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: Paul J. Poggione

Heard: June 26, 2017 in Toronto, Ontario
Decision: June 26, 2017
Reasons for Decision: October 30, 2017

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

John Lorn McDougall QC	Chair
Guenther W. K. Kleberg	Industry Representative
Joseph Yassi	Industry Representative

Appearances:

Shelly Feld Maria Abate	))	Counsel for the Mutual Fund Dealers Association of Canada
Ellen Bessner Morgan Westgate	))	Counsel for the Respondent
Paul J. Poggione	)	Respondent via teleconference

I. INTRODUCTION

1. By Notice of Settlement Hearing dated June 13, 2017, the Mutual Fund Dealers Association of Canada (the "MFDA") announced that it would convene a hearing panel of the MFDA ("Hearing Panel") on June 26, 2017 at 2:30 pm (Eastern), or as soon thereafter as the matter could be heard, to consider whether, pursuant to section 24.4 of By-law No. 1 of the MFDA, the Hearing Panel should accept the settlement agreement ("Settlement Agreement") entered into by Staff of the MFDA ("Staff") and Paul J. Poggione ("Respondent'). That hearing took place on June 26, 2017.

2. On the joint motion of Staff and the Respondent, the Hearing Panel granted an order that the proceeding dealing with the acceptance of the Settlement Agreement be held *in camera*.

3. The position of the parties on acceptance of the Settlement Agreement is fundamental for an understanding to the resolution of the matter reached by the Hearing Panel. It is best described by quoting the words of Ms. Bessner for the Respondent and Mr. Feld for Staff:

> MS. BESSNER: Notwithstanding all of this, Mr. Poggione wants this settlement. He has signed on the bottom line. This has been very difficult for him. It has been very difficult for us to negotiate because of these unbelievable meek [sic] facts, and for Mr. Poggione, I really hope that this matter can be resolved today, because he has lived through 18 months out of this industry, and the emotional and the financial burden he's carried over the 18 months has been pretty horrible.
>
> So, notwithstanding that my friend has been asked a lot of excellent questions, this is not a falsified-document case. I really hope that your reasons will reflect some of your concerns, I think that's important. I also hope that your reasons will stick with the Settlement Agreement.
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> MR. FELD: And just one last thing, if the Hearing Panel does have any concerns, you know, about accepting the Settlement Agreement, we would ask that you provide us with an opportunity to address your concerns before making your decision.

4. After considering the Settlement Agreement, as well as the submissions from Staff and counsel for the Respondent, the Hearing Panel accepted the Settlement Agreement as modified on consent to delete the suspension of one month and the order for costs of $5,000 and to substitute a fine of $5,000, and signed an order dated June 26, 2017 to that effect. The Hearing Panel also indicated, as is its duty under Rule 15.2(3), that it would provide reasons for its decision in due course. These are those reasons.

II. THE SETTLEMENT AGREEMENT

5. The salient portions of the Settlement Agreement, before modification, are as follows:

> ### II. JOINT SETTLEMENT RECOMMENDATION
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> 2. Staff conducted an investigation of the Respondent's activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.
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> 3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent agrees to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule "A".
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> ### IV. AGREED FACTS
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> **Registration History**
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> 6. From October 22, 1997 to May 24, 2011, the Respondent was registered in the province of Ontario as mutual fund salesperson or dealing representative[1] with a number of mutual fund dealers.
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> 7. In particular:

[1] In September 2009, the registration category formerly known as 'mutual fund salesperson' was changed to 'dealing representative'.

(a) from August 25, 1998 to May 24, 2011, the Respondent was registered with Desjardins Financial Security Investments Inc. ("Desjardins")[2] and other mutual fund dealers that were subsequently acquired by Desjardins. Desjardins has been a Member of the MFDA since November 15, 2002; and
(b) from May 27, 2011 to August 27, 2013, the Respondent was registered as a dealing representative in the provinces of Ontario, Alberta and Quebec with Worldsource Financial Management Inc. ("Worldsource"), a Member of the MFDA.

