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: Stephen Gill Fricker

Heard: March 3, 2015, in Toronto, Ontario
Reasons for Decision: March 23, 2015

# REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

| | |
|---|---|
| The Honourable P. T. Galligan, Q.C. | Chair |
| Susan L. Schulze | Industry Representative |
| Kenneth Mann | Industry Representative |

Appearances:

| | | |
|---|---|---|
| H.C. Clement Wai | ) | For the Mutual Fund Dealers Association of Canada |
| Clarke Tedesco | ) | For the Respondent, who also appeared in person |

## INTRODUCTION

1. The Staff of the Mutual Fund Dealers Association ("MFDA") and Stephen Gill Fricker (the "Respondent") entered into a settlement agreement which they had negotiated pursuant to s. 24.4.1 of MFDA By-law No. 1. They submitted the settlement agreement to this Hearing Panel, pursuant to Rule of Procedure 15.1, for approval or rejection. After considering the settlement agreement, the other material filed and upon hearing the submissions made by Enforcement Counsel and by counsel for the Respondent, we issued an order accepting the settlement agreement. These are our reasons for making that order.

## THE CONTRAVENTIONS

2. The Respondent admits that:

(a) In September 2008, the Respondent failed to follow instructions received from clients PC, SC and F-Co. by not selling or switching out of, the clients' holdings in a specific mutual fund, the CI Signature High Income Fund, in the clients' accounts, contrary to MFDA Rule 2.1.1; and

(b) Between September 16, 2008 and October 1, 2008, the Respondent misapprehended the risk rating of the CI signature High Income Fund and failed to make himself aware of all of the risks of that fund, contrary to MFDA Rule 2.2.1(a).

## TERMS OF SETTLEMENT

3. The Respondent agreed to the following terms of settlement:

(a) The Respondent shall pay a fine in the amount of $15,000, pursuant to section 24.1(b) of MFDA By-law No. 1, upon the acceptance of this Settlement Agreement;

(b) The Respondent shall pay the costs of this proceeding in the amount of $5,000, pursuant to section 24.2 of MFDA By-law No. 1, upon the acceptance of this Settlement Agreement;

(c) The Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations; and

(d) The Respondent will attend in person, on the date set for the Settlement Hearing.

**THE CIRCUMSTANCES**

4. The circumstances are set out in detail in Part IV of the Settlement Agreement. It is attached as Appendix "A" to these reasons for decision. The following is a brief summary of the circumstances.

5. Failure to follow clients' instructions. In September 2008 the clients instructed the Respondent to reallocate holdings in their accounts to investments which were "100% safe – zero risk/zero loss". The Respondent failed to reallocate the clients' holdings in CI Signature High Income Fund to safer investments.

6. Risk rating misapprehension. CI Signature High Income Fund was rated, in its prospectus, as suitable for investors having at least a medium risk tolerance. The Respondent erred in deciding that the investment was suitable for clients who wanted investments that were "100% safe – zero risk/zero loss".

**SERIOUSNESS OF THE CONTRAVENTIONS**

7. The two contraventions constitute breaches of the important obligations of a registrant to use due diligence to know the client and to know the product. In this case the failure to follow the clients' specific instructions and his failure to realize that CI Signature High Income Fund was not a suitable investment for them led to them having a significant loss. While the Member

made good the clients' loss the Respondent's failure to follow the clients' instructions and leave them in an unsuitable investment made the contraventions serious ones.

## CIRCUMSTANCES OF MITIGATION

8. In determining an appropriate remedy it is always necessary to consider mitigating circumstances. The circumstances of mitigation which we take into account are:

(a) The Respondent has no prior disciplinary history after many years of working in the financial services industry.

(b) He neither sought nor obtained any improper benefits from his work for his clients.

(c) He has cooperated fully with Staff and has admitted his contraventions. That shows remorse and an intention to fully comply with what is expected of an honest person in the industry.

(d) He was disciplined by the Member.

## THE DUTY OF A PANEL CONDUCTING A SETTLEMENT HEARING

9. It is well settled that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties in their settlement agreement. Rather, our duty is to determine whether the penalty is a reasonable one and whether it meets the objectives of the disciplinary process which are to maintain the integrity of the Investment Services Industry and to protect the public. In *Re Professional Investments (Kingston) Inc.*, [2009] LNCMFDA 9 at paragraph 13 the following appears:

> 13. 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."
>
> Re: Clark (Re), [1999] I.D.A.C.D. No. 40 at page 3.

10. See also *Re Raymer*, [2009] LNCMFDA 15 at paragraph 4:

> 4. It is generally agreed that hearing panels should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness given the conduct of the Respondent. (See, for instance, *Re Rodney Jacobson*, June 11, 2007, Prairie Regional Council, No. 200712; *Re Clark*, [1999] I.D.A.C.D. No. 40, and *Re Milewski*, [1999] I.D.A.C.D. No. 17.)

