



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: Jonathan Robert MacPherson

Heard: January 24, 2017 in Calgary, Alberta

Decision: January 24, 2017

Reasons for Decision: April 6, 2017

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Alan V. M. Beattie, Q.C.

Chair

Kathleen Jost

Industry Representative

M. Elaine Bradley

Industry Representative

Appearances:

Justin Dunphy

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Counsel for the Mutual Fund Dealers

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Association of Canada

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Jay M.C. Wilkins

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Counsel for the Respondent

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Jonathan Robert MacPherson

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Respondent, Appeared in Person

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1. INTRODUCTION

1. The Hearing Panel (“the Panel”) was convened pursuant to a Notice of Hearing dated April 5, 2016, to consider whether, pursuant to Section 24.4 of By-law No. 1 of the MFDA, the Hearing Panel should accept the Settlement Agreement (the “Settlement Agreement”).

2. At the commencement of the Hearing, the Panel granted a motion by Staff Enforcement Counsel to move the proceedings “in camera”. Upon acceptance by the Panel of the Settlement Agreement the “in camera” order would be lifted.

3. At the commencement of the Hearing, the Panel granted a motion by Staff Enforcement Counsel, consented to by Counsel for the Respondent, to abridge the ten day notice period required under Rule 15 of MFDA Rules of Procedure and Section 24.4.3 of MFDA By-law No. 1 for giving notice of the Settlement Hearing. We were also referred to MFDA Rules of Procedure 15.2, 2.2 and 1.5(b) as authority for abridging the time requirement. We agreed that the time should be abridged and so ordered.

4. The Panel members had, prior to the Hearing, reviewed the Settlement Agreement. All quoted passages herein from the Settlement Agreement and the Submissions of Staff contain the paragraph numbers from those documents.

2. SETTLEMENT AGREEMENT

5. The Settlement Agreement includes the following:

JOINT SETTLEMENT RECOMMENDATION

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 By-law No. 1.

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”.

4. Staff and the Respondent agree that the terms of this 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.

AGREED FACTS

Registration History

6. From December 14, 2009 to February 19, 2014, the Respondent was registered in Alberta and British Columbia as a mutual fund dealing representative with Investors Group Financial Services Inc. (“IG”), a Member of the MFDA.

7. At all material times, the Respondent conducted business in the Calgary, Alberta area.

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

9. The Respondent has not previously been the subject of disciplinary proceedings.

Background - IG Policies

10. At all material times, the policies and procedures maintained by IG prohibited Approved Persons from falsifying client signatures and client meeting notes.

11. At all material times, the policies and procedures maintained by IG prohibited Approved Persons from obtaining and possessing blank or partially complete pre-signed account forms.

Clients MM and KM

12. On or about March 24, 2011, the Respondent met with clients MM and KM to discuss the transfer of a number of the clients' accounts from other financial institutions to IG. Included among the transferred accounts were a spousal RSP of KM, a Locked-In Retirement Account ("LIRA") of MM, and two joint RESP accounts for the two children of MM and KM.

13. During the March 24, 2011 meeting, the Respondent failed to inform clients MM and KM that the investments that he recommended they purchase in their registered accounts at IG would be purchased subject to deferred sales charges ("DSC") that would be payable upon redemption of units of any of those funds prior to the expiry of applicable DSC schedules.

14. Sometime after March 24, 2011, the Respondent became aware that he had missed client KM's signature on a transfer authorization form pertaining to the spousal RSP that was held in client KM's name, as well as the signatures of clients MM and KM on a transfer authorization form pertaining to the RESPs for their children. The Respondent falsified client KM's signature on the spousal RSP transfer authorization form, which was dated March 24, 2011. The Respondent also falsified the signatures of both clients MM and KM on the RESP transfer authorization form which was also dated March 24, 2011. The Respondent submitted both transfer authorization forms to process the transfers.

15. Between March 24, 2011 and May 11, 2011, the transfer of the RESP was rejected. The Respondent completed two new RESP transfer authorization forms and falsified the signatures of clients MM and KM on each form. The forms were dated May

11, 2011 and were submitted by the Respondent to process the transfer of the RESPs to IG.

16. On or about August 7, 2013, client MM inquired about DSC fees that were applicable to his various registered and non-registered accounts. The Respondent subsequently falsified client MM's signature on a Withdrawal Fees Information Form that provides disclosure to IG clients about the declining sales charges that are payable upon redemption of fund units during the seven year DSC schedule. The Respondent dated the form as having been signed by client MM on March 24, 2011. The Respondent falsified the form in order to give the appearance that he had discussed the DSC fees with client MM when, in fact, he had not.