8. From May 27, 2011 to January 26, 2013, the Respondent was also designated as a Branch Manager with Worldsource, however, he did not assume responsibility for Branch Manager duties including account opening approval and trade supervision until September 2011.

9. From September 2013 to December 31, 2015, the Respondent was a dealing representative of Members of the Investment Industry Regulatory Organization of Canada ("IIROC").

10. At all material times, the Respondent conducted business in the greater Ottawa area.

The Policies And Procedures Of The Member

11. At all material times, the policies and procedures manual (the "PPM") of Worldsource stated that: "[b]y using the signature guarantee stamp, the Branch Manager or advisor is certifying that the signature is an original client signature." The PPM also stated that Branch Mangers or Approved Persons may be held responsible for any losses incurred by the client or the dealership if the signature guarantee stamp is used inappropriately.

False Signature Guarantees

12. During the time in which the Respondent was an Approved Person of Desjardins, the Respondent also served as the licensed assistant to Approved Person Conrad Eagan ("Eagan").

13. The Respondent was aware that Eagan was the mutual fund salesperson who was assigned responsibility for certain inactive client accounts at Desjardins. Some of the inactive client accounts had been opened with mutual fund dealers that were later

[2] Prior to September 27, 2006, Desjardins operated under the name of Optifund Investments Inc.

acquired by Desjardins. Eagan was assigned responsibility for the inactive client accounts on behalf of Desjardins.

14. During the period when the Respondent served as Eagan's licensed assistant at Desjardins, the Respondent did not meet any of the inactive account holders. He also did not observe and was not informed about any meetings or scheduled appointments between Eagan and the inactive account holders. The Respondent was also aware that the inactive account holders were excluded from certain office mailings that were sent to clients by Eagan.

15. After Eagan and the Respondent transferred their registration to Worldsource, Eagan began processing the transfer of client accounts from Desjardins to Worldsource. The Respondent signature guaranteed the signatures of clients on Worldsource Change of Dealer/Advisor forms in order to facilitate the transfer of client accounts from Desjardins to Worldsource.

16. Between June 22, 2011 and July 29, 2011, among the numerous Worldsource Change of Dealer/Advisor forms that were provided to the Respondent by Eagan to be signature guaranteed were five (5) forms that contained signatures purportedly of clients who had held inactive accounts at Desjardins (the "Five Forms").

17. In light of the circumstances described above, the Respondent knew or ought to have known that the signatures on the Five Forms had been falsified.

18. Prior to signature guaranteeing the documents, the Respondent did not exercise due diligence to validate the authenticity of the signatures that he was asked to guarantee.

19. By signature guaranteeing the Five Forms, the Respondent facilitated the transfer from Desjardins to Worldsource of the five inactive client accounts referenced in the chart below:

Client Name	**Account Number(s)**	**Date on Form**
BA	*****6957	June 22, 2011
OM	*****5900	July 28, 2011
LDG	*****4400	July 28, 2011
AJ	*****0155; *****0422	July 28, 2011
MM	*****2095; *****3194	July 29, 2011

20. By engaging in the conduct described above, the Respondent breached the standard of conduct.

The Respondent Later Reported Eagan's Conduct

21. During the fall of 2011, the Respondent became increasingly concerned about the conduct of Conrad Eagan. In October 2011, the Respondent began sending emails to AM, the then President of Worldsource, asking to speak with him by telephone to describe his concerns.

22. On November 28, 2011, the Respondent sent a 4 page letter to AM, informing AM in detail of serious concerns that the Respondent had with respect to Eagan's activities as an Approved Person and dealing representative that had occurred at Desjardins and at Worldsource including allegations of conduct by Eagan that could constitute contraventions of regulatory [sic].

23. Among the alleged contraventions of regulatory requirements that the Respondent reported to Worldsource in his November 28, 2011 letter to AM, the Respondent informed Worldsource about the bulk transfer of certain inactive client accounts from Desjardins to Worldsource that he referred to in the letter as "dead accounts" and 6 account holders were listed in the letter. 5 of the 6 inactive client accounts that the Respondent listed in his letter were the five aforementioned accounts.

