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: Diego Gonzalez Borrero

Heard: November 29, 2018 in Toronto, Ontario
Decision: November 29, 2018
Reasons for Decision: February 7, 2019

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Cheryl A. Hamilton	Industry Representative
Jeff J. Page	Industry Representative

Appearances:

Alan Melamud	)	Counsel for the Mutual Fund Dealers Association of Canada
Maureen Doherty	)	Counsel for the Respondent
Diego Gonzalez Borrero	)	Respondent, in person

I. BACKGROUND

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The hearing was held on Thursday, November 29, 2018. The full Settlement Agreement, dated September 11, 2018, entered into between Staff of the MFDA and Diego Gonzalez Borrero (the "Respondent") is available on the MFDA website. The Respondent was represented by counsel and also appeared in person.

2. The Panel accepted the proposed Settlement Agreement at the conclusion of the November 29, 2018 hearing, with reasons to follow. These are our reasons for the decision.

3. Since June 2001, the Respondent has been registered in Ontario as a mutual fund salesperson (now known as a Dealing Representative) with Sun Life Financial Investment Services (Canada) Inc. ("Sun Life"), a Member of the MFDA. At all material times, the Respondent conducted business in the Newmarket, Ontario, area.

4. From September 2009 to November 2011, Sun Life designated the Respondent as a branch manager.

5. On February 14, 2017, Sun Life's compliance staff identified some of the altered forms that are the subject of this Settlement Agreement as a result of a routine branch audit. The following month, Sun Life conducted a review of all of the client files serviced by the Respondent and identified additional altered and pre-signed forms. As part of its investigation, Sun Life sent letters to all of the Respondent's clients to determine whether the Respondent had engaged in any unauthorized trading. No clients reported any concerns.

6. On March 31, 2017, Sun Life issued a warning letter to the Respondent, and placed him under close supervision for a period of two years. The respondent continues to be employed as a Dealing Representative with Sun Life, under close supervision.

Contraventions

7. The Respondent admits in paragraph 4 of the Settlement Agreement that:

a) between January 2013 and September 2016, the Respondent altered, and used to process transactions, 42 account forms in respect of 34 clients by altering information on the account forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1;

b) between January 2013 and September 2016, the Respondent obtained, possessed, and in some instances, used to process transactions, 32 pre-signed account forms in respect of 20 clients, contrary to MFDA Rule 2.1.1.; and

c) on or about February 8, 2017, the Respondent processed two trades in relation to two clients based on the instructions of someone other than the client, contrary to MFDA Rules 2.3.1 and 2.1.1.

The Misconduct

8. The details of the misconduct are set out in paragraphs 10 to 21 of the Settlement Agreement and will not be described in detail here.

9. MFDA Hearing Panels have consistently held that such conduct – using pre-signed forms and altering account forms – constitutes a contravention of the standard of conduct under MFDA Rule 2.1.1. See *Re Price* 2011 CanLII 72458; *Re Symes* 2017 LNCMFDA 104; *Re Owen* 2017 LNCMFDA 287; *Re Lewis* 2018 LNCMFDA 59; *Re Pollon* 2018 LNCMFDA 54; and *Re Garofalo* 2016 LNCMFDA 119.

10. Using these forms are proscribed because their use adversely affects the integrity and reliability of account documents, leads to the destruction of the audit trail, has a negative impact on Member complaint handling, and has the potential for misuse in the form of unauthorized trading, fraud, and misappropriation.

11. For a number of years, the MFDA has been warning Approved Persons against the use of pre-signed, altered, and re-used account forms. See MFDA Staff Notice, MSN-0066, dated October 31, 2007 (updated January 26, 2017); and MFDA Staff Notice MSN-035, dated December 10, 2004 (updated March 4, 2013).

12. Processing trades based on the instructions of someone other than the client is also against MFDA Rules.

Terms of Settlement

13. Staff and the Respondent agreed and consented to the following Terms of Settlement (see Paragraph 5):

a) the Respondent shall pay a fine in the amount of $18,000 in certified funds upon acceptance of this 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 this 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 2.3.1; and

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

Acceptance of Settlement Agreement

14. As stated above, the Panel accepted the terms of the Settlement Agreement. A Panel can either accept or reject a Settlement Agreement. It cannot modify it.

15. The conduct in the present case is serious. Altered forms are especially serious because, unlike pre-signed forms that the client knows are blank when he or she signs the form, an alteration may be done without the client's knowledge. It should also be noted that for a period of time the Respondent had been a Branch Manager.

16. The third allegation sounds serious, but is not, when the facts are known. It was a case of a grandfather putting small sums of money ($300 and $600) into the Registered Education Savings Plans of his children for the benefit of his grandchildren and then instructing the Respondent on what funds should be purchased.

17. The Respondent has been in the mutual fund industry with Sun Life since 2001 and has not previously been the subject of a disciplinary hearing.

18. There were no client complaints and no evidence of client losses as a result of the improper conduct. There is also no evidence that the Respondent received any financial benefit from the misconduct besides commissions and fees that he would have received if the transactions had been properly carried out. Further, there is no evidence of lack of authorization for the underlying transactions.

19. Some of the improper conduct, however, took place after the publication of MFDA Bulletin #0661-E, dated October 2, 2015, in which the MFDA advised Members and Approved Persons that Staff would be seeking enhanced penalties at MFDA disciplinary proceedings for conduct that occurred after the publication of the Bulletin on October 2, 2015.

20. The monetary fine of $18,000 is a significant penalty. It will serve as a deterrent to the Respondent and others in the industry.

21. The penalty agreed upon is not out of line with the numerous cases cited by counsel for the MFDA or with the new MFDA Sanction Guidelines that came into effect on November 15, 2018.

22. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission (*B.C. Securities Commission v. Seifert* [2007] B.C.J. No. 2186, para. 49 (B.C.C.A.)):

> "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."

23. Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel.

24. A Settlement Agreement indicates a recognition of wrongdoing by the Respondent and also saves the MFDA the time, resources, and expense of a contested hearing.

25. As a Panel stated (*Re Keshet*, File No. 201419 at paragraph 7), to take one of many such cases: "It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness." There are many similar statements by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated: "A District Council considering a settlement agreement 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 not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness."

26. The penalty agreed to in this case clearly falls within "a reasonable range of appropriateness."

27. For the above reasons the panel accepted the Settlement Agreement.

DATED this 7th day of February, 2019.

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

"Cheryl A. Hamilton"
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Industry Representative

"Jeff J. Page"
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