11. The courts have addressed the importance of settlements and have approved of their place in the disciplinary process. See *B.C. Securities Commission v. Seifert*, [2006] BCJ No. 225, where the following appears at p. 49:

> Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing. …

12. Finally we refer to the comments of an IIROC Hearing Panel in the recent case of *Re Vorstadt*, [2012] IIROC at p. 4:

> Before leaving this case we wish to stress the importance of respect for the settlement process. Settlement leads to fair, efficient and economical resolution of disciplinary matters. The settlement process should be encouraged and supported. In *Re Clarke*, [1999] I.D.A.C.D. No. 40, the Hearing Panel stated, at p. 3:
>
> > The panel must be cognizant of the importance of the settlement process and should not interfere lightly in a negotiated settlement. [Emphasis added.]
>
> We subscribe to that view.

## GUIDELINES AND OTHER DECISIONS

13. In determining whether a settlement is a reasonable one, a hearing panel is entitled to look at regulatory guidelines and other decisions. Guidelines are not binding upon a hearing panel and cannot derogate from its responsibility to decide what might be an appropriate penalty in a given case. However guidelines are useful in that they show what penalties members of the industry consider to be generally appropriate. We have considered the guidelines for breaches of the standard of conduct and for failing to exercise due diligence. The fine suggested in this case is very much in line with those guidelines.

14. Decisions in other cases can often be of some assistance in helping to indicate what might be a reasonable range of penalties. It is always necessary to be cautious about relying too heavily on decisions in other cases because no two cases are ever the same. Of the decisions referred to us by counsel we think it appropriate to mention only one of them. It is the decision in *Re Rounthwaite*, 2012 Central Regional Council – decision dated July 30, 2012. In that case a registrant engaged in discretionary trading and facilitated investment in a program which had not been approved by the Member. The penalty imposed was a fine of $20,000 plus $5,000 for costs.

15. In our view those contraventions were more serious than the ones in this case. There the Respondent had engaged in discretionary trades in 29 instances for 14 clients. In this case there was only one instance of bad judgment in an otherwise blameless career. The penalty proposed in this case falls well within a range suggested in *Rounthwaite*.

## IMPACT OF THE PENALTY

16. Monetary penalties are imposed to act as specific and general deterrence. The Respondent is an individual with limited resources. He is not a large organization. The penalty composed of a fine of $15,000 and costs of $5,000 is a significant penalty to him. The penalty imposed is sufficient to act as a specific deterrent to this Respondent and should be sufficient to alert all Approved Persons that similar conduct will attract significant consequences.

**DECISION**

17. At the conclusion of the hearing we withdrew from the hearing room. We considered the circumstances of this case and reached the conclusion that the settlement was a reasonable one. Therefore we accepted it.

**DATED** this 23rd day of March, 2015.

"P. T. Galligan"

The Hon. P. T. Galligan, Q.C.
Chair

"Susan L. Schulze"

Susan L. Schulze
Industry Representative

"Kenneth Mann"

Kenneth Mann
Industry Representative

## APPENDIX "A"

**AGREED FACTS**

*Registration*

6. The Respondent has been registered as a mutual fund salesperson in Ontario with Worldsource Financial Management Inc. ("Worldsource") since February 2007. The Respondent has been a mutual fund salesperson since 1993.

7. At all material times, the terms of the Respondent's registration as a mutual fund salesperson did not authorize him to exercise discretionary authority over client accounts.

*Client Complaint*

8. PC and his spouse SC were clients of Worldsource. In addition to their personal accounts they also had an account for their company, F-Co. (collectively the "Accounts"). The Respondent was the mutual fund salesperson assigned to the Accounts.

9. On September 15, 2008, client PC and the Respondent met to discuss the Accounts.

10. Client PC was concerned with the direction of the markets. According to client PC, client PC instructed the Respondent at the meeting to reallocate the holdings in the Accounts to investments that were "100% safe – zero risk/zero loss".

11. On September 16, 2008, the Respondent sent client PC an email to confirm client PC's instructions and attached statements for the Accounts showing their current holdings (i.e. before the Respondent carried out the reallocation requested by client PC) together with market commentary. The Respondent wrote:

> *"In general I believe it is our understanding to convert, within the same fund company, (Mackenzie to Mackenzie, Guardian to Guardian etc.) and within the*

*same code (DSC to DSC and FEL to FEL) all equity investments to Canadian Bonds. If a fund company does not have a Canadian Bond fund I will move those values to Money Market. My advice will be to keep the high yield bonds and obviously I will keep any cash (Money Market) investments.*

*As a result our agreement will be that the investment risk tolerance of all accounts will be changed to something like this:*

*20% Very Low Risk (Money Market)*
*80% Low Risk (Canadian Government and High Yield Bonds)*

*In addition the investment objective will be:*

*100% Income*

*0% Growth*

*We will review each quarter to decide if there is any merit in re-allocating to some equity positions."*

12. Client PC replied to the Respondent's email, thanking him for confirming his (client PC's) instructions, repeating his aversion to risk given the current market conditions, and authorizing the Respondent to proceed.