Eagan's Subsequent Conduct

24. On August 10, 2012, more than 8 months after the Respondent informed Worldsource of his concerns, unbeknownst to the Respondent and without any involvement of the Respondent, and without the knowledge or authorization of client LDG, Eagan arranged for investments held in the account of client LDG to be redeemed by faxing paperwork directly to a fund company from Eagan's branch office instead of submitting transaction documentation with an original client signature through the facilities of the Member (the "Off-Book Transactions"). The Off-Book Transactions resulted in the redemption of $120,000 constituting 100% of the proceeds from the investment account of LDG. Unbeknownst to the Respondent, the entirety of the redemption proceeds from the account of client LDG that had been obtained by means of the Off-Book Transactions was subsequently misappropriated by Eagan when it was directed by Eagan into his personal investment account.

MITIGATING FACTORS

25. As noted above, the Respondent reported serious concerns about Eagan's conduct to Worldsource in November 2011, including his concerns about the transfer of inactive client accounts from Desjardins to Worldsource.

26. The Respondent fully cooperated with the Worldsource and MFDA investigations of Eagan's conduct and produced the Five Forms and other materials relevant to the investigation of Eagan's conduct.

27. The Respondent has no prior disciplinary history or complaint history during more than 18 years that he was registered in the securities industry.

28. The Respondent resigned from an IIROC dealer on December 31, 2015 to accept another registered position, but has been denied registration pending the resolution of this matter.

29. Partly as a consequence of the fact that he has not been registered in the securities industry since January 2016, the Respondent's recent income has been very limited and he earned a total of approximately $12,000 in 2016 engaging in odd jobs and manual labour in order to support his spouse and 3 children.

V. CONTRAVENTIONS

30. The Respondent admits that between June 22, 2011 and July 29, 2011, he signature guaranteed 5 falsified client signatures on forms prepared to facilitate the transfer of accounts to a new dealer for 5 clients when he knew or ought to have known that the client signatures were not authentic and he failed to exercise due diligence to ensure that the signatures on the forms were genuine, and thereby failed to deal fairly, honestly and in good faith with clients or observe high standards of ethics and conduct in the transaction of business and engaged in conduct detrimental to the public interest, contrary to MFDA Rule 2.1.1 and the policies and procedures of the Member.[3]

VI. TERMS OF SETTLEMENT

31. The Respondent agrees to the following terms of settlement:

(a) the Respondent shall be suspended from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of one (1) month from the date that this Settlement Agreement is accepted by a Hearing Panel;

[3] It is clear from a reading of the Settlement Agreement as a whole that Staff does not allege that the Respondent had actual knowledge of the fact that the client signatures were not authentic when he guaranteed the signatures.

(b) the Respondent shall successfully complete the branch manager course prior to accepting designation or acting in the capacity of a branch manager or any other supervisory role in the future;
(c) the Respondent shall pay costs in the amount of $5,000;
(d) the Respondent shall in the future comply with all applicable MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations that the Respondent has agreed he breached in relation to this Settlement Agreement; and
(e) the Respondent will attend by teleconference, on the date set for the Settlement Hearing.

III. ADDITIONAL FACTS

6. During the course of the Hearing, counsel for both parties provided additional facts which the Hearing Panel considered to be material to the determination it was to make respecting the proposed settlement. As well as the additional facts, the Hearing Panel became aware that the contemporaneous settlement negotiations in the other related proceedings described in paragraph 4 of Staff's written submissions resulted in a significant delay in completing the Settlement Agreement in this case which had a complicating effect on the proceedings overall, particularly because hearings in two of the related cases had occurred or were to occur within days of this Hearing.

