



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: Garth Plunkett

Heard: November 29, 2016, in Calgary, Alberta
Reasons for Decision: January 17, 2017

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

The Hon. René P. Foisy
M. Elaine Bradley
Richard R. Sydenham

Chair
Industry Representative
Industry Representative

Appearances:

Justin Dunphy)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Garth Adrian Plunkett)	In Person and not represented by counsel
)	
)	

1. By Notice of Settlement Hearing dated November 14, 2016, and duly served upon Garth Adrian Plunkett (the “Respondent”), a settlement hearing was heard in Calgary, Alberta on November 29, 2016.

2. The relevant facts are as follows.

AGREED FACTS.

Registration History

7. Since August 21, 1997, the Respondent has been registered in Alberta as a mutual fund salesperson (now known as dealing representative) with Desjardins Financial Security Investments Inc. (“Desjardins”), a Member of the MFDA.

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

Altered Account Forms

9. At all material times, Desjardins’ policies and procedures prohibited its Approved Persons from using altered account forms.

10. Between May 13, 2011 and April 11, 2014, the Respondent altered 3 letters of direction (“LOD”) in respect of 3 clients, by using correction fluid to alter information on the account forms and submitting them to the Member for processing, without having the clients initial the alterations.

11. The LOD were processed in accordance with client instructions.

Pre-Signed Account Forms

12. At all material times, Desjardins' policies and procedures prohibited its Approved Persons from using pre-signed account forms.

13. Between February 22, 2007 and June 27, 2013, the Respondent or his assistant for whom he was responsible, obtained, possessed and used to process transactions, 33 pre-signed account forms in respect of 26 clients.

14. The pre-signed account forms were comprised of:

- a) 24 LOD;
- b) 1 Know Your Client Update Form;
- c) 3 Transfer Forms; and,
- d) 5 Trade Tickets.

Member Response

15. On June 24 and 25, 2015, Desjardins reviewed all of the client files maintained by the Respondent, and on October 9, 2015, Desjardins sent letters to all clients for whom pre-signed or altered forms were identified to determine whether the Respondent engaged in any unauthorized trading activity in the accounts of the clients. No clients responded to Desjardins.

16. On November 17, 2015, as a result of the conduct described above, Desjardins issued a warning letter to the Respondent, and placed the Respondent on close supervision for a period of 12 months.

Additional Factors

17. The Respondent has no prior disciplinary history with the MFDA.

18. There is no evidence of client harm in this matter.

19. There is no evidence that the Respondent received any financial benefit from engaging in the misconduct beyond the commissions or fees to which he would have been ordinarily entitled had the transactions in the clients' accounts been carried out in the proper manner.

20. The Respondent has expressed remorse for his misconduct and has cooperated fully with Staff during the course of the investigation, and by agreeing to this settlement, has avoided the necessity of a full hearing on the merits.

Contraventions

3. The Respondent has admitted that between May 13, 2011 and April 11, 2014, he altered and used to process transactions, 3 client account forms with respect to 3 clients, without having the clients initial the alterations, contrary to MFDA Rue 2.1.1.

4. The Respondent admitted that between February 22, 2007 and June 27, 2013, he, or his assistant for whom he was responsible, obtained, possessed and used to process transactions, 33 pre-signed account forms in respect of 26 clients, contrary to MFDA Rule 2.1.1

Terms of Settlement

5. The Respondent has agreed to the following terms of settlement:

- a) The Respondent shall pay a fine in the amount of \$11,250, pursuant to section 24.1.1(b) of 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 shall in the future comply with MFDA Rule 2.1.1; and
- d) The Respondent will attend the Settlement Hearing in person.

Settlement Agreement, at para. 5

6. For the reasons set out herein, Staff submits that the settlement advances the public interest as it is reasonable and proportionate having regard to the nature and extent of the Respondent’s misconduct and all of the circumstances.

THE LAW

Applicable Provisions

7. The Relevant MFDA provisions in this matter are:

Law	Details of Provision	Book of Authorities
MFDA Rule 2.1.1	Standard of Conduct	Tab 1.
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 	Tab 2.

Factors Concerning Acceptance of a Settlement Agreement

8. 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.

MFDA By-law No. 1, Staff’s Book of Authorities, Tab 2.

9. The role of a Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing. As stated by the MFDA Hearing Panel in *Sterling Mutuals Inc. (Re)*, citing the I.D.A. Ontario District Council in *Milewski (Re)*:

“We also note that while in a contested hearing the Panel attempts to determine the correct penalty, in a settlement hearing the Panel “will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a

settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.” [Emphasis added.]

Sterling Mutuals Inc. (Re), MFDA File No. 200820, Hearing Panel of the Central Regional Council, Decision and Reasons dated August 21, 2008 at para. 37, Staff’s Book of Authorities, Tab 3.