17. On or about August 7, 2013, the Respondent also altered his client meeting notes in relation to his March 24, 2011 meeting with clients MM and KM. The Respondent falsified part of the March 24, 2011 entry to indicate that client MM had reviewed and signed the Withdrawal Fees Information Form that the Respondent had falsified. By falsifying the client's signature on the Withdrawal Fees Information Form, the Respondent misrepresented to a reader of the document that he had discussed the DSC fees with client MM when he had not and that client MM had acknowledged that the discussion had occurred when he had not.

Client JT

18. On or about September 17, 2013, the Respondent met with client JT to open a LIRA at IG. Thereafter, the Respondent realized that he had failed to secure client JT's signature on three forms.

19. On or about October 10, 2013 the Respondent falsified client JT's signature on:

- a) a Prescribed Locked-In Retirement Account Addendum Form;
- b) an Alberta declaration of Spousal Status Form; and

c) a Transfer Account Form.

20. The Respondent submitted the forms to IG to process the LIRA transfer.

21. On or about October 10, 2013, the Respondent also altered his September 17, 2013 client meeting notes in relation to client JT by falsely representing in the notes that client JT had signed the three above noted forms when she had not.

Clients NC and AD

22. The Respondent met with clients NC and AD on December 12, 2013 in order to facilitate the transfer of their registered accounts from the clients' previous financial institutions to IG, and to complete an application for an investment loan of \$100,000 as part of a leverage strategy.

23. During the December 12, 2013 meeting, clients NC and AD applied for an investment loan through Solutions Banking ("Solutions"). Clients NC and AD also signed a blank Loan Investment Instruction Form during this meeting.

24. On December 24, 2013, the Respondent emailed client AD to advise him that the investment loan had been approved and that the funds would be available from the lender on December 30, 2013.

25. At approximately 11:00 a.m. on December 27, 2013, the Respondent was informed by a representative at Solutions that Solutions would release the funds associated with the loan as soon as Solutions received a copy of the investment loan application containing initials of the clients to acknowledge changes that had been made to the original application form to accurately record client NC's passport and social insurance numbers and the interest rate that (was) applicable to the loan which had been reduced from 3.75% to 3.5%

26. The Respondent informed the Solutions representative that one of the clients would be coming in to initial the forms later that day and asked Solutions to release the borrowed money on December 27, 2013.

27. At approximately 12:30 p.m. on December 27, 2013, the Respondent re-submitted the investment loan application form to Solutions with falsified initials of client AD purporting to acknowledge the changes to client NC's passport and social insurance numbers and the change in the interest rate of the investment loan.

28. The Respondent had not met with client AD on December 27, 2013 and client AD had not initialed the investment loan application form. The Respondent falsified the initials and submitted the investment loan application to Solutions in order to facilitate the immediate release of the borrowed money on December 27, 2013.

29. On December 31, 2013, the Respondent invested the proceeds of the loan as follows:

Holdings	Value at December 31, 2013
Investors Fixed Income Flex Portfolio	\$10,000
Investors Real Property	\$10,000
Investors Dividend	\$15,000
Investors Canadian Small Cap Growth	\$10,000
Investors U.S. Opportunities	\$15,000
IG Franklin Bissett Canadian Equity	\$15,000
Investors International Small Cap	\$15,000
IG Mackenzie Ivy foreign Equity	\$10,000
TOTAL	\$100,000

30. The Respondent determined:
- a) which funds should be purchased;
 - b) the amount of each fund that should be purchased; and
 - c) the timing of each purchase transaction,

without discussing any of these elements of the trades with the clients NC and AD.

31. Without the knowledge or approval of clients NC and AD, the Respondent completed the blank pre-signed Loan Investment Instruction Form that clients NC and AD had signed during the December 12, 2013 meeting. The Respondent used the form to facilitate the processing of unauthorized discretionary trades in the accounts of clients NC and AD in order to implement the leveraged investment strategy.

32. Seven of the eight mutual funds that the Respondent purchased on behalf of AD and NC were purchased subject to DSC fees. The Respondent did not explain to clients NC and AD that they might be required to pay a DSC fee on the subsequent sale of the units of the funds, prior to the expiration of the DSC fee schedule. The Respondent also did not identify the fee schedule that would apply to the DSC funds being purchased as part of the leveraging strategy and he did not warn them of the risk that DSC fees might be applicable in the event that they decided to unwind the leveraging strategy before the expiry of the applicable DSC schedules.