13. On September 16, 2008, the Respondent proceeded to reallocate the holdings in the Accounts. Contrary to client PC's instructions, however, the Respondent did not switch any of the clients' holdings out of the CI Signature High Income Fund. At the time, the clients' holdings of the CI Signature High Income Fund constituted approximately 20% of the total holdings of the Accounts.

14. The CI Signature High Income Fund is a mutual fund that invests primarily in high-yielding equity securities and Canadian corporate bonds. The fund's stated objective is to generate a high level of income and long-term capital growth. The CI Signature High Income Fund was rated as suitable for investors having at least a medium risk tolerance in the mutual fund's prospectus and by Worldsource. As of June 2008, it was assigned an investment objective of "100% income" by Worldsource. (At the time, Worldsource's back office system only allowed it to classify mutual funds as either "100% growth" or "100% income".)

15. On October 1, 2008, the Respondent sent an email to client PC to which he attached updated KYC forms that the Respondent had prepared for signature. The email provided, as follows:

> …
> *"As per my discussion with you on September 16th, I completed all the appropriate transactions to create the most conservative posture on your Accounts while maintaining a very small portion for growth opportunities. I need to officially record our agreement, as required by law, with my Dealer, Worldsource Financial…"*
>
> *"One technical difference is that in my email on the 16th I referred to the revised objective as 20% very low risk and 80% low risk, however in completing the transactions I decided not to sell the CI Signature High Income. This is made up of low risk high yield bonds and income trust and I grouped into the 'low risk' category. Worldsource categorizes it as medium risk because they call it an Income Trust fund even though that's not absolutely correct profile. Anyways, this is just interpretation. I believe this product to offer the stability and some growth potential and do not view it as a threat in the short term to your portfolio. As a result however, this has thrown off my previous allocation and these documents correctly represent the Worldsource interpretation."*

16. The KYC Update Forms the Respondent attached to his email recorded the risk tolerance for the Accounts as follows:

a. client PC: Low 30%; Low-Medium 57%; Medium 13%;

b. client SC: Low 22%; Low-Medium 67%; Medium 11%; and

c. client F-Co.: Low 8%; Low-Medium 69%; Medium 23%.

17. Notwithstanding the Respondent's email of September 16, 2008, the KYC update forms provided for a risk tolerance of "medium" in specified percentages in each of the Accounts to reflect the fact that the clients were continuing to hold the CI Signature High Income, a medium risk investment.

18. The email of October 1, 2008 was the first indication that client PC received that the Respondent had not reallocated the holdings in the Accounts in accordance with their discussion

on September 15th and as the Respondent had confirmed in his email of September 16th. (The Respondent had processed all of the transactions using Limited Trading Authorizations which the clients had provided to him for each of the Accounts. In accordance with MFDA requirements, the Limited Trading Authorizations permitted the Respondent to process the transactions in the clients' accounts without obtaining the clients' signatures on the trade forms.).

19. According to the clients, due to the high level of trust established with the Respondent and the length of their advisor-client relationship, they did not feel it was necessary to review the KYC Update Forms in detail before signing them. The clients also state that they executed and returned the KYC Update Forms to the Respondent, believing them to be consistent with the directions and concerns they had previously provided to the Respondent with respect to the Accounts.

20. On December 9, 2008, client PC wrote an email to the Respondent expressing his concerns that despite his instructions to the Respondent to re-allocate the holdings in the Accounts to "safe havens", the Accounts had declined over $168,000 since September 2008.

21. On December 10, 2008, client PC sent a letter of complaint to Worldsource and requested compensation for the losses in the Accounts.

22. From September 16, 2008 to December 9, 2008 the value of the client's holdings of the CI Signature High Income Fund, which the Respondent had chosen not to switch out of contrary to the clients' instructions, fell from approximately $388,598.45 to $290,941.72. The loss attributable to the client's holdings of the CI Signature High Income Fund during this time was approximately $97,656.73.

23. Worldsource paid the clients $100,000 in settlement of the complaint. In addition, Worldsource fined the Respondent $500 and placed the Respondent on close supervision for a period of six months. This complaint is the first by a client against the Respondent. The Respondent has had no further complaints.