



**Mutual Fund Dealers Association of Canada**  
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING  
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF  
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Donald Wayne O’Connor**

Heard: April 5 and 6, 2018 in Calgary, Alberta  
Decision: April 6, 2018  
Reasons for Decision: October 31, 2018

**REASONS FOR DECISION**

Hearing Panel of the Prairie Regional Council:

Sherri Walsh	Chair
Nada Israeli	Industry Representative
Richard Sydenham	Industry Representative

Appearances:

Justin Dunphy	)	Enforcement Counsel for the Mutual Fund
	)	Dealers Association of Canada
	)	
	)	
Donald Wayne O’Connor	)	Respondent, in person
	)	
	)	

## I. Background

1. By Notice of Hearing dated May 16, 2017, the following allegations were made against Donald Wayne O'Connor ("Respondent"):

**Allegation No. 1:** Between April 2011 and June 2015, the Respondent obtained, possessed and used to process transactions, 189 pre-signed account forms in respect of 26 clients, contrary to MFDA Rule 2.1.1.

**Allegation No. 2:** In July 2015, the Respondent failed to comply with the Member's policies and procedures by failing to record and maintain evidence of client trade instructions with respect to two transactions in respect of two clients, contrary to MFDA Rules 2.5.1, 1.1.2 and 2.1.1.<sup>1</sup>

2. The matter proceeded by way of a contested hearing which took place on April 5 & 6, 2018.

3. At the outset of the hearing, during his opening statement, Enforcement Counsel (also referred to in these Reasons as "Staff") advised the Hearing Panel that on a final review of the evidence Staff was amending the allegations slightly as follows:

- a) With respect to **Allegation No. 1**, the number of pre-signed account forms was reduced from 189 to 186.
- b) With respect to **Allegation No. 2**, Staff indicated it was only proceeding with respect to one client rather than two.

4. The Respondent attended the hearing in person and actively represented himself in putting forward his case. In addition to filing a Reply, he entered documents into evidence, questioned witnesses and made written and oral submissions at the hearing.

5. Following the presentation of evidence and closing arguments made by both Staff and the Respondent, the Panel determined that the allegations as amended had been proven.

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<sup>1</sup> A copy of the relevant rules is attached to these Reasons as Appendix 1

6. Staff then proceeded to make submissions with respect to penalty following which the Panel again deliberated and ordered that the Respondent pay a fine of \$25,000.00 and costs of \$5,000.00.

7. Our Reasons for Decision are set out below.

## **II. Registration History**

8. Between October 1996 and November 2016, the Respondent was registered with Investors Group Financial Services Inc., a member of the Mutual Fund Dealers Association ("MFDA") (herein referred to as "Investors Group" or the "Member").

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

10. The MFDA retains jurisdiction over the Respondent despite the fact that he is no longer registered, pursuant to section 24.1.4 of MFDA By-Law No. 1 which reads as follows:

### **"24.1.4 Jurisdiction**

(a) Former Members. For the purposes of Sections 20 to 24 inclusive, any Member, Approved Person or other person subject to the jurisdiction of the Corporation shall remain subject to the jurisdiction of the Corporation notwithstanding that such Member has ceased to be a Member, Approved Person or other person subject to the jurisdiction of the Corporation."

## **III. Presentation of Evidence**

11. The primary evidence before the Panel consisted of a 39 paragraph Affidavit sworn by Patricia West who is the Senior Investigator with the MFDA. Attached to Ms. West's affidavit were two volumes of Exhibits numbered 1 – 20.

12. The MFDA Rules of Procedure contain provisions which deal with the admissibility of evidence generally and sworn statements in particular. Rule 1.6 states:

“1.6 Admissibility of Evidence

- (1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.”

13. Rule 13.4 states:

“13.4 Evidence by Sworn Statement

- (1) The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.”

14. Accordingly, the Panel admitted Ms. West's affidavit into evidence and marked it as an exhibit in the proceedings.

15. Ms. West was also called to testify in person and at the Panel's request was taken through the evidence set out in her affidavit, by Staff. She was available to be cross-examined by the Respondent and to answer any questions posed by the Panel.

16. Staff also called Ms. Danielle Tétrault to testify. Ms. Tétrault is currently the Chief Compliance Officer for Investors Group. She was cross-examined by the Respondent and responded to questions from the Panel.

17. The Respondent gave evidence, was cross-examined by Staff and answered questions posed by the Panel.

18. In the opening statement he made at the outset of the hearing, Enforcement Counsel made it clear to the Panel that these proceedings were not dealing with:

- a) Discretionary trading;
- b) Allegations of client harm; or
- c) Allegations of any unauthorized transactions.

19. Rather, he said, the allegations before the Panel related to a breach of the Member's Policies and Procedures and a violation of MFDA Rule 2.1.1 with respect to the use of pre-signed account forms.

#### **IV. Allegation No. 1**

#### **EVIDENCE**

##### **Patricia West, Senior Investigator**

20. As set out in her Affidavit, Ms. West testified that the MFDA became aware of the matters which are the subject of these proceedings through what is called the Member Event Tracking System ("METS"). On June 30, 2015 Investors Group filed a METS report with the MFDA. In that report Investors Group advised Staff that it had identified among other things, pre-signed account forms in client files that were serviced by the Respondent.

21. Ms. West explained that Members must report certain events to the MFDA, through the METS regardless of whether a complaint has been made about an event.

22. She testified that after conducting its investigation, Investors Group concluded that in servicing his clients the Respondent was reusing pre-signed transfer forms in order to move clients' money from Investors Group Securities Inc. ("IGSI") to Investors Group Financial Services ("IGFS") – the latter being the Member's mutual fund side. Both IGSI and IGFS are subsidiaries of the same parent company: Investors Group Inc.

23. In response to the METS report, Staff at the MFDA opened an investigation into the Respondent's business conduct. As part of its investigation it obtained information and documents about transfer forms from both Investors Group and the Respondent.

24. Ms. West attached the forms which she reviewed as exhibits to her Affidavit – being 186 forms relating to 26 clients.

25. She explained that the expectation by both Members and the MFDA is that a client's form must be fully completed prior to being signed and dated. Having the clients date the form when they sign it demonstrates that they have authorized the trade on that date. She explained that this is important information for the purposes of, for example, an audit trail.

26. Ms. West said that in reviewing the forms she compared them to each other to determine whether or not they were the same. In particular, she said, she focused on the date, the investment instructions and the location of the signatures on the form.

27. She explained that in some cases to make sure that she was being diligent she used a ruler in order to determine whether the signatures were in exactly the same place. She testified that it is very rare for clients to sign in exactly the same place every time and this process assisted her in coming to the conclusion that the forms had been reused. The identical location of the signature from form to form could only happen, she explained, if the client signed the original form and then the form was photocopied afterwards so that it could be used again.

28. Ms. West confirmed that in cases where she could not say that the signature was in exactly the same place she eliminated those forms and did not include them in her affidavit.

29. She noted that the dates on all the forms were changed in order to allow the form to be used for more than one transaction. As well, she said there were 28 instances where the fund code had also been changed from month-to-month.

30. At paragraphs 11 – 13 of her affidavit Ms. West referenced the relevant excerpts from Investor Group’s Policies and Procedures Manual (the "PPM") regarding pre-signed forms:

“11. Staff has copies of the excerpts of Investors Group’s Policies and Procedures Manual (the “PPM”) that was in force during the material time period. In the PPM, Investors Group prohibits its Approved Persons, including the Respondent, from holding blank or partially completed pre-signed account forms.