7. Staff described these related proceedings more particularly in its written submissions:

> 4. Staff has conducted separate but related disciplinary proceedings against Eagan (MFDA File No. 201416), against Desjardins (MFDA File No. 2016115) and against Worldsource (MFDA File No. 2016069). Reasons for decision were issued in the Eagan case ("*Eagan*") in February 2016. A Settlement Agreement between Staff and Desjardins was accepted by a Hearing Panel of the Central Regional Council of the MFDA on Tuesday, June 20, 2017. The Reasons for Decision of the Hearing Panel in the Desjardins case are presently pending. A settlement hearing is also presently scheduled to take place on Wednesday, June 28, 2017 in the Worldsource case.

8. Fundamental to the proceeding was the statement made by Staff that "what is not suggested is that he [Mr. Poggione] was aware that Mr. Eagan was misappropriating client money or in any way dealing inappropriately or unfairly with clients to their detriment".

9. The five signatures in question were part of the large group of accounts that were transferred and required the Respondent to apply the signature verification stamp. The Hearing Panel was not told how many accounts were involved in this transfer process.

10. Staff made the point that this was not a signature falsification case in the normal sense. Here the signatures which were guaranteed were falsified by another person, not the Respondent. It was also acknowledged that it was that fact, among others, that the Respondent subsequently reported to his previous employers and it was their failure to act on the information provided by the Respondent which led to the previously mentioned discipline proceedings against them.

11. The Hearing Panel learned from the submissions of Staff and Counsel for the Respondent why it was so urgent to resolve the matter immediately if possible. Ms. Bessner advised the Hearing Panel as follows:

> MS. BESSNER: So I've conferred with my client, who is still on the phone, and he is desperate to have a settlement today.
>
> If it doesn't settle today, there is a real risk that we're going to get a Notice of Hearing. A Notice of Hearing has to be served, that's 30 days; the hearing has to be scheduled. It won't be scheduled until the new year, which means he will be out of the box for that period of time because the OSC will not register him until this is resolved. We're not even sure if the OSC will register him, but it will certainly not do so without this resolved [sic].

12. The combination of a late signed Settlement Agreement, which was found to be in error in part during the Hearing, the coincidental related discipline proceedings and the status of the Respondent vis a vis registration for a new employment in the securities industry all created a sense of urgency and, it must be said, an atmosphere of frustration which affected the proceeding, in that if the acceptance of the Settlement Agreement was refused, the Respondent would be unfairly punished by not being able to resume his career, but if it was accepted, he would be suspended with the same result.

IV. REASONS FOR DECISION

13. The law recognizes that settlement agreements negotiated between the relevant authorities and an individual subject to criminal or quasi criminal proceedings are to be treated differently than those cases which the adjudicative body, such as courts, hearing panels or similar institutions decide themselves. It has been made quite clear that it is in the public interest that the test in such cases is not what the adjudicative body itself would have done and what penalty it would have imposed. Instead the question to be answered is, is the settlement put forward one that, taken as a whole, is in the public interest. If so, the adjudicative body must defer to the wisdom of the parties, particularly the representative of the Crown or the regulator. In such cases, the preferred verb is that the settlement is "accepted" rather than "approved". In the case of the MFDA, that word is enshrined in By-law No. 1, s. 24.1.

14. It has been long established that there should be no interference with a negotiated settlement agreement unless it results in a settlement that is "outside the reasonable range of appropriateness". This is the test utilized by MFDA hearing panels heretofore. However recently, in *R. v. Anthony-Cook,* [2016] 2 S.C.R. 204 the Supreme Court of Canada dealt with joint settlement agreements in the context of a criminal case and developed the test further. Moldaver J. wrote the decision for a unanimous court and said as follows:

> [41] But as I have said, for joint submissions to be possible, the parties must have a high degree of confidence that they will be accepted. Too much doubt and the parties may choose instead to accept the risks of a trial or a contested sentencing hearing. The accused in particular will be reluctant to forgo a trial with its attendant safeguards, including the crucial ability to test the strength of the Crown's case, if joint submissions come to be seen as an insufficiently certain alternative.
>
> [42] Hence, the importance of trial judges exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower

> threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.
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> [43] At the same time, this test also recognizes that certainty of outcome is not "the ultimate goal of the sentencing process. Certainty must yield where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result" (*R. V. DeSousa*, 2012 ONCA 254, 109 O.R. (3d) 792, per Doherty J.A., at para. 22).