33. On December 31, 2013, client AD was surprised when he was informed by the Respondent that the proceeds from the investment loan had been received by the Respondent and invested without any prior discussion with AD and NC about which mutual funds were being purchased in connection with the implementation of the leveraged investment strategy.

34. On February 4, 2014, client AD emailed the Respondent regarding the transfer of the self-directed RSP that had not yet been transferred to IG from client AD's previous financial institution. The Respondent informed client AD that he could process the transfer using a blank pre-signed transfer form that the Respondent had obtained from client AD during their meeting on December 12, 2013. The Respondent completed the pre-signed transfer form between February 4 and 12, 2014. Client AD passed away on February 12, 2014. Client AD's self-directed RSP had not yet been transferred to IG.

Additional Factors

35. The Respondent has cooperated fully with Staff during the course of the investigation, and by agreeing to his settlement, has avoided the necessity of a full hearing on the merits.

36. The Respondent has expressed remorse for his misconduct.

CONTRAVENTIONS

37. The Respondent admits that:

(a) Between March 24, 2011 and October 10, 2013, he falsified:

- i. The signatures of clients KM and MM on five documents, which were used to process the authorized transfer of spousal RSP and RESP investments to IG;
- ii. client JT's signature on three LIRA account documents;
- iii. client NC and AD's initials on an investment loan application;
- iv. the March 24, 2011 note entry in client KM and MM's client file;
and
- v. the October 10, 2013 note entry in client JT's client file,

all of which, was contrary to MFDA Rule 2.1.1;

(b) Between March 24, 2011 and February 12, 2014, he failed to advise clients KM, MM, NC and AD that they might be required to pay a deferred sales charge on the subsequent sale of certain fund units, and the fee schedule that would apply to the deferred sales charge, thereby failing to deal fairly, honestly and in good faith with his clients, contrary to MFDA Rule 2.1.1;

- (c) Between December 19, 2013 and December 31, 2013, he engaged in unauthorized discretionary trading in the account of clients NC and AD, contrary to MFDA Rules 2.3.1 and 2.2.2; and
- (d) Between December 12, 2013 and February 12, 2014, he obtained, possessed and/or used at least two pre-signed client account forms, contrary to MFDA Rule 2.1.1.

TERMS OF SETTLEMENT

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

- (a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of five years pursuant to s. 24.1.1(e) of MFDA By-Law No. 1;
- (b) the Respondent shall pay costs in the amount of \$2,500 pursuant to section 24.2 of By-law No. 1;
- (c) the Respondent will attend in person, on the date set for the Settlement Hearing; and
- (d) The Respondent shall in the future comply with MFDA Rules 2.1.1 and 2.3.1.

STAFF COMMITMENT

39. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the facts set out in Part IV and the contraventions described in Part VII of this Settlement Agreement, subject to the provisions of Part IX below. 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 Parts IV and V of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the facts and contraventions set out in Parts IV and V, whether known or

unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

3. SUBMISSIONS OF STAFF OF THE MFDA

6. Staff Enforcement Counsel submitted written Submissions and a Book of Authorities. He referred to the facts as set out in the Agreed Facts (above) and to the admissions by the Respondent to the allegations of misconduct as also set out in the Settlement Agreement. For the reasons set out herein, Staff submits that the Hearing Panel ought to accept the Settlement Agreement as the proposed resolutions fall inside the reasonable range of appropriateness having regard to the nature of the conduct admitted by the Respondent and the MFDA’s regulatory objective of protecting the public.

THE LAW AND ARGUMENT

7. The relevant rules and provisions in this matter are:

Law	Details of Provision
MFDA Rule 2.1.1	Standard of Conduct
MFDA Rule 2.3.1	Discretionary Trading
MFDA By-law No. 1	<ul style="list-style-type: none"> ◦ Section 24.1.1 - Power of Hearing Panels To Discipline - Approved Persons ◦ Section 24.2 - Costs ◦ Section 24.4 - Settlement Agreements

MFDA Rule 2.1.1 - High Standard of Ethics

6. MFDA Rule 2.1.1 prescribes the standard of conduct applicable to registrants in the mutual fund industry. The Rule requires that each Member and Approved Person: deal fairly, honestly, and in good 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.

Pre-Signed Account Forms are Not Permissible

7. In the present case, the Respondent admits that he obtained, possessed, and/or used at least two pre-signed client account forms, contrary to MFDA Rule 2.1.1.

8. “Pre-signed account forms” is a generic term which 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.

9. The MFDA has warned approved persons against the use of pre-signed account forms for a number of years.

MFDA Staff Notice #MSN-0066 dated October 31, 2007 (updated March 4, 2013)

MFDA Bulletin #0661-E dated October 2, 2015

10. Hearing Panels have held that obtaining or using pre-signed account forms is a contravention of the standard of conduct under MFDA Rule 2.1.1.