12 From May 28, 2010 to December 2014, Investors Group’s PPM states as follows with respect to pre-signed forms:

*Pre-signed forms – from time to time situations have arisen where forms that have been pre-signed by clients have been found in Consultant files. Pre-signed forms are prohibited. The use of pre-signed form, from a regulatory point of view, may suggest discretionary or improper activity on the part of the Consultant. Pre-signed forms are not to be used under any circumstances and they should be destroyed immediately.*

[...]

*It is prohibited to hold forms or documents on file that have been pre-signed by the client with the intent to complete and execute the form upon the client’s verbal authorization.*

[...]

*Pre-signed client form(s)*

*You cannot in any circumstances use pre-signed forms with clients, even if requested to do so by the client. Under securities legislation and MFDA rules, Consultants are not permitted to accept discretionary trading authority from clients. The use of pre-signed forms suggests discretionary authority. In addition, the use of pre-signed forms destroys the integrity of the audit trail and makes it difficult to establish whether authority was given in the event of a future dispute.”*

13. Commencing January 2015, Investors Group’s PPM states as follows with respect to pre-signed forms:

*“Pre-signed forms – from time to time situations have arisen where forms that have been pre-signed by clients have been found in Consultant files. Pre-signed forms are prohibited. The use of pre-signed form, from a regulatory point of view, may suggest discretionary or improper activity on the part of the Consultant. Pre-signed forms are not to be used under any circumstances and they should be destroyed immediately.*

[...]

*PRE-SIGNED CLIENT FORM(S)*

*You must not collect, accept from a client, maintain for future use, or submit for processing, any form that was signed by a client prior to being completed in full. You must not alter any form that has been signed by a client, unless you obtain the client's signature or initials authorizing the change on the completed form.*

*You cannot in any circumstances use pre-signed forms with clients, even if requested to do so by the client. Under securities legislation and mutual fund rules, Consultants are not permitted to accept discretionary trading authority from clients. The use of pre-signed forms suggests discretionary authority.*

*In addition, the use of pre-signed forms is problematic because it effectively destroys the audit trail and therefore, impacts the ability to reconstruct the client file history.*

*If there is an investigation, a pre-signed form questions your credibility and everything done on a client's behalf. The result is that complaints may be indefensible.*

*You must not under any circumstances maintain or use blank pre-signed or partially completed forms.*

[...]

#### *15.4 Pre-Signed Forms*

*It is prohibited to hold forms or documents on file that have been pre-signed by the client with the intent to complete and execute the form upon the client's verbal authorization."*

31. Ms. West explained that as part of its investigation, Staff sent an initial letter to the Member on December 11, 2015 in which it requested a number of things, including a statement from the Respondent. The Respondent provided a written response to that request on December 21, 2015 and additional statements between July 21, 2015 and October 21, 2015, all of which were attached as exhibits to Ms. West's affidavit. At paragraphs 18 and 19 of her affidavit Ms. West stated:

"18. In the Respondent's December 21, 2015 statement to Investors Group (see Exhibit 7), the Respondent denied obtaining blank signed forms, but stated as follows (emphasis added);

*In response to IG's Jennifer Howard's email dealing with MFDA File 05560/15/12/AB allegations I wish to provide the following answers to their questions:*

*2.a) i. Client transfer forms were not blank when signed, I assisted with target fund selection and then fax in for processing*

*2.a) ii. I did not obtain blank pre-signed forms. My normal practice at that time was to pre-populate transfer forms, send these to clients for their signature with an instruction for them to return the form to my attention.*

*2.a) iii. Given the frequency of some transactions, and with the instructions of the client, some previously used transfer forms were used with the date being amended.*

*2.a) iv. All clients requested and expected their IGSI self-directed cash balances to be transferred to IGFS. Further, they were aware, involved and authorized all transfers. My notes on IGSI self-directed transactions were not as detailed as on MFDA accounts as I felt the archived transfer document itself was adequate evidence of communication and authorization.*

19. In the Respondents' statement to Investors Group on July 21, 2015, (see Exhibit 8), the Respondent stated (emphasis added):

*Hi Sandra, here are my responses to your 5 questions:*

*1. Have you photocopied and reused transfer authorizations for clients moving their cash in IGSI accounts to their IGFS accounts on a recurring basis? **Yes but only after clients verbally confirmed, authorized & requested existing transfer form be used.***

*2. Were the forms completed in their entirety when originally signed by the client? **Some elements of the form could not be completed when signed by the client. The clients had instructed me to move the funds and therefore based on their authorization, I completed the forms and submitted them for processing. At that time I was not aware of this being non-compliant, as I am today. It was my understanding given the relationship of the dealers (IGFS and IGSI), the frequency of the transaction, and the authorization of the client, I could obtain their signature in advance in order to provide greater ease of doing business.***

*3. Are there notes in the client files to evidence the discussion for every transfer? Were clients aware of these transfers? As noted above, clients were aware of these transactions taking place and had instructed me to do so. While I have limited notes on these transactions, I've recently made changes to my practice and now document all trade instructions from clients in Pathway.*

*4. Are there any other forms that you have accepted pre-signed or altered/photocopied in any way? If so, please provide client name, and form(s) used. I've been reviewing my files and have not identified any other instances where I have used pre-signed forms.*

*5. Please provide any further explanation regarding your process when transferring cash in IGSI accounts to IFGS accounts. **The steps I took in using pre-signed forms was to create a greater ease of doing business for clients. Since these transfers take place on a regular basis, it was my thinking that since I had***

*the authorization of the client, how that authorization was captured was a secondary issue. I acknowledge that thinking on my part was incorrect and I've taken immediate steps to amend my practice by setting up nominee accounts to automatically sweep IGSI cash. This is an automated process does not require signed authorizations. Whenever signed transfer forms are required they will only take place when a signature from the client is obtained & instruction is given."*

32. According to Ms. West's affidavit, on March 4, 2016 Investors Group sent the Respondent a letter in which it set out the regulatory concerns it had identified from its investigation, including the discovery of the forms which had been reused. That letter was attached as an exhibit to her affidavit. It stated, in part:

"Investors Group prohibits the use of pre-signed documents for clients. Pre-signed forms include any situation where a client signs a form prior to the form being fully completed. When a client signs a form, they are acknowledging their awareness and agreement with the instructions on the form. If a form is signed before completion, the authorization process is undermined and questions could be raised about the reliability of the audit trail."

33. The letter went on to say:

"In December 2014, you were asked to sign an attestation, confirming that you do not use pre-signed forms in your practice. While we were unable to locate a signed attestation by you the details of pre-signed forms and the consequences have been provided through the Investors Group News on March 27, 2015, April 7, 2015, and December 18, 2015. The attestation document explained the consequences should pre-signed forms be found in any of your client files after the attestation date, which included internal fines. Accordingly, we will be assessing you a \$1,000 fine to be charged back to your commissions as part of our disciplinary actions."

34. In addition to imposing a fine of \$1,000.00, Investors Group imposed a period of 6 months close supervision on the Respondent.

35. At the hearing, in cross-examining Ms. West, the Respondent suggested to her that in helping clients to transfer money from IGSI to IGFS he was simply a "middleman" – that once he made sure there was a fund code on the document he sent it to the IGSI side for processing and that it was the IGSI side's responsibility to do their due diligence.

36. Ms. West responded by saying that she disagreed with the Respondent's characterization of his responsibility. She confirmed that as the advisor of record it was his obligation to make sure that the form was fully completed before the client signed it and before it was submitted to anyone for processing; the expectation being that after discussions with the client the Respondent would enter the fund code on the document, return the form to the client for the client to sign and date and then return back to him, before he sent it for processing.