Milewski (Re), [1999] IDACD No. 17 at p. 12, Ontario District Council Decision dated July 28, 1999, Staff’s Book of Authorities, Tab 4.

10. Settlement assist the MFDA in meeting its regulatory objective of protecting the public by proscribing activities that are harmful to the public, and by enabling flexible remedies tailored to the interests of both the MFDDA and a respondent. The Panel agrees that the ability of the MFDA to enter into settlements is enhanced where Hearing Panels do not reject a settlement agreement unless the proposed penalty clearly falls outside the reasonable range of appropriateness.

British Columbia Securities Commission v Seifert, 2007 BCCA 484 at para. 31, Staff’s Book of Authorities, Tab 5.

11. In past cases, 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 specific and general deterrence;
- d) Whether the settlement agreement 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; and

- g) Whether the settlement agreement will foster confidence in the regulatory process itself.

Sterling Mutuals Inc. (Re), *supra*, at para. 36 and the decisions cited therein, Staff's Book of Authorities, Tab 3.

MFDA Penalty Guidelines

12. The MFDA Penalty Guidelines are an additional resource that a Hearing Panel may consult when determining the appropriateness of the penalty to be imposed pursuant to a settlement agreement. The penalty types and ranges stated in the Penalty Guidelines are not mandatory or binding; they are intended to provide a basis upon which a Hearing Panel's discretion can be exercised consistently in like circumstances.

MFDA Penalty Guidelines, Staff's Book of Authorities, Tab 6

13. 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
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 industry into disrepute

MFDA Penalty Guidelines at p. 27, Staff's Book of Authorities, Tab 6.

Appropriateness of the Proposed Penalty

14. The primary goal of securities regulation, whether in the context of a settlement hearing or a contested hearing, is protection of the investor.

Pezim v British Columbia (Superintendent of Brokers), [1994] 2 SCR 557 (SCC) at paras. 59, 68, Staff's Book of Authorities, Tab 7.

Breckenridge (Re), MFDA File No. 200718, Hearing Panel of the Central Regional Council, Decision and Reasons dated November 14, 2007 at para 74, Staff's Book of Authorities, Tab 8.

15. In addition to addition to protection of the investor, the goals of securities regulation include fostering public confidence in the capital markets and the securities industry.

Pezim v British Columbia (Superintendent of Brokers), *supra*, at paras. 59, 68, Staff's Book of Authorities, Tab 7.

16. Hearing Panels frequently consider the following 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), *supra*, at para. 77 and the decisions cited therein, Staff's Book of Authorities, Tab 8.

APPLICATION IN THE PRESENT CASE

17. Staff has taken the factors set out above into account in reaching the Settlement Agreement with the Respondent, as follows:

i. Nature of the Misconduct: Pre-Signed and Altered forms

18. The Respondent's misconduct is serious; he altered and used to process transactions, 3 client account forms in relation to 3 clients, and he, or his assistant for whom he was responsible, obtained, possessed and used to process transactions, 33 pre-signed account forms in respect of 26 clients.

19. MFDA Rule 2.1.1 sets the standard of conduct to be followed by all Approved Persons. The Rule is designed to protect the public interest by requiring Approved Persons to adhere to a high standard of ethical conduct. The Rule has been interpreted and applied in a purposive manner in a wide range of circumstances. As stated by the MFDA Hearing Panel in *Breckenridge (Re)*: "The Rule articulates the most fundamental obligations of all registrants in the securities industry."

Breckenridge (Re), *supra*, at para. 71, Staff's Book of Authorities, Tab 8

Price (Re), MFDA File No. 200814, Hearing Panel of the Central Regional Council, Decision and Reasons dated April 18, 2011, at paras. 118 – 121, Staff's Book of Authorities, Tab 9.

20. MFDA Rule 2.1.1. requires that each Member and Approved Person deal fairly, honestly, and in good with 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.

MFDA Rule 2.1.1, Staff's Book of Authorities, Tab 1.

21. The MFDA has made clear to Approved Persons since October 31, 2007, that possessing and using pre-signed forms is contrary to the obligations of Rule 2.1.1.

Member Staff Notice 0066: Pre-Signed Forms, dated October 31, 2007, Staff's Book of Authorities, Tab 10.

22. Hearing Panels of the MFDA, IIROC, and provincial securities commissions have also confirmed that the possession and use of pre-signed forms is prohibited.

Price (Re), *supra* at para. 135 and the decisions cited therein, Staff's Book of Authorities, Tab 9.

23. The MFDA Hearing Panel in *Price (Re)* identified the dangers posed by pre-signed forms which can be summarized as follows:

- a) pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading;
- b) at worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other harmful conduct towards a client;
- c) pre-signed forms subvert the ability of a Member to properly supervise trading activity.