Byce [2013] Hearing Panel of the Central Regional Council, MFDA File No. 201311, Panel Decision dated September 4, 2013

Price [2011] Hearing Panel of the Central Regional Council, MFDA File No. 200814, Panel Decision (Misconduct) dated April 18, 2011

11. The use of pre-signed account forms 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.

Price, supra, at paras 122-124

12. The prohibition on the use of pre-signed account forms applies regardless of whether:

- (a) the client was aware, or authorized the use, of the pre-signed account forms; and
- (b) the forms were used by the Approved Person for discretionary trading or other improper purposes.

Byce, supra

Price, supra

Falsifying Forms is Not Permissible

13. In the present case, the Respondent admits that he falsified [the documents set out in para. 37(a) supra].

14. Like pre-signed account forms, the prohibition against falsifying forms exists regardless of the existence of client authorization or the motive behind the use of the form, and, like pre-signed account forms, the MFDA has been warning Approved Persons against falsifying forms for a number of years.

MFDA Notice #MSN-0066 dated October 31, 2007 (updated March 4, 2013)

MFDA Bulletin #0661-E dated October 2, 2015

15. Hearing Panels have held that falsifying forms is a contravention of the standard of conduct as set out in MFDA Rule 2.1.1.

Bryce, supra

Ewart [2015] Hearing Panel of the Central Regional Council, MFDA File No. 201528, Panel Decision dated September 11, 2015

16. Like pre-signed account forms, the creation, possession or use of a falsified form is considered serious misconduct. The reasoning in *Price* above, paragraph 11, for why pre-signed account forms affect the integrity and reliability of account documents also applies to falsified forms.

17. MFDA Staff considers this type of form to be a more serious violation of the contravention of the standard of conduct under MFDA Rule 2.1.1. The falsification of a client signature or initials is particularly serious. In the MFDA matter of *Barnai*, the Hearing Panel, citing earlier decisions, summarized the principles with respect to falsifying client signatures.

Barnai [2015] Hearing Panel of the Central Regional Council, MFDA File No. 201325, Panel Decision dated March 17, 2015

Other Misconduct Subject to Rule 2.1.1

18. Rule 2.1.1 has been interpreted in a broad and purposive manner by Hearing Panels in furtherance of the goal of investor protection. It has been applied to encompass a wide variety of activities conducted by Approved Persons which may not be covered under a specific rule.

Davis [2016] Hearing Panel of the Prairie Regional Council, MFDA File No. 201615, Panel Decision dated November 15, 2016, at para 18

Smilestone [2013] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201129, Panel Decision dated August 8, 2013, at para 12

19. In the present matter, between March 24, 2011 and February 12, 2014, the Respondent failed to advise clients KM, MM, NC and AD that they might be required to

pay a deferred sales charge on the subsequent sale of certain fund units, and the fee schedule that would apply to the deferred sales charge, thereby failing to deal fairly, honestly and in good faith with his clients. Rule 2.1.1 is sufficiently broad to address this conduct in particular.

Discretionary Trading is Not Permissible

20. Pursuant to MFDA Rule 2.3.1(a), Approved Persons are prohibited from engaging in discretionary trading.

21. An Approved Person is required to obtain express client instructions from a client with respect to each of the elements of every trade (including purchases, redemptions and switches) that are processed in a client account including:

- (a) the specification of which security is to be traded;
- (b) the amount of the trade (in either dollar value or the number of units to be traded);
- (c) the timing of the trade; and
- (d) the specific details of any costs for fees associated with executing the trade.

Smilestone, supra

O'Brien [2008] Hearing Panel of the Atlantic Regional Council, MFDA
File No. 200809, Panel Decision dated November 25, 2008, at para 21

22. If an Approved Person fails to obtain instructions from a client with respect to one or more elements of the trade and exercises his or her own discretion with respect to any elements of the trade in order to process the trade, the Approved Person has engaged in discretionary trading.

23. If a trade is processed without the knowledge or approval of the client (even if it can be shown that the trade was processed with good intentions and even if the trade

benefits the client financially or otherwise) the trade is unauthorized and the processing of such a trade constitutes a contravention of the regulatory obligations of the Approved Person who processed it.

24. Even if prior to the processing of the trade, the client has expressed a clear intention to delegate authority to the Approved Person to exercise discretion with respect to one or more elements of the trade, such a trade is still a discretionary trade and an Approved Person is not permitted to accept authority to engage in discretionary trading.