37. She explained that once the Respondent wrote the fund code on the document he was more than a middleman and was in fact, engaging in a trade.

38. In response to the Respondent's question on cross-examination as to whether a "re-used" form was the same as a "pre-signed" form, Ms. West confirmed that where a form that was signed but missing information is photocopied and information is then added after the client has signed it, which is what happened in this case on numerous occasions, that constitutes using a pre-signed form.

### **Danielle Tétrault**

39. Ms. Tétrault is the Chief Compliance Officer for Investors Group Financial Services. She testified that Investors Group has had policies and procedures with respect to the prohibited use of pre-signed account forms dating back as far as 2002.

40. She described the transfer authorization process that allows the Member's clients to transfer their money between the two platforms - IGSI and IGFS. She explained that although the two are connected dealers, when money transfers from one to the other it involves changing platforms. A client's signature is therefore required to transfer money from the IGSI side which is an IIROC platform, to the IGFS side, which is an MFDA platform.

41. Having reference to the matters set out in Ms. West's affidavit, Ms. Tétrault confirmed that essentially what Investors' Policy and Procedures Manual says is that the use of pre-signed forms

is a prohibited activity because it permits people to potentially engage in discretionary trading or transactions.

42. She also testified that there is an automated process which has been in place since 2003 that allows a client to “sweep” money from their account on the IIROC platform to their account on the MFDA platform. This process allows dividends or interest that is paid into the cash position on the client's IIROC platform to be moved to their account on the MFDA platform, but if they have signed up for the process.

43. On cross-examination, the Respondent asked Ms. Tétrault whether she was aware that he had found the manual process for transferring clients' cash from their accounts on the IGSI side to their accounts on the IGFS side, to be cumbersome and that since 1996 he had made three managers aware of his concerns.

44. He also asked her whether she was aware that it was not until 2014 that Management advised him about the availability of the automated sweep system, notwithstanding the fact that he had been asking for help in finding a better system since 1996.

45. She indicated that she was not aware of these inquiries.

46. Ms. Tétrault did confirm on cross-examination by the Respondent that although, as the result of its investigation, Investors Group sent over 300 letters and made 30 phone calls to the Respondent's clients to determine whether any discretionary trading had taken place, the results showed that no such activity had occurred.

47. She also agreed and confirmed that the Respondent’s clients allowed him to use the forms and enter information after they had signed them; that they did not have any concerns about that process; and in fact, had authorized him to act in that way.

48. She went on to say however, that the activity was still a violation of the policies and procedures of both the MFDA and the Member.

## **The Respondent**

49. The Respondent entered the following documents into evidence and which were marked as Exhibits at the hearing:

- Investors Group form entitled "Investment Instructions" for client EM, signed by both the Respondent and the Respondent's Branch Manager
- blank Investors Group form entitled "Federal LRSP Addendum" and "Client Application"
- handwritten letter of endorsement from client LL dated March 2, 2018 addressed "To Whom It May Concern"

50. The Respondent commenced his testimony by stating that none of his clients ever reported any concerns despite the 300 letters and 30 phone calls made by the Member. Further, he said, there was no evidence of harm to clients or lack of client authorization nor evidence that he received any financial benefit as the result of his activity.

51. He told the Panel that he was very client oriented and always acted in the best interests of his clients.

52. He said that he was shocked when he heard Ms. Tétrault testify that the automated sweep process for transferring clients' money was available as far back as 2003. He said he did not know why it took until 2014 for someone to advise him of that process because every year, up until that time, he had been asking about a better process.

53. He reiterated that in using the forms, his clients were always aware of what he was doing and advised him to insert the fund codes, as necessary.

54. He testified that if he had forwarded a transfer form which did not include a fund code or a date, the IGFS side would not have accepted it. Since his clients did not know what the fund

codes were, he felt it was appropriate for him to insert them on the form. He testified that in his view he was never actually processing the forms but was simply being a "middleman".

55. On cross-examination, the Respondent admitted that there was really no dispute that on occasion, he entered dates and fund codes on forms, after a client had signed them.

## **The Parties' Positions**

### **Staff**

56. Enforcement Counsel submitted that what is being addressed are 186 forms which, based on the comparison carried out by Staff, are identical and where the dates were inserted after the forms were signed and in 26 cases, the fund codes were added after the signatures as well.

57. Counsel then pointed to the answers which were given by the Respondent on cross-examination where he admitted to adding dates and fund codes to documents which had already been signed. He also pointed to the testimony of Ms. West who confirmed that when fund codes and dates are added after the fact, those are material changes.

58. This, Counsel submitted, is a clear violation of MFDA Rule 2.1.1. He told the Panel that one of the concerns that arises when dates and fund codes are added after a client has signed a form is that the audit trail is skewed because it is not possible to match up the client's signature with the date on the form.

59. As well, when fund codes or dates are added after the fact there is the potential for discretionary trading which is an even larger issue. In making this submission, Counsel reiterated that Staff is not alleging that any discretionary trading took place in this case.

60. With respect to the Respondent's evidence that he was not aware of an automated process which would have prevented him following the process that he used in this case, Staff submitted that that was not an answer to the allegation that the MFDA rules had been violated.

61. With respect to the Respondent's argument that he was simply a "middleman", Staff submitted that the evidence of both Ms. West and Ms. Tétrault was very clear that in preparing the forms the Respondent was required to discuss fund codes with his clients and that that requirement fell squarely within MFDA jurisdiction as being conduct that needed to be regulated.

62. Staff also pointed to the evidence of Ms. Tétrault that as early as 2002 Investors Group published policies and information which set out the prohibitions on using pre-signed account forms in its Policies and Procedures Manual and that this had been brought to the Respondent's attention from time to time.

63. Further, Staff submitted, the prohibition against using pre-signed forms is not a new rule. He pointed to MFDA bulletins which were published to the industry in 2006, 2013 and 2015, which advised about this prohibition.

64. Staff submitted that even if the Respondent did not admit to using pre-signed account forms *per se* he has admitted to the essential conduct that constitutes using pre-signed account forms, which is a violation of Rule 2.1.1.

### **The Respondent**

65. In his final submission the Respondent reiterated that he continually asked for a better process for transferring clients' funds from their IGSI accounts to their IGFS accounts. He submitted that he did use the automated process once he found out about it in 2014 and was able to meet with clients to get the process established. He said that the manual process of filling out these forms was in fact, a lot of work with little compensation.

66. He submitted that all the transactions identified in these proceedings were initiated by the clients and that he was simply a "middleman". He said Management signed off on all the documents and all the transactions were done in the clients' best interests. He submitted that a great number of the forms were obviously reused but that he did not think it was his position to do

due diligence on that and that he thought he was passing that responsibility off to the Member's IIROC or IGSI side.

### **Analysis and Decision**

67. The Panel is satisfied, based on the totality of the evidence, that Allegation No. 1 as amended, has been established. We agree with the submissions of Staff that the Respondent has admitted to the essential conduct that constitutes using pre-signed forms as alleged.

68. By adding the date, and in some cases the fund code, to the transfer forms after they were signed, the Respondent violated MFDA Rule 2.1.1 which, among other things prohibits the use of pre-signed forms.

69. The Respondent suggested that he was only a "middleman", and was neither processing nor using forms. He had no authority, he said, to conduct transactions on the Member's securities side and was only passing along information, expecting that IGSI would conduct its own diligence.