15. The test propounded by Moldaver J. is one of approval or acceptance of a joint settlement agreement unless to do so would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. In more traditional words, it is to ascertain whether acceptance would bring the system of justice into disrepute.

16. The traditional test of "outside the reasonable range of appropriateness" parallels the views expressed by the Supreme Court of Canada in *R. v. Anthony-Cook.* It is in the public interest that joint settlement agreements be encouraged. The standard to be applied by the approving body should be lowered from that which would be applicable in a contested hearing, as it is in the public interest to do so. That fundamental principle applies to all levels of courts and boards and regulatory hearing panels and is not restricted to criminal proceedings alone.

17. The Hearing Panel was troubled by the proposal to impose a month long suspension on the Respondent. In the first place, the Respondent's transgressions in reality amounted to a failure to detect something which was virtually impossible to do on the evidence available to him at the time. To select five of an unspecified number of signatures as being fraudulent was unlikely in the extreme and would have required the Respondent to challenge the integrity of his long-time colleague and senior on absolutely no evidence. That he would have done so had there been such evidence is demonstrated by the fact that, when he did acquire it, he reported his concerns at what turned out to be great cost to himself.

18. The Hearing Panel agrees with Staff's submissions regarding the significance of the settlement which was as follows:

> MR. FELD: You know, certainly if this Settlement Agreement is, if this settlement is approved, you know, it conveys with it the expectation that there is something more than simply rubber-stamping, for lack of a better word, something more required when you provide a signature-guarantee, than simply taking somebody else's word for it, that that is an authentic signature. If that's all you're doing, you're really not, it's really, it's a meaningless act if you are simply providing a guarantee without any basis for doing so.

19. However, the point is not that the Respondent is getting a free pass in this proceeding. Far from it; he and his family have obviously suffered from his failure to detect the false signatures. Whether that was just or not is now beyond the point. He has accepted that he contravened MFDA Rule 2.1.1. Any fair-minded member of the public would find it obvious that he has already paid a heavy price and the deterrence requirement Mr. Feld argued for has been easily satisfied in this instance.

20. It also should be said that the Respondent's behaviour is beyond reproach in all other respects. His is a record free of transgression, he fully cooperated and, above all, he reported the events and had he been listened to, no client harm is likely to have occurred. There can be no reasonable worry that he presents any danger to the securities industry. It is quite the contrary. He deserves to return to it if that is his wish.

21. It should also be said that there is no case presented to us that is at all similar to the present facts. All involved falsification of signatures by the person charged, not failure to identify a false signature. As Staff fairly acknowledged in opening at the hearing, this is a unique case and as it turned out, it has been dealt with in a unique way.

22. The Hearing Panel accepted Staff's request to advise them if the Hearing Panel had concerns about accepting the original settlement agreement. We did so because of the

suspension, which we felt was draconian, meaning as it did that the proceeding would continue and the Respondent would in all likelihood be unable to continue to work in the securities industry for some time. The Hearing Panel concluded that to suspend the Respondent for a month in the circumstances would be likely to cause a reasonable person to conclude that the administration of justice had malfunctioned.

23. Staff and counsel for the Respondent caucused and an alternate proposal, providing for no suspension and a $5,000 fine instead was made and accepted by the Hearing Panel. An order to that effect was signed on June 26, 2017.

V. CONCLUSION

24. In the result, the Hearing Panel accepted the amended Settlement Agreement which provided as follows:

1. The Respondent shall pay a fine in the amount of $5,000 on the date of this Order, pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

2. The Respondent shall successfully complete the branch manager course prior to accepting the designation of branch manager or acting in the capacity of a branch manager or any other supervisory role for a Member of the MFDA in the future, pursuant to s. 24.1.1(f) of MFDA By-law No. 1; and

3. 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 30th day of October, 2017.

"John Lorn McDougall"

John Lorn McDougall, QC
Chair

"Guenther W. K. Kleberg"

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Industry Representative

"Joseph A. Yassi"

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