25. In the decision of *Rounthwaite*, the Hearing Panel stated that:

Discretionary trading is fundamentally wrong. Subject to certain exceptions, which are not applicable here, Member Rule 2.3.1 absolutely prohibits it. We agree with the reasons which [Enforcement Counsel] submitted for the prohibition. It:

- (i) undermines the client's right and ability to make informed decisions about their financial affairs;
- (ii) subverts the ability of a Member to properly supervise trading activity; and
- (iii) destroys the integrity of the audit trail.

Jurisprudence emanating from MFDA Hearing Panels is consistent that even when an Approved Person fully apprises a client of the details of a transaction, after it has been made, a discretionary trade is still wrong. See *Re O'Brien*, [2008] LNCMFDA 17 and *Re Price* [2011] MFDA Case No. 200814.

Rounthwaite [2012] Hearing Panel of the Central Regional Council, MFDA File No. 201123, Panel Decision dated July 30, 2012, at paras 7-8

26. In the case of *O'Brien* (supra, at para. 19) an MFDA Hearing Panel also noted that discretionary trading exceeds the scope of a mutual fund salesperson's registration category.

27. In the present case, the Respondent admits that he engaged in unauthorized discretionary trading in the account of clients NC and AD. The respondent completed a blank pre-signed Loan Investment Instruction Form that clients NC and AD had previously signed and used the form to facilitate the processing of unauthorized discretionary trades in their accounts in order to implement a leveraged investment strategy.

General Principles Regarding the Acceptance of Settlement Agreements

28. For the reasons set out below, it is in the public interest for the Hearing Panel to accept the Settlement Agreement having regard to the nature of the conduct admitted to by the Respondent and the MFDA's mandate to protect the public.

29. 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.

30. The role of a Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing.

Sterling Mutuals Inc. [2008] Hearing Panel of the Central Regional Council, MFDA File No. 200820, Panel Decision dated August 21, 2008, at page 9, quoting the reasoning in *Milewski*

Milewski [1999] IDA Ontario District Council, Decision dated July 28, 1999, IDACD No. 17 at p. 14

31. 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 flexible remedy tailored to address the interests of both the regulator and a respondent.

British Columbia Securities Commission v. Seifert, 2007 BCCA 484, at para 31

General Considerations Concerning the Acceptance of a Settlement Agreement

32. The primary goal of securities regulation is the protection of the investor.

Pezim v British Columbia (Superintendent of Brokers), [1994] 2 SCR 557 (SCC), at paras 59, 68

33. MFDA Hearing Panels have taken into account the following considerations when determining whether a proposed settlement should be accepted:

- (a) whether acceptance of the settlement agreement would be in the public interest and whether the penalty imposed will protect investors;
- (b) whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
- (c) whether the settlement agreement addresses the issues of both specific and general deterrence;
- (d) whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future
- (e) whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;
- (f) whether the settlement agreement will foster confidence in the integrity of the MFDA;
- (g) whether the settlement agreement will foster confidence in the regulatory process itself.

Jacobson, [2007] Hearing Panel of the Prairie Regional Council, MFDA File No. 200712, Panel Decision dated July 13, 2007, at page 9

34. A Hearing Panel should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness having regard to the conduct of the Respondent.

Jacobson, supra, at page 10

Specific Factors Concerning the Appropriateness of the Penalty

35. Factors that Hearing Panels frequently consider when determining whether a penalty is appropriate include the following:

- (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 activities;
- (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 activities to those who are permitted to participate in the capital markets; and
- (k) previous decisions made in similar circumstances.

Headley [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200509, Panel Decision dated February 21, 2006, at pages 25-26

36. The MFDA Penalty Guidelines are an additional source of factors to be taken into account with regards to penalty. The MFDA Penalty Guidelines are not mandatory but are intended to assist Hearing Panels, MFDA Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings.

37. In cases involving misconduct of the type admitted to in the present case, the Penalty Guidelines recommend consideration of the following penalties and factors:

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
Discretionary Trading (Rule 2.3.1) (Guidelines, p.26)	<ul style="list-style-type: none"> • Fine (AP): Minimum of \$5,000 • Write or rewrite an appropriate industry Course (e.g. IFIC Officers', Partners' and Director's Course or Canadian Investment Funds Course) • Period of increased supervision • Suspension • Permanent prohibition in egregious cases 	<ul style="list-style-type: none"> • Number of trades • Whether client provided verbal authority to engage in discretionary trading • Underlying reason for engaging in trading (e.g. For personal financial gain) • The number of clients affected • Period of time over which the trading took place • Suitability of trades • Extent of client losses
Standard of Conduct (Rule 2.1.1) (Guidelines, p.27)	<ul style="list-style-type: none"> • Fine (AP): Minimum of \$5,000 • Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course) • Suspension • Permanent prohibition in egregious cases 	<ul style="list-style-type: none"> • Nature of the circumstances and conduct • Number of individuals affected • Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute

Considerations in the Present Case

38. MFDA Staff has taken the factors set out above into account in reaching its Settlement Agreement with the Respondent. Set out below are a number of factors particularly relevant to the Settlement Agreement.