70. However, as pointed out by Ms. Tétrault, in dealing with his clients and receiving and providing their instructions as to which funds monies should be transferred, the Respondent was acting within his capacity as an individual who was subject to the requirements of the MFDA and its members.

71. We agree. We find that in each case the evidence was clear that the Respondent called his client to let them know that money was available in their IGSI account and received instructions from them as to the fund to which the money should be transferred on the IGFS side. In doing this, he received signed forms from the client in order to transfer their money. When he did that he was clearly acting in his capacity as an Approved Person registered under the MFDA and was subject to both the MFDA's rules and the Member's requirements regarding the prohibition against using pre-signed forms.

72. Approved Persons are expected to be familiar with requirements of their regulator. The MFDA has issued bulletins starting as far back as 2006 regarding the prohibition against using pre-signed forms. The evidence of the Member was that it has also brought this prohibition to the attention of its Approved Persons on a regular basis, as far back as 2002.

73. The Respondent submitted that he had asked his superiors on many occasions for a better way to serve his clients and said he was not aware of the existence of an automated sweep process until late 2014. However, we note that a review of the 186 forms entered into evidence shows that the Respondent continued to use 110 pre-signed forms into 2015.

74. MFDA Rule 2.1.1 is a broad rule and encompasses a range of misconduct that may not necessarily be caught by other, more specific Rules. The Rule prescribes the standard of conduct applicable to registrants in the mutual fund industry. It requires that an Approved Person, among other things:

- a) Deal fairly, honestly and in good faith with its clients;
- b) Observe high standards of ethics and conduct in the transaction of business; and
- c) Not engage in any business conduct or practice which is unbecoming or detrimental to the public interest.

75. Although the terms ‘business conduct or practice unbecoming’, and ‘high standards of ethics’ are not defined in the Rules, these are concepts that fall within the Hearing Panel’s specialized knowledge. As stated by Cory, J. (as he then was) in *Re Milstein and Ontario College of Pharmacy et al. (No. 2)*:

One of the essential indicia of a self-governing profession is the power of self-discipline. That authority is embodied in the legislation pertaining to the profession. The power of self-discipline perpetuated in the enabling legislation must be based on the principle that members of the profession are uniquely and best qualified to establish the standards of professional conduct. Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of the professional person are deemed to have and, indeed, they must have special knowledge, training and skill that particularly adapts them to formulate their own professional standards and to judge the conduct of a member of their profession.

No other body could appreciate as well the problems and frustrations that beset a fellow member.

***Re Milstein and Ontario College of Pharmacy et al (No. 2) (1977), 13 O.R. (2d) 700 (Ont. Div. Ct.) at p. 7 Q/L, varied on other grounds 20 O.R. (2d) 283 (C.A.), leave to appeal to the SCC dismissed [1992] S.C.C.A. No. 85.***

76. Further, as Roscoe J. stated in *Ripley v. Investment Dealers Association (Business Conduct Committee)*:

... to require that evidence be given in proof of such issues of basic ethics and honesty would be an affront to the common sense, experience and intelligence of the members of every professional Disciplinary Committee.

***Ripley v. Investment Dealers Association (Business Conduct Committee), [1990] NSJ No. 295 (NSSC) at p. 16 Q/L, affirmed [1991] NSJ No. 452 (NSCA)***

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

***Price (Re), MFDA File No. 200814, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 18, 2011***

78. The term “pre-signed account form” 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 which was not provided by the client at the time the document was completed.

79. 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. As the Hearing Panel explained in *Price (Re)*:

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.

***Price (Re), supra, paras 122 - 124***

80. 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 forms; and
- b) The forms were actually used by the Approved Person for discretionary trading or other improper purposes.

***Price (Re), supra***

***Byce (Re), MFDA File No. 201311, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 4, 2013***

81. Based on the evidence of Ms. West we find that the 186 forms in question in these proceedings have all forms where the dates and in some cases the fund code were added after the clients signed them. We note that Ms. West was diligent in carrying out her investigation to make this determination.

82. We further find that the Respondent has admitted, in statements he made to Investors Group and in his testimony at the hearing of these proceedings, to obtaining transfer authorization forms for clients where he subsequently added the date and in some cases the fund code, after the clients had signed the forms.

83. By definition, we find that such forms were, therefore, pre-signed account forms.

84. Accordingly, we find that the Respondent has admitted to the requisite elements that prove he obtained, possessed, and used to process transactions, 186 pre-signed account forms, in breach of MFDA Rule 2.1.1.

85. The Panel believes the Respondent when he said that his only intention in re-using pre-signed forms was to accommodate his clients' convenience. We find that he was not doing it for his own benefit and did not benefit from the practices, nor was there any evidence that any of the Respondent's clients suffered harm as a result of his activities.

86. By all accounts, Mr. O'Connor was otherwise a well-respected consultant who had no prior MFDA disciplinary record and who worked hard to meet his clients' needs.

## **V. Allegation No. 2**

### **Evidence**

#### **Patricia West**

87. The affidavit of Patricia West set out that the Member's investigation into the Respondent's conduct, also identified that there was a gap of several months between when certain transactions occurred and when notes evidencing client instructions of those transactions were put onto the Member's electronic "Pathway" system. In particular, in one instance, Staff identified that the notes on the Pathway system for client EM did not have any details with respect to transactions that occurred on July 16, 2015 in EM's account.

88. In her testimony, Ms. West explained that Pathway is Investors Group's electronic note system. It allows advisors and their assistants to document their discussions with clients and attach any necessary documents as evidence of those discussions. Emails with clients can also be put into this system. The system is time stamped as to when matters are entered and represents an internal electronic record of activity that takes place on clients' files.

89. Ms. West's affidavit explained that when Investors Group conducted a review of the Respondent's trades for client EM, between July 13, 2015 and July 16, 2015, it could not locate meeting records of client authorization for the trades that were made on July 16, 2015.

90. Investors Group provided the MFDA with a copy of the electronic Pathway notes for clients CM and EM and a portfolio statement of client EM for transactions which occurred between July 1, 2015 and September 30, 2015.

91. The trade blotter and portfolio statement for client EM showed 7 purchases were made in EM's LIRA account on July 16, 2015.

92. However, the Pathway notes for CM and EM did not have any details with respect to those transactions. There was a general note in the Pathway printout dated July 5, 2015 which was not entered until July 20, 2015 which stated that the Respondent met with clients CM and EM and filled out paperwork for a termination/severance package and discussed certain funds. However, that note did not specifically refer to the LIRA purchases which were actually made on July 16, 2015 in EM's LIRA account.

93. As part of its investigation, Investors Group contacted the Respondent and asked that he provide additional information and notes with respect to the interactions with client EM, regarding the transactions which took place between July 13 to July 17, 2015.

94. The responses from the Respondent and his assistant dated October 19, 2015 and October 21, 2015 were attached as exhibits to Ms. West's affidavit.

95. According to the Respondent's email of October 21, 2015 the Respondent's practice was to prepare handwritten notes which would subsequently be shredded once they were put into the Pathway system.

96. In his email of October 21, 2015, the Respondent stated:

*“Hi Sandy, my associates, assistant and I have been busy putting together additional clarification notes to pathway & proof of client authorizations for these 17 reviews. Kristina will scan & email you what we have assembled so far. As you advised in our telephone confirmation a few minutes ago our practice of completing pathway templates is not adequate evidence of client authorized instructions & that something much more detailed is required. Your suggestion that more detailed notes written on pathway investment summaries subsequently scanned into pathway may be a possible solution. Please complete your review & advise what changes you would like us to make to our practice in order to meet regulatory standards, thanks.”* (Emphasis added in affidavit of West)"

97. Ms. West’s evidence was that none of the documentation that the Respondent provided gave any additional details with respect to the transactions which took place on July 16, 2015 for client EM.

