Rules and Policies of the MFDA and all applicable securities legislation.

22. In particular, MFDA Policy No. 2 states:

> Effective self-regulation begins with the Member establishing and maintaining a supervisory environment which both fosters the business objectives of the Member and maintains the self-regulatory process. To that end a Member must establish and maintain procedures which are supervised by qualified individuals. A major aspect of self-regulation is the ongoing education of staff in all areas of sales compliance.
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> ***Establishing Procedures***
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> 1. Members must appoint designated individuals who have the necessary knowledge of industry regulations and Member policies to properly perform the duties.
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> 2. Written policies must be established to document supervision requirements.
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> 3. Written instructions must be supplied to all supervisors and alternates to advise them on what is expected of them.
>
> 4. All policies established or amended should have senior management approval.
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> MFDA Policy No. 2.

23. Tradex admits it failed to supervise the activities of its Approved Persons in order to ensure compliance with MFDA requirements and failed to establish, implement and maintain policies and procedures that prohibited its Approved Persons from collecting, maintaining or using pre-signed or altered account forms.

Factors Concerning Acceptance of a Settlement Agreement

24. Pursuant to s. 24.4.3 of MFDA By-law No. 1, a Hearing Panel has two options with respect to a settlement agreement referred to it on the recommendation of Staff. The Hearing Panel shall either accept the settlement agreement or reject it.

MFDA By-law No. 1.

25. The role of a Hearing Panel at a settlement hearing is fundamentally different from its role at a contested hearing. As was stated by the hearing panel in the case of *Sterling Mutuals,* which cited the IDA case of *Clark,* [1999]:

> In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed *to* the penalties set out in the Settlement Agreement. **In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.** As has been said: "The settlement process is one of negotiation and compromise and the penalty imposed following a settlement will often be less onerous than one imposed following a Hearing where similar findings are made." [Emphasis added]
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> *Sterling Mutuals Inc. (Re),* MFDA File No. 201619, Hearing Panel of the Central Regional Council, Decision and Reasons dated June 27, 2016 at para. 11.
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> See also *Sterling Mutuals Inc. (Re),* MFDA File No. 200820, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 21, 2008 at para. 37.

26. The principle that a Hearing Panel will not reject a settlement agreement unless the proposed penalty clearly falls outside the reasonable range of appropriateness assists 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 remedy that addresses the interests of the regulator and a respondent.

> *British Columbia Securities Commission* v. *Seifert,* [2007] B.C.J. No. 2186 (B.C.C.A) at para. 31.

Appropriateness of the Proposed Penalty

27. The primary goal of securities regulation is the protection of the investor. In addition to investor protection, the goals of securities regulation include fostering public confidence in the capital markets and the securities industry.

> *Pezim* v. *British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. *557* (S.C.C.) at paras. *59,* 68.
>
> *Breckenridge, supra,* at para. 74.

Seriousness of the Misconduct

28. The misconduct in the present case was serious due to the nature of the misconduct, and the nature of Mr. Cooper's and Mr. Marshall's positions within Tradex. The use of pre-signed and altered forms is inherently serious. Compounding the seriousness of that misconduct are the supervisory expectations that accompany Mr. Cooper's and Mr. Marshall's positions within Tradex as, respectively, the Ultimate Designated Person ("UDP") for Tradex and the Chief Compliance Officer ("CCO") for Tradex.

29. As stated in MFDA Staff Notice 0057, a UDP is responsible for the compliance culture at a Member, including the establishment and maintenance of an effective compliance system:

> The UDP is expected to communicate and reinforce the importance of compliance within the firm on an ongoing basis. Furthermore, as part of his or her ultimate responsibility for compliance at a firm, the UDP is responsible for ensuring that all staff understands the importance of consulting with the Compliance Department on all relevant matters. To ensure the effectiveness of the compliance system, the UDP is also expected to ensure that there are effective procedures for identifying and escalating all instances of non-compliance. The UDP should ensure all instances of non-compliance are resolved in a timely and effective manner.
>
> MFDA Staff Notice 0057: Joint Regulatory Notice on the Role of Compliance and Supervision, revised February 6, 2013.

30. Likewise, a CCO is expected to establish and maintain policies and procedures for assessing compliance by the Member and the individuals acting on its behalf:

> The CCO is responsible for monitoring and assessing compliance with all MFDA requirements and applicable securities legislation ... The CCO must report all material incidents of non-compliance with MFDA requirements and applicable securities legislation to the firm's UDP as soon as possible after becoming aware of the matter, including any incidents of non-compliance that create a reasonable

> risk of harm to clients or the capital markets, or where there is a pattern of non-compliance.
>
> *Ibid.*

31. Both UDPs and CCOs are expected to ensure compliance with the MFDA's By-laws, Rules and Policies. The Hearing Panel agrees with Staff's submission that where a UDP and/or CCO engage in misconduct, the nature of their positions increases the seriousness of the misconduct at issue. Such misconduct by persons responsible for ensuring that the MFDA's By-laws, Rules and Policies are complied with endangers the integrity of the self-regulatory regime.

Mitigating Factors

32. The Respondents Mr. Cooper and Mr. Marshall have been registered as Approved Persons since 2000 and 1992 respectively, and neither has been the subject of an MFDA disciplinary proceeding. Tradex has been a Member of the MFDA since April 4, 2002 and has never been the subject of an MFDA disciplinary proceeding.

33. By entering into the Settlement Agreement, the Respondents have accepted responsibility for their misconduct and avoided the necessity of the MFDA incurring the additional time and expense of a full contested hearing. The Respondents have also cooperated with Staff's investigation of this matter.

34. There is no evidence of any investor harm suffered by clients of the Respondents as a result of the present misconduct. There is also no evidence that financial benefits, above and beyond what would accrue to the Respondents in the ordinary course of business, were received by the Respondents in relation to the present misconduct.

Risk to Investors and Markets if the Respondents Continue Operating in Industry

35. Staff submitted, and the Hearing Panel accepts, that the Respondents do not pose a risk to investors or other market participants through their continued operation in the markets. As well Staff noted that Tradex has also revised its policies and procedures, and implemented additional

training for all Approved Persons, with respect to the prohibition on the collection or use of pre-signed or altered account forms.

Settlement Agreement, at para. 22.

IV. CONCLUSION

36. The Hearing Panel agrees that the proposed penalties are necessary in order to communicate to other Members that the present misconduct is regarded as serious and that it has no place in the mutual fund industry. In the Hearing Panel's view, the penalties fall within a reasonable range of appropriateness.

37. The Hearing Panel also agrees that the proposed penalties are in keeping with the purpose of the MFDA which is to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members. Furthermore, the proposed sanctions will improve overall compliance by mutual fund industry participants and foster public confidence in the mutual fund industry.

DATED this 19th day of March, 2018.

"John Lorn McDougall"

John Lorn McDougall, QC
Chair

"Brigitte J. Geisler"

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Industry Representative

"Joseph Yassi"

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