(a) Nature of the Misconduct

39. Engaging in discretionary trading is considered serious misconduct.

Griffith [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201329, Panel Decision dated August 19, 2014, at para 7

40. As well, the use of pre-signed and falsified account forms is a serious breach of MFDA Rule 2.1.1.

Byce, supra
Ewart, supra

(b) Client Harm

41. Staff does not have any evidence of client harm.

(c) Benefits Received by the Respondent

42. There is no evidence that the Respondent received any financial benefit from engaging in the misconduct at issue in this proceeding.

(d) Respondent's Experience and Level of Activity in the Capital Markets

43. The Respondent was registered in the mutual fund industry from 2009 to 2014. He ought to have known and respected the compliance requirements of the Member and the MFDA.

(e) Deterrence

44. The proposed penalty and costs are significant and help the MFDA send a message to the Respondent and others in the capital markets about the seriousness of the misconduct at issue.

(f) Respondent's Past Conduct

45. The Respondent has not previously been subject to MFDA disciplinary proceedings.

(g) Respondent's Recognition of the Seriousness of His Misconduct

46. By entering into this Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring the time and expense of conducting a full disciplinary hearing.

(h) Penalty Guidelines

47. The proposed penalty of a 5 year prohibition in engaging in any securities related business and costs of \$2,500 is greater than the \$5,000 suggested minimum penalty for the violations as set out in the Penalty Guidelines above. This is due to the number of MFDA Rule violations in total, in addition to the number of discretionary trades and the number of pre-signed account forms and falsified forms, all of which merit a higher penalty than the suggested minimums.

(i) Previous Decisions Made in Similar Circumstances

48. The proposed resolution is within the reasonable range of appropriateness with regard to other decisions made by MFDA Hearing Panels in similar circumstances:

Barnai, supra

Smilestone, supra

Griffiths [2009] Hearing Panel of the Prairie Regional Council, MFDA File No. 200916, Panel Decision dated January 13, 2010

Brown [2014] Hearing Panel of the Atlantic Regional Council, MFDA File No. 201413, Panel Decision dated March 23, 2015

Huang [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201570, Panel Decision dated September 8, 2016

Gragasin [2014] Hearing Panel of the Prairie Regional Council, MFDA File No. 201249, Panel Decision dated July 9, 2014

Costs

49. An award of costs in the amount of \$2,500 would be appropriate in the circumstances.

Conclusion

50. Having regard to all the foregoing circumstances, the proposed penalty is reasonable, proportionate to the misconduct in question, and are in keeping with the MFDA's mandate to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry by ensuring high standards of conduct by Members and Approved Persons.

4. SUBMISSIONS OF THE RESPONDENT

8. Counsel for the Respondent spoke briefly reiterating the joint recommendation that the Panel approve the proposed settlement. He pointed out that the circumstances of this case are less egregious than those in the decision in *Huang* referred to by Staff Enforcement Counsel. He said there is no evidence of client harm, no financial benefit received by the Respondent and no

prior disciplinary record. He pointed out that the Respondent recognizes the seriousness of the misconduct, is present at this Hearing and is anxious to have the matter concluded.

5. REASONS FOR DECISION

9. In the Settlement Agreement the Respondent admits to the Contraventions set out at MFDA para. 37 above. The admitted misconduct by the Respondent was serious but, as pointed out by Counsel for the Respondent, less serious than the misconduct in *Huang* in which a permanent prohibition was imposed.

10. We accept the submissions of Staff Enforcement Counsel and agree that the decisions in *Price*, *Barnai* and *Rounthwaite* are particularly instructive.

11. Regarding pre-signed account forms the hearing panel in *Price* (MFDA para 10 above) stated:

Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading...At its worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client...Pre-signed forms also subvert the ability of a Member to properly supervise trading activity. They destroy the audit trail. The presence of the client's signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account.