98. In his response the Respondent stated in part as follows:

*“- B & C. In mid-2015 I hired a new full time assistant but still arranged for my previous assistant to come in on the weekend to enter all my meeting & transaction notes into pathway. The idea seemed like a win -win arrangement for all at the time but a backlog of pathway entries began to accumulate. The backlog has been caught up & is now being processed within a day or so of activity completion.”* (emphasis added in affidavit of West)

99. Correspondence from Investors Group to the MFDA dated February 4, 2016 identified that generally the Respondent’s practice was for his assistant to destroy handwritten notes once they were put onto the Pathway system.

100. The Disciplinary Letter that Investors Group sent to the Respondent on March 4, 2016, referenced above, in addition to the matters regarding use of pre-signed forms, also identified a second point - “Documenting Evidence of Trade” as a deficiency. It reminded the Respondent that discussions with clients must be documented which confirm the client's acceptance, the trade details, and date and time of discussion.

101. Ms. West attached as an exhibit to her affidavit, excerpts from the Investors Group's PPM from 2015 which said that the Member required its Approved Persons to document client trade instructions on the electronic Pathway system or on written notes.

102. She highlighted the following section from the PPM for the relevant time:

*“DOCUMENTING CLIENT TRADE INSTRUCTIONS*

*When accepting trade instructions from a client, you must ensure that:*

- *Every transaction is consistent with the “Know Your Client” information on file.*
- *Each client must be properly identified. If there is any question regarding the identity of the individual, a request should be made to obtain a signed order by fax or in person.*
- *If the instructions involve joint accounts, you must obtain verbal authorization from all joint owners.*
- ***Your client file notes include sufficient information concerning the client trade to document the verbal instructions received.***
- ***In order to meet the requirements you must maintain documentation in the client file, or electronic notes on Pathway, which includes:***
  - ***Date***
  - ***Time***
  - ***Details of any trade received***
  - ***Whether the trade was solicited or unsolicited (i.e., when you make a recommendation to a client to initiate a transaction you must record that the trade was solicited)***
  - ***Evidence that no-load vs. DSC discussions took place***
- ***In addition to these requirements, Consultants are expected to document the client file on discussions, meetings, proposals, etc. This should be done using Pathway or a contact sheet or memos in the client file.***
- *Advise the client when the investment instructions received contradict their documented risk tolerance and financial planning needs. Should a client act against your advice it must be properly documented in either the contact sheet or Client Trade Instruction Documentation form as an unsolicited order.” (Emphasis added in affidavit of West)*

103. Finally, Ms. West’s affidavit identified that Investors Group had provided Staff with copies of branch audits which were conducted on the Calgary locations where the Respondent conducted his business, in January 2011 and March 2015 respectively. In both instances Investors Group had identified that the Respondent failed to maintain adequate records documenting client trade

instructions. The Panel notes that this evidence was not relied on by Staff *per se* in its submission and was not given any weight by the Panel in reaching its decision in these proceedings.

104. In her testimony at the hearing, Ms. West explained that with respect to documenting client trade instructions, Investors Group's obligation is to ensure that a transaction is consistent with the Know-Your-Client information on a client's file. Documentation must show that the client is properly identified and must include sufficient information concerning the client trade to document the verbal instructions received. In order to meet that requirement, the advisor must document in the client file or in an electronic note on Pathway: the date, time and details of any trade received as well as whether or not the trade was solicited and evidence of whether or not fee options were discussed.

105. In this case, the Pathway note which was entered into evidence showed that on July 5, 2015 the Respondent met with EM and CM, in the Respondent's office. That note was entered into the Pathway system on July 20, 2015.

106. The note indicated the following:

“July 5-2015, 3pm – Meeting in our office.

- Don and Sean met with CM and EM
- filled out the paperwork for the Sunlife RRSP transfer (termination/severance package). What funds to use together with the load options were also discussed with the client. We put sufficient funds into no load, the rest was put into loaded funds as per the client's request. They have access to enough no loaded funds as it is.
- added more information to their PFP plan”

107. The Pathway system did not contain, however, any note regarding the actual purchases which were made in EM's LIRA account.

108. The Respondent had entered into evidence a document entitled “Investment Instructions – Contributions for the Client EM”. The document was dated July 16, 2015. It was signed by both the Respondent and the Respondent's branch manager and listed 7 funds to be purchased for EM's LIRA account.

109. No reference was made, however, to these purchase in the Pathway system. Nor was there any documentation either in the Pathway system or otherwise, which identified that the client had authorized the 7 purchases. There was no note, for example, which indicated that these purchases were the subject of any conversation between the Respondent and client EM.

110. In her testimony Ms. West confirmed that she saw no reference in the Pathway notes from the meeting of July 5, 2015 to any discussions about transferring cash into EM's LIRA account.

111. She said that although the entry for July 5, 2015 indicated that the Respondent discussed with the client what funds were to be used, together with the load options, that did not satisfy the requirement to show the client's instructions. What was needed was a breakdown which indicated the amount of money and the name of the fund to which the money was transferred, in each case, which would have shown that both the fund and the amount were agreed to by the client.

112. Ms. West testified that this expectation comes not only from the Member's PPM but also from MFDA requirements although she confirmed that in these proceedings the allegation related only to failure to comply with the Member's procedures manual.

### **Danielle Tétrault**

113. Ms. Tétrault testified that Investors Group has had policies and procedures for documenting client trade transactions that go back at least 15 years.

114. She said that Investors Group expects to see a note in every file for every meeting that an Approved Person has with a client, whether or not a trade occurs.

115. Regarding trading instructions, she said Investors Group expects at a minimum that notes would document: the date, time, and details of the trade; the funds involved; the amounts involved; whether or not the trade was solicited; the suitability of the recommendation; and the discussions around the fund series selected including whether it was a no load or DSC trade.

116. She said that the Pathway system is the preferred method for documenting interactions with the client because it is an electronic system which is backed up by head office. There was certainly no prohibition on a consultant using a paper journal but whatever method was used, the same requirements applied with respect to what needed to be documented.

117. Ms. Tétrault also testified as to how Approved Persons were generally made aware of Investors Group's policies and procedures. She indicated that there were a number of different ways that was done. If there was a change to policies and procedures, for example, Investors Group issued an electronic bulletin advising of the change. The PPM, she testified, is available to Approved Persons online as well as in hardcopy.

118. Further, on an annual basis Investors Group issues a form of questionnaire called an "Annual Consultant's Certificate" which requires every Consultant to attest and answer questions regarding their compliance and practices. This, she said, shows there is an expectation that Consultants know the contents of the PPM and understand any changes that have been made to it.

119. The Questionnaire has been in place since at least 2010.

120. She said that Investors Group also has an annual consultant training presentation which highlights any changes to policies and procedures.

121. She confirmed that the Investment Instructions document which the Respondent put into evidence and which referenced 7 transactions for EM's LIRA account, showing instructions about both the specific fund and the amount of money that was being invested into each fund, did not need to be signed by the client. However, she testified, because of that fact, there still needed to be documentation showing that the client authorized the specific transactions.

122. She said that in the absence of notes that support a consultant's discussion with clients, compliance is not able to confirm that that discussion took place.