Price (Re), *supra*, at paras. 122 – 124, Staff's Book of Authorities, Tab 9.

24. The prohibition on the use of pre-signed account forms applies regardless of whether the client was aware, or authorized the use, of the pre-signed forms, and whether the forms were actually used by the Approved Person for discretionary trading or other improper purposes.

Wellman (Re), MFDA File No. 201529, Hearing Panel of the Central Regional Council, Decision and Reasons dated December 21, 2015, at para. 10, Staff's Book of Authorities, Tab 11.

25. Like pre-signed account forms, a prohibition against altering 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 warned Approved Persons against the use of altered forms.

Member Staff Notice 0066: Pre-Signed Forms, dated October 31, 2007, Staff's Book of Authorities, Tab 10.

26. Hearing Panels have held that altering client account forms is a contravention of the standard of conduct as set out in MFDA Rule 2.1.1.

Byce (Re), MFDA File No. 201311, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 4, 2013, Staff's Book of Authorities, Tab 18.

Weller (Re), MFDA File No. 201544, Hearing Panel of the Central Regional Council, Decision and Reasons dated February 19, 2015, Staff's Book of Authorities, Tab 19.

27. Like pre-signed account forms, the creation, possession or use of an altered form is considered serious misconduct. Similar to pre-signed forms, altered forms destroy the audit trail and impugn the integrity of a client account form. 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*, at paras. 122 -124, Staff's Book of Authorities, Tab 9.

28. 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. Unlike pre-signed account forms, where the client knows he or she is signing an incomplete form to be used in some way, in the case of a form altered by the Approved Person, the possibility exists that the client is unaware of the Approved Person's actions.

Wellman (Re), *supra*, at para. 11, Staff's Book of Authorities, Tab 11

29. On the basis of the foregoing, by obtaining and using altered and pre-signed forms as described in Part III of the settlement Agreement, the Respondent engaged in conduct prohibited by MFDA Rule 2.1.1, and therefore, engaged in misconduct that should be regarded as serious.

ii. The Respondent's Past Conduct

30. The Respondent has never previously been the subject of an MFDA disciplinary proceeding.

Settlement Agreement, at para. 17.

iii. The Respondent's Experience in the Securities Industry

31. The Respondent has been registered as a mutual fund dealing representative since August 21, 1997.

Settlement Agreement, at para. 7

iv. The Respondent's Recognition of the Seriousness of her Misconduct

32. By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and avoided the necessity of the MFDA incurring the additional time and expense of a full contested hearing. The Respondent also co-operated with Staff's investigation of this matter.

Settlement Agreement, at para. 20.

v. Client Harm and Benefits Received by the Respondent

33. Staff's investigation did not reveal any evidence of unauthorized trades or client losses. There is no evidence to suggest that the Respondent received a financial or other benefit through his conduct, and there were no client complaints.

vi. Deterrence

34. Staff Submits a fine of \$11,250.00 is necessary and sufficient to achieve the goals of specific and general deterrence, having regard to the aggravating factors described above.

35. The penalty demonstrates that the Respondent’s misconduct in all of the circumstances is serious and has significant consequences. The penalty will also deter others in the capital markets from engaging in similar activity.

vii. Penalty Guidelines

36. Staff is seeking a \$11,250 fine, which is higher than the minimum fine recommended by the Penalty Guidelines for an Approved Person’s breach of the standard of conduct. The Panel agrees that a higher than minimum fine is appropriate in the present case, having regard to the above-noted aggravating factors.

viii. Previous Decisions in Similar Cases

37. The following penalties have been imposed in similar circumstances:

CASE	FACTS	OUTCOME
<i>Wellman (Re)</i>	<ul style="list-style-type: none"> • The Respondents admitted that they: <ul style="list-style-type: none"> ○ obtained, maintained, and in some instances, used to process trades, 29 pre-signed account forms, and one pre-signed cheque in respect of 16 clients; ○ altered risk tolerances, investment objectives, or investment instructions recorded on 7 account forms in respect of 6 clients; and ○ processed a trade in a client account without documenting the client’s authorization of the trade. • There was no evidence of client complaints and no evidence of harm. • The Respondents did not have any discipline history. 	<p>The Hearing Panel accepted the following settlement terms for each Respondent:</p> <ul style="list-style-type: none"> • Fine of \$10,000 • Costs of \$1,000
<i>Weller (Re)</i>	<ul style="list-style-type: none"> • The Respondent admitted that he: <ul style="list-style-type: none"> ○ obtained, possessed, and in some instances, used to process transactions, 20 pre-signed account forms in respect of 11 clients; and 	<p>The Hearing Panel accepted the following settlement terms:</p> <ul style="list-style-type: none"> • Fine of \$10,000 • Costs of \$2,500