12. Falsification or forgery of documents is well summarized in the *Barnai* decision (MFDA para 17 above), quoting with approval from an IDA (now IIROC) decision:

6. Falsifying client signatures or initials is serious misconduct. Signature falsification (like the use of pre-signed forms) 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 authorized trading, fraud and misappropriation.

7. As a Hearing Panel of the Investment Dealers Association (now IIROC) stated in *Bell*:

“Forgery is always serious. It is unequivocally condemned because it is fundamentally dishonest and dangerous. Any act of forgery is a step onto a steep and slippery slope of deception that is always potentially harmful to clients and actually harmful to the Member firm and the securities industry as a whole.”

8. Lamontagne (Re) reiterated the principle set out in Bell (Re), but went on to state that, where warranted, hearing panels may distinguish between serious and less egregious instances of falsification:

“Forgery is always a serious regulatory matter because it shows that the Respondent lacks the honesty required of a professional in the securities industry...forgery often attracts severe sanctions. While there is no such thing as a “minor case” of forgery, hearing panels may distinguish between more and less egregious examples of forgery.”

13. The panel in *Rounthwaite* (MFDA para 25 above) wrote the following with respect to discretionary trading, at paras 7, 8:

Discretionary trading is fundamentally wrong. Subject to certain exceptions, which are not applicable here, Member Rule 2.3.1 absolutely prohibits it. We agree with the reasons which [Enforcement Counsel] submitted for the prohibition. It:

- (i) undermines the client’s right and ability to make informed decisions about their financial affairs;
- (ii) subverts the ability of a Member to properly supervise trading activity; and
- (iii) destroys the integrity of the audit trail.

Jurisprudence emanating from MFDA Hearing Panels is consistent that even when an Approved Person fully apprises a client of the details of a transaction,

after it has been made, a discretionary trade is still wrong. See *Re O'Brien*, [2008] LNCMFDA 17 and *Re Price*, [2011] MFDA Case No. 200814.

14. We have considered the decisions in the cases cited by Staff Enforcement Counsel regarding penalty (MFDA para 48 above). As he mentioned in his oral submissions, it is difficult to find circumstances bearing close similarity to the present case, and the decisions cited serve only to provide examples of a range of penalties.

15. In *Barnai*, which involved a Settlement Agreement, a 9-month suspension was imposed for falsifying the signatures of two clients on trading and KYC account forms. The respondent did it in order to give effect to transactions which the clients had approved, a factor which the panel took into account as less serious contraventions and falsifications than those committed for other purposes. The panel found the respondent not admitting to the member that he had signed one of the documents as an aggravating factor. There was no client harm and neither of the clients complained. Clearly more serious penalties are warranted in the present case.

16. In *Smilestone* the respondent committed a number of transgressions:

- i) The respondent falsified an unknown number client signatures and initials in order to open and execute trades in client accounts and falsely provided signature guarantees on trade tickets with respect to one client.
- ii) The respondent engaged in authorized and unauthorized discretionary trading in respect of an unknown number of clients.
- iii) The respondent failed to comply with the member's conditions with respect to an outside business activity.
- iv) The respondent provided false responses to the member's compliance staff during a course review.

His untruthful statements to the member were an attempt to mislead or deceive the member and undermine the ability of the member to supervise the respondent's activities. In the MFDA investigation the respondent admitted that he made some untruthful statements to the member. There was no evidence of clients suffering losses, no complaints by clients and no evidence that

the respondent derived any material benefit from his actions. He cooperated fully with the MFDA. A two-year suspension, a fine of \$10,000 and costs of \$5,000 were imposed. In our view, from the information provided, we consider that the two-year prohibition to have been at the low end of the range of appropriate penalties. Obviously, as in the present case, the respondent's cooperation and entering into the Settlement Agreement were significant considerations.

17. The circumstances in *Griffiths* were similar to those in *Smilestone* except that there were only three clients involved in the falsified documents and there was no discretionary trading. The respondent had misled the Member which he later admitted and he cooperated with the MFDA. A two-year suspension, fine of \$1,000 (no costs), agreed in the Settlement Agreement, were approved by the panel. The penalties imposed in that case seem to provide justification for the appropriateness of the penalties in the present case which involves more extensive misconduct (other than the misleading of the Member).