123. On cross-examination by the Respondent, Ms. Tétrault confirmed that although there was a note in Pathway of the meeting which took place between the Respondent and EM on July 5, 2015 that entry was only proof that a meeting was held. She said it was not proof of what funds were discussed with the client and selected or what amounts were going into funds. It did not, therefore, satisfy the Member's policy and procedure expectations for documentation.

124. There was nothing in the Respondent's documentation which connected the meeting which his notes indicated took place on July 5, 2015 and the trades that were detailed, 11 days later on the Investment Instructions form which was dated July 16, 2015.

125. She could not, therefore, say that the Instructions sheet had been filled out in front of and as the result of the discussion with, the client.

126. She testified that if the Instructions form had been completed on July 5, 2015 and attached to the July 5 note, that would be different because then there would be a connection between the details that were discussed and the transactions that were made which is what the Investors Group's PPM requires.

127. On further questioning from the Panel, Ms. Tétrault confirmed that the concern in terms of the Member's policies and procedures was that the details of the transactions which took place on July 16, 2015 were not recorded.

128. The documentation in its current form gave the Member no way of telling if the clients had a discussion in fact about the transactions that were listed on the Investment Instructions form because the date on that form did not correspond to the date of the documented meeting.

### **The Respondent**

129. The Respondent said that in his view the documents which he put into evidence should have been sufficient for Investors Group to presume that the client was involved. He pointed to the fact that the two-page Investment Instructions document did not need to be signed by the client.

He also pointed to another document he put into evidence which was a three-page Pension Transfer Review and Checklist which he said had a lot of detail about what the client wanted. It was dated July 16, 2015. His evidence was that everything that the Compliance Department needed in terms of documentation was there and that the Pathway notes which documented his meeting with EM on July 5, 2015 were further evidence which should have told the Member what transpired.

130. He testified that there would also have been notes made on July 16, 2015, however, he said that he had not been able to locate those yet.

131. The main focus of his evidence was that based on the documentation which did exist, including the various forms which he filled out regarding the client's wishes and the Pathway note which documented that he had had a meeting with the client on July 5, 2015 it should have been obvious to the Member that the client had in fact authorized the transactions that took place on July 16, 2015.

## **The Parties' Positions**

### **Staff**

132. In his submissions, Enforcement Counsel confirmed that Staff was not alleging a breach of a particular MFDA rule *per se* but rather a breach of Rules 2.5.1, 1.1.2 and 2.1.1, namely that what had been breached were the Member's policies and procedures regarding proper documentation.

133. What was missing from the Respondent's records, he submitted, was documentation which connected the client's instructions to the transactions which took place in the client's accounts.

134. He submitted that Ms. Tétrault's evidence was determinant of the issue when she said that the documentation in client EM's file did not comply with Investor Group's interpretation of its policies and procedures.

135. In making his submission on this allegation Counsel pointed to the following statement made by the Hearing Panel in *Wellman (Re)*:

“The failure by an Approved Person to document a client’s authorization of a trade may give rise to ramifications that are similar to those that result from the use of pre-signed account forms and altered account forms. Such ramifications include the destruction of the audit trail and the frustration of the Member’s ability to respond to inquiries and complaints from clients concerning propriety of trading activity in their accounts.”

***Wellman (Re)*, MFDA File No. 201529, Hearing Panel of the  
Central Regional Council, Decision and Reasons dated  
December 21, 2015 at paragraph 13**

**The Respondent**

136. The Respondent reiterated that over the course of his career he had documented a significant amount of notes both in handwriting and in Pathway and that Management had signed off on all his documentation.

137. He said that while he may have made errors none of them was intentional and he deliberately tried to be as compliant as possible.

**Analysis and Decision**

138. The Panel finds that Allegation No. 2 as amended, has been established.

139. We find that the Respondent failed to comply with the Member’s policies and procedures by failing to record and maintain evidence of client trade transactions with respect to one transaction in respect of one client, contrary to MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

140. As a Member of the MFDA, Investors Group was and is required to comply with the MFDA’s By-laws, Rules and policies.

141. MFDA Rule 1.1.2 requires each Approved Person who participates in any securities related business in respect of a Member, to comply with the By-laws and Rules as they relate to the Member or the Approved Person.

142. Accordingly, the Respondent, as an Approved Person, was required to comply with the policies and procedures that were established, implemented and maintained by the Investors Group under MFDA Rule 2.5.1.

143. The Hearing Panel in *Franco (Re)* stated that the:

“obligation of Approved Persons to comply with the policies and procedures of the Members that they are registered with is a cornerstone of the self-regulatory system. MFDA members are expected to be aware of the regulatory obligations and to implement policies and procedures to ensure compliance. When Approved Persons disregard those obligations, the Member’s ability to supervise the conduct of such Approved Persons and protect the interest of clients and the public is undermined.”

***Franco (Re)*, MFDA File No. 201016, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated May 6, 2011 at paragraph 38**

144. Other MFDA Hearing Panels have similarly held that an Approved Person’s failure to comply with a Member’s compliance directive, or its policies and procedures, is conduct which is contrary to MFDA Rules 2.5.1, 1.1.2 and 2.1.1.

***Irwin (Re)*, MFDA File No. 200915, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 28, 2010**

***Boldt (Re)*, MFDA File No. 201649, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 6, 2017**

145. The evidence in this case was that the Member was unable to locate notes from face-to-face meetings or records of telephone conversations in which the client authorized the specific trades which were made in his account on July 16, 2015.

146. The Pathway notes which did exist of a meeting with the client which took place on July 5, 2015, did not provide any details of the trades that occurred on July 16, 2015 as required by the Member’s PPM.

147. We find, therefore, that with respect to the transaction at issue relating to monies invested in client EM's LIRA account on July 16, 2015, while many aspects of that transaction were documented, one important aspect was not – namely – evidence linking the client's instructions to the actual trades that were made.

148. There was no documentation - whether a document signed by the client or a note made by the Respondent that captured the actual fund selection that occurred for the transactions made on July 16, 2015.

149. While this may seem like a minor oversight, failure to document a client's instructions compromises the ability of a Member to oversee transactions and is, therefore, significant.

150. We find, therefore, that in failing to document client trade transactions for client EM as required in accordance with Investors Group's policies and procedures, the Respondent failed to comply with MFDA Rules 1.1.2 (compliance by approved persons), 2.1.1 (standard of conduct) and 2.5.1 (member responsibilities).

151. In making this finding we again emphasize there was no evidence of harm to the client or benefit to the Respondent.

152. Having found both allegations as amended, to be proven, we now move to the issue of the appropriate penalty.

## **VI. Penalty – Both Allegations**

153. MFDA By-law No. 1, section 24 sets out the disciplinary power of Hearing Panels. With respect to Approved Persons, the By-law states:

### **“24.1 Power of Hearing Panels to Discipline**

#### *24.1.1 Approved Persons*

A Hearing Panel of the applicable Regional Council shall have power to impose upon an Approved Person or any other person under the jurisdiction of the Corporation any one or more of the following penalties:

- (a) a reprimand;
  - (b) a fine not exceeding the greater of:
    - (i) \$5,000,000.00 per offence; and
    - (ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation;
  - (c) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;
  - (d) revocation of the authority of such person to conduct securities related business;
  - (e) prohibition of the authority of such person to conduct securities related business in any capacity for any period of time;
  - (f) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel;
- if, in the opinion of the Hearing Panel, the person:
- (g) has failed to carry out any agreement with the Corporation;
  - (h) has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or any regulation or policy made pursuant thereto;
  - (i) has failed to comply with the provisions of any By-law, Rule or Policy of the Corporation;
  - (j) has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or
  - (k) is otherwise not qualified whether by integrity, solvency, training or experience.”