	<ul style="list-style-type: none"> ○ altered information on 2 account forms in respect of 2 clients without obtaining client initials authorizing the changes. <p>• There was no evidence of client harm and the Respondent did not have any discipline history.</p>	
<i>Estabrooks (Re)</i>	<p>• The Respondent admitted that he:</p> <ul style="list-style-type: none"> ○ altered 2 client account forms in respect of 2 clients without obtaining client initials authorizing the changes; and ○ obtained, possessed, and used to process transactions, 26 pre-signed account forms in respect of 13 clients. 	<p>The Hearing Panel accepted the following settlement terms:</p> <ul style="list-style-type: none"> • Fine of \$7,500 • Costs of \$2,500
<i>Coelho (Re)</i>	<p>• The Respondent admitted that he obtained, possessed, and in some instances used to process transactions, 49 pre-signed account forms in respect of 27 clients.</p>	<p>The Hearing Panel accepted the following settlement terms:</p> <ul style="list-style-type: none"> • Fine of \$12,500 • Costs of \$2,500
<i>Lynn (Re)</i>	<p>• The Respondent admitted that she:</p> <ul style="list-style-type: none"> ○ obtained, possessed, and used to process trades, 54 pre-signed account forms in respect of 10 clients; and ○ obtained, altered, and in one instance, used to complete a transaction, 2 client account forms in respect of 2 clients. 	<p>The Hearing Panel accepted the following settlement terms:</p> <ul style="list-style-type: none"> • Fine of \$7,500 • Costs of \$2,500
<i>Gocool (Re)</i>	<p>The Respondent admitted that he:</p> <ul style="list-style-type: none"> ○ obtained, possessed, and in some instances used to process transactions, 52 pre-signed account forms in respect of 10 clients; ○ Altered and used 5 client account forms in respect of 5 clients by using liquid correction fluid to change information on the account forms to reflect client instructions, without having the clients initial the changes; ○ Acting in the capacity of branch manager, reviewed and approved the use of 54 account forms. 	<p>The Hearing Panel accepted the following settlement terms:</p> <ul style="list-style-type: none"> • Fine of \$15,000 • Costs of \$2,500

CONCLUSION

38. Having regard to all of the foregoing factors, the Panel concludes that the penalties proposed in the Settlement Agreement are reasonable and proportionate and will deter the Respondent and other Approved Persons from obtaining, maintaining and using pre-signed forms. Accordingly, acceptance of this Settlement Agreement will advance the public interest and the objective of the MFDA to enhance investor protection and ensure high standards of conduct in the mutual fund industry.

39. The Settlement Agreement is accepted.

40. The formal Order is attached as Schedule “A” hereto.

DATED this 17th day of January, 2017.

“René P. Foisy”

The Hon. René P. Foisy
Chair

“M. Elaine Bradley”

M. Elaine Bradley
Industry Representative

“Richard R. Sydenham”

Richard R. Sydenham
Industry Representative



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: Garth Adrian Plunkett

ORDER

(ARISING FROM SETTLEMENT HEARING ON NOVEMBER 29, 2016)

WHEREAS the Respondent entered into a settlement agreement with Staff of the MFDA, dated October 6, 2016 (the “Settlement Agreement”), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

AND WHEREAS the Hearing Panel is of the opinion that:

- a) between May 13, 2011 and April 11, 2014, the Respondent altered and used to process transactions, 3 client account forms with respect to 3 clients, without having the clients initial the alterations, contrary to MFDA Rule 2.1.1; and
- b) between February 22, 2007 and June 27, 2013, the Respondent, or his assistant for whom he was responsible, obtained, possessed and used to process transactions, 33 pre-signed account forms in respect of 26 clients, contrary to MFDA Rule 2.1.1.

IT IS HEREBY ORDERED THAT the Settlement Agreement is accepted, as a consequence of which:

1. The Respondent shall pay a fine in the amount of \$11,250, pursuant to section 24.1.1(b) of By-law No. 1;
2. The Respondent shall pay costs in the amount of \$2,500, pursuant to section 24.2 of By-law No. 1;
3. The Respondent shall in the future comply with MFDA Rule 2.1.1; and
4. If at any time a non-party to this proceeding, with the exception of the bodies set out in section 23 of MFDA By-law No. 1, requests production of or access to exhibits in this proceeding that contain personal information as defined by the MFDA Privacy Policy, then the MFDA Corporate Secretary shall not provide copies of or access to the requested exhibits to the non-party without first redacting from them any and all personal information, pursuant to Rules 1.8(2) and (5) of the MFDA *Rules of Procedure*.

DATED this 29th day of November, 2016.

“Rene P. Foisy”

The Hon. Rene P. Foisy
Chair

“M. Elaine Bradley”

M. Elaine Bradley
Industry Representative

“Richard Sydenham”

Richard Sydenham
Industry Representative