18. In *Brown* the parties jointly recommended the proposed penalties making it the equivalent of a settlement. The prohibition was for five years, the same as the prohibition proposed in the present case. The panel approved a \$25,000 fine and costs of \$7,500. The contraventions were:

- i) The respondent misrepresented, failed to fully and adequately explain, or omitted to explain the risks of a leveraged investment strategy that he recommended and implemented in the accounts of 9 clients, failing to ensure the leveraged investment strategy was suitable for clients.
- ii) The respondent failed to ensure that the leveraged investment strategy was suitable and in keeping with the clients' investment objectives, having regard to the clients' KYC information and financial circumstances.
- iii) The respondent filed an assignment in bankruptcy and claimed he was impecunious.
- iv) The respondent benefited from the transaction by way of commissions. He cooperated with the MFDA investigation, expressed remorse for his actions and

for the financial harm suffered by clients, was no longer employed in the securities industry, had invested in the same leveraged investments as his clients and incurred significant losses. The panel observed that some allegations of misconduct involved in the original Notice of Hearing were removed from the Agreed Statement of Facts and stated “were it not for the removal of these Allegations and the mitigating factors listed above, we would have been inclined to impose harsher penalties”.

In our view the panel in that case was, albeit with some reluctance, prepared to accept the joint recommendation of the parties. The penalty strikes us as being on the low side of the appropriate range of penalties.

19. In *Huang* the matter proceeded by way of an Agreed Statement of Facts which essentially made the proceedings a settlement. The contraventions were:

- i) The respondent falsified the identity of an account holder on void cheques and changed the address of 3 clients to his own address in order to deposit redemptions in his own personal account.
- ii) The respondent falsified KYC information on a loan application of a client which was submitted to a lender to facilitate the implementation of a leverage investment strategy.
- iii) The respondent falsified the signatures of 2 clients, recorded false KYC information of 1 client, and processed unauthorized trades in the accounts of two clients.
- iv) The respondent provided false answers during an interview with Staff, thereby failing to cooperate with the MFDA’s investigation.

The clients did not suffer financial harm. The respondent did not receive any financial benefit of any consequence. The penalties imposed were a permanent prohibition, a fine of \$25,000 and costs of \$7,500. Those penalties, in a case which obviously involved more serious contraventions

than the present case, provide a benchmark from which the penalties agreed upon in the present case are seen to be within the range of reasonable penalties.

20. In *Gragasin* the panel imposed a three year prohibition, fine of \$30,000 and costs of \$5,000. The contraventions were:

- i) The respondent prepared and submitted account forms for 10 clients which contained false, misleading, or incorrect information.
- ii) The respondent misrepresented or failed to fully explain a leveraged investment strategy he recommended to 10 clients, and failed to ensure the recommendations were suitable.
- iii) The respondent failed to ensure that a leveraged investment strategy was suitable having regard to 10 clients' KYC information and the member's requirements with respect to leverage.

Again, there was an Agreed Statement of Facts. The clients had insufficient resources to withstand the investment losses from the borrowed monies. Their risk tolerance was low and they had no investment knowledge. The Member provided compensation to each of the clients who lost money. The respondent borrowed funds himself to purchase mutual funds which created financial hardship for his family and he could be said to have suffered severely for his actions. The panel, while recognizing that the conduct was serious, took into account that the respondent had accepted responsibility and cooperated with MFDA staff. He had no prior disciplinary record. The panel accepted the agreed penalties of a three year prohibition, fine of \$30,000 and costs of \$5,000. The panel relied primarily on a decision very close in time regarding similar circumstances (*Sarker*, MFDA File No. 201327).

The circumstances in that case were dissimilar to the circumstances in the present case and were, in our view, more serious than the present case so, again, the penalties imposed tend to indicate the low end of the appropriate range.

21. A serious disciplinary response is required in this case having regard to the protection of the investing public, the integrity of the security markets, specific and general deterrence, the protection of the MFDA's membership and the protection of the integrity of the MFDA's enforcement processes. Several mitigating factors are to be considered including the fact that the Respondent had no previous disciplinary record, cooperated with the MFDA in its investigation and the Hearing, expressed remorse, received no financial benefit and clients suffered no financial harm.

22. We view all aspects of the Settlement Agreement as being reasonable and consider the proposed penalties to be "within a reasonable range of appropriateness". Not imposing a fine reflects the lack of any financial gain by the Respondent.

23. We confirm our decision on penalties as follows:

- a) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member for a period of five years pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- b) the Respondent shall pay costs in the amount of \$2,500 pursuant to section 24.2 of By-law No. 1; and
- c) the Respondent shall in the future comply with MFDA Rules 2.1.1 and 2.3.1.

24. At the conclusion of the Hearing we signed an Order confirming the foregoing.

DATED this 6th day of April, 2017.

"Alan V. M. Beattie"

Alan V. M. Beattie, Q.C.
Chair

“Kathleen Jost”

Kathleen Jost
Industry Representative

“M. Elaine Bradley”

M. Elaine Bradley
Industry Representative

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