154. In this case, Enforcement Counsel submitted that in light of the allegations set out in the Notice of Hearing, an appropriate penalty would be a fine between \$20,000.00 and \$30,000.00.

155. We recognize that the main purpose in imposing a penalty in cases such as this one is not to punish past conduct but rather to deter the individual Respondent and others from making future violations, thereby protecting the public.

156. The Hearing Panel in *Tonnies (Re)*, in describing the role of a hearing panel when determining penalty cited with approval the Ontario Securities Commission’s decision in *Re Mithras Management Ltd. et al (1990)*, 13 O.S.C.B. 1600. In that case the Commission stated at p.1610:

“... [T]he role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.”

***Tonnies (Re)*, MFDA File No. 200503, Hearing Panel of the Central Regional Council, Decision and Reasons dated June 27, 2005 at paragraph 45**

157. The Courts and other Tribunals have set out a number of factors which should be taken into account when determining penalties under provisions which are similar to section 24 of MFDA By-law No. 1.

158. The Supreme Court of Canada has indicated that in determining an appropriate penalty, tribunals must keep in mind that the primary goal of securities regulation is the protection of the investing public.

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

159. The Court in *Pezim* stated that in addition to protection of the public, the goals of securities regulation include fostering public confidence in the capital markets and the securities industry.

***Pezim, supra*, at paragraphs 59 and 68**

160. To determine whether a penalty is appropriate, a Hearing Panel should, therefore, consider:

- a) the protection of the investing public;
- b) the integrity of the securities market;
- c) specific and general deterrents;
- d) the protection of the governing body’s membership; and
- e) the protection of the integrity of the governing body’s enforcement process.

***Tonnies (Re), supra, at paragraph 46***

161. Hearing Panels frequently consider the following additional factors when determining whether a penalty is appropriate:

- 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.

***Breckenridge (Re), MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007***

**MFDA Penalty Guidelines**

162. The MFDA Penalty Guidelines are another resource that a Hearing Panel may consult when determining the appropriateness of the penalty to be imposed. The Penalty Guidelines are not binding on a Hearing Panel but provide a basis upon which a Hearing Panel's discretion can be

exercised consistently, in like circumstances. Staff submitted that the MFDA Penalty Guidelines recommend the following with respect to the conduct at issue in these proceedings:

BREACH	PENALTY TYPE & RANGE	SPECIFIC FACTORS TO CONSIDER
<b>Standard of Conduct</b> (Rule 2.1.1) (Guidelines, p. 27)	<ul style="list-style-type: none"> <li>• Fine: Minimum of \$5,000.</li> <li>• Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course).</li> <li>• Suspension.</li> <li>• Permanent prohibition in egregious cases.</li> </ul>	<ol style="list-style-type: none"> <li>1) Nature of the circumstances and conduct.</li> <li>2) Number of individuals affected.</li> <li>3) Whether the conduct is likely to bring the individual, the Member or the mutual fund industry into disrepute.</li> </ol>
<b>Policies and Procedures</b> (Guidelines, p. 16)	<ul style="list-style-type: none"> <li>• Fine: Minimum of \$5,000.</li> <li>• Write or rewrite an appropriate industry course (e.g. IFIC Officers', Partners' and Directors' Course or Canadian Investment Funds Course).</li> <li>• Suspension.</li> <li>• Permanent prohibition in egregious cases.</li> </ul>	<ol style="list-style-type: none"> <li>1) Extent and nature of internal control inadequacy (e.g. capital requirement control, insurance or client funds/securities segregation or safekeeping problem).</li> <li>2) Intentional or reckless disregard for requirements, or whether due to carelessness or inadvertence.</li> </ol>

### Considerations in the Present Case

#### Staff's Submissions

163. Staff submitted that it had taken the factors set out above into account, as follows:

#### Nature of the Misconduct

164. With respect to the seriousness of the Allegations, Staff reiterated that allegations regarding the use of pre-signed forms constitute serious misconduct, notwithstanding the lack of client harm. A violation of the MFDA Code of Conduct Rule 2.1.1 Staff submitted, is a serious violation of MFDA Rules and must be treated seriously.

165. Staff submitted that for Allegation No. 1, regarding pre-signed forms, what was significant in this case was the large number of forms that were involved, being 186 forms.

166. Similarly, with respect to the matters set out in Allegation No. 2, Staff reminded the Panel as to the seriousness of misconduct which flows from a failure to follow a Member's requirements to document evidence of client instructions.

167. Staff submitted that the penalty should be such that it affirms public confidence in the regulatory system and ensures that the misconduct is not repeated by others in the industry.

168. With this in mind, Staff submitted that the proposed penalty – a fine of between \$20,000.00 to \$30,000.00 and costs of \$7,500.00 is significant and would send a message to the industry and capital markets about the seriousness of the misconduct at issue in this proceeding.

### **Client Harm**

169. There is no evidence of client harm or unauthorized discretionary trading.

170. Staff confirmed that there was no client harm, no unauthorized trading and no client complaints for either of the allegations.

171. However, Staff submitted that that does not lessen the seriousness of the conduct and is not so much a mitigating factor as simply not an aggravating factor.

172. In response to a question from the Panel on that point, Staff said that in its view a mitigating factor would be something which would actively go towards reducing the penalty. In this case the fact that there was no client harm, Staff submitted, was a neutral factor and not something that should go towards lessening the penalty.

173. An example of a mitigating factor, Staff said, would be where a Respondent enters into a Settlement Agreement, thereby publicly recognizing the seriousness of their misconduct.

174. Entering into a Settlement Agreement Staff submitted, also spares the MFDA the time and resources of having to prove an allegation.

175. No such factors were present in this case, however.

### **Benefits Received by the Respondent**

176. There is no evidence that the Respondent received any benefits outside what he would normally be entitled to receive had he carried out the transactions in the proper manner.

### **Respondent's Experience and Level of Activity in the Markets**

177. Having been registered since 1996 in the mutual fund industry the Respondent ought to have known and respected the compliance requirements of both the Member and the MFDA.

178. Staff acknowledged, however, that this was the Respondent's first MFDA violation in what was otherwise an unblemished career.

### **Deterrence**

179. The effect of general deterrence was discussed by the Supreme Court of Canada in *Cartaway Resources Corp.*:

“A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence with the CE as a factor, albeit not the only one, in imposing a sanction ... the respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged ...”

***Cartaway Resources Corp. (Re)*, [2004] 1 SCR 672 (SCC) at paragraph 61**

180. Although the Respondent has retired, Staff submitted that the proposed penalty will certainly deter others from engaging in similar misconduct.

### **Respondent's Previous Conduct**

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

### **Respondent's Recognition of the Seriousness of his Misconduct**

182. Staff submitted that the Respondent has not demonstrated that he recognizes the seriousness of his misconduct.

### **Penalty Guidelines**

183. MFDA Staff requested a fine which is greater than the suggested minimum fine of \$5,000.00 as set out in the Penalty Guidelines. In making its submission Staff pointed out:

- a) The Respondent obtained a large number of pre-signed account forms; and
- b) There are multiple MFDA Rule violations as between the two proven allegations.

184. Numerous cases were cited to the Panel as a guide to the appropriate penalties that should be considered. Staff pointed out, however, that none of the cases was exactly on point in part because most of the MFDA decisions where a penalty was imposed with respect to use of pre-signed forms are decisions which were made in the context of settlement agreements.

185. Nonetheless, Staff brought the following cases to the Panel's attention for its consideration:

<b>Case:</b>	<b>Facts:</b>	<b>Penalties:</b>
<i>Burchill (Re)</i>	<ul style="list-style-type: none"><li>• The Respondent obtained, possessed, and used to process transactions, 222 pre-signed account forms in respect of 92 clients.</li></ul>	The Hearing Panel approved the following settlement: <ul style="list-style-type: none"><li>• \$20,000 fine</li><li>• 1 month suspension</li><li>• \$2,500 costs</li></ul>

<b>Case:</b>	<b>Facts:</b>	<b>Penalties:</b>
<i>Owen (Re)</i>	<ul style="list-style-type: none"> <li>• The Respondent obtained, possessed, and in some instances, used to process transactions, 164 pre-signed account forms in respect of 26 clients.</li> <li>• The Respondent altered 11 accounts forms in respect of 7 clients.</li> <li>• 3 of the forms were obtained after the MFDA issued Bulletin #0661-E. The same 3 forms were obtained while the Respondent was on close supervision for the use of pre-signed forms.</li> </ul>	<p>The Hearing Panel approved the following settlement:</p> <ul style="list-style-type: none"> <li>• \$20,000 fine</li> <li>• 2 month suspension</li> <li>• \$2,500 costs</li> </ul>
<i>Yeung (Re)</i>	<ul style="list-style-type: none"> <li>• The Respondent obtained and used 101 blank or partially complete pre-signed account forms or photocopies of the same.</li> <li>• Most forms consisted of trading or KYC forms.</li> </ul>	<p>The Hearing Panel approved the following settlement:</p> <ul style="list-style-type: none"> <li>• \$2,500 fine</li> <li>• 2 year suspension</li> <li>• \$2,500 costs</li> </ul>
<i>Williamson (Re)</i>	<ul style="list-style-type: none"> <li>• The Respondent obtained and in some cases used 136 blank or partially completed pre-signed account forms.</li> <li>• The Member imposed a \$6,000 close supervision fee and required the completion of an ethics and compliance officers' course.</li> </ul>	<p>The Hearing Panel approved the following settlement:</p> <ul style="list-style-type: none"> <li>• \$11,000 fine</li> <li>• \$2,500 costs</li> </ul>
<i>Doyle, Andrew (Re)</i>	<ul style="list-style-type: none"> <li>• The Respondent, or his assistants, altered 60 account forms without obtaining client initials.</li> <li>• The Respondent, or his assistants, obtained, possessed, and in some cases used, 65 pre-signed account forms.</li> </ul>	<p>The Hearing Panel approved the following settlement:</p> <ul style="list-style-type: none"> <li>• \$17,500 fine</li> <li>• \$2,500 costs</li> </ul>

**Burchill (Re), MFDA File No. 201755, Hearing Panel of the Central Regional Counsel, Decision and Reasons dated September 18, 2017**

**Owen (Re), MFDA File No. 201784, Hearing Panel of the Prairie Regional Counsel, Decision and Reasons dated December 7, 2017**

**Yeung (Re), MFDA File No. 201502, Hearing Panel of the Pacific Regional Counsel, Decision and Reasons dated September 28, 2016**

**Williamson (Re), MFDA File No. 201533, Hearing Panel of the Prairie Regional Counsel, Decision and Reasons dated November 6, 2015**

**Doyle, Andrew (Re), MFDA File No. 201651, Hearing Panel of the Central Regional Counsel, Decision and Reasons dated March 16, 2017**

186. Of these decisions, Staff highlighted the decision in *Burchill*, as being of particular relevance, because it was a case which involved 222 pre-signed account forms.

187. Like the Respondent in this case, Mr. Burchill was senior in the industry and there was no evidence of client harm, lack of authorization, client complaints or discretionary trading. The Hearing Panel in that case imposed a fine of \$20,000.00 and a one month suspension.

188. There were, however, mitigating factors in that case because it involved a settlement. Staff submitted, therefore, that the fine of \$20,000.00 which was approved by the Hearing Panel in that case is the minimum this Panel ought to consider when dealing with conduct of a similar nature, in a fully contested hearing on the merits and without the mitigating factors that exist in a settlement hearing.

**Respondent's Submissions**

189. The Respondent, in his submission on penalty highlighted for the Panel that because of these proceedings he has lost his career, has experienced tremendous financial expense and more anxiety and distress than could actually be quantified.

190. He also reminded the Panel that there was no harm caused to investors nor did he receive any benefit from the conduct. In his view, he was set up to fail, by the Member.

**Costs**

**Staff's Submissions**

191. In support of its submission that the Respondent should be ordered to pay costs in the amount of \$7,500.00, Staff provided the Panel with a draft Bill of Costs which, Staff confirmed,

was prepared simply to give the Panel an idea of how many hours had been spent in prosecuting this matter and what the cost would be using a billing rate of \$150.00 per hour for counsel and \$100.00 per hour for the senior investigator.

192. The draft Bill of Costs showed costs just under \$15,000.00.

193. Staff referred us to three decisions each involving a one day contested hearing where costs were awarded in the amount of \$5,000.00:

***Phillips (Re)*, MFDA File No. 201631, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated February 28, 2017**

***Husain (Re)*, MFDA File No. 201556, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated March 17, 2016**

***McKenzie (Re)*, MFDA File No. 201508, Hearing Panel of the Central Regional Council, Decision and Reasons (Penalty) dated February 9, 2017**

194. Staff submitted that based on these cases, the range for costs in a contested hearing is between \$5,000.00 and \$10,000.00. In the present case which involved a two day hearing and the requirement to call two witnesses, \$7,500.00 was appropriate.

195. The Respondent had nothing further to add with respect to the issues of costs.

### **Analysis**

196. Based on the totality of the evidence and the submissions from both Staff and the Respondent, the Panel has determined that the Respondent should pay the following penalty:

- a) A fine of \$25,000.00; and
- b) Costs of \$5,000.00.

197. In making this determination we agree with the submissions of Staff that the misconduct in this case represents more than a mere technical violation. Although the Respondent believed that he was acting in the best interests of his clients, for the reasons set out earlier in this decision, the penalty must demonstrate to the public and the industry, the seriousness of the violations of the MFDA Rules which occurred in this case.

198. This penalty is in keeping with the MFDA's goal of enhancing investor protection and strengthening public confidence in the Canadian Mutual Fund industry, and is intended to ensure high standards of conduct by Approved Persons.

199. We recognize that the Respondent has retired from the industry, however, this penalty should prevent future misconduct by deterring others from engaging in similar misconduct and will improve overall compliance by mutual fund industry participants.

200. In reaching our decision, we have taken into account the fact that the Respondent was required to pay a \$1,000.00 penalty, by the Member.

201. On the issue of costs, the Panel acknowledges that costs for a contested hearing typically range from \$5,000.00 to \$10,000.00. We find that \$5,000.00 is appropriate in the circumstances, keeping in mind that penalties in these matters are generally meant to deter more rather than to punish misconduct.

## VII. Conclusion

202. For all of the reasons set out above, we find that the two Allegations set out in the Notice of Hearing, as amended at the outset of these proceedings, have been proven and we therefore order the Respondent to pay:

- a) A fine in the amount of \$25,000.00; and
- b) Costs in the amount of \$5,000.00.

**DATED** this 31<sup>st</sup> day of October, 2018.

“Sherri Walsh”

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Sherri Walsh  
Chair

“Nada Israeli”

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Nada Israeli  
Industry Representative

“Richard Sydenham”

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Richard Sydenham  
Industry Representative

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