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: Brian Louis Poncelet

Heard: October 23, 2013 in Toronto, Ontario
Reasons for Decision: December 11, 2013

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. John B. Webber, Q.C.	Chair
Terrence Bourne	Industry Representative
Selwyn Kossuth	Industry Representative

Appearances:

Shelly Feld	)))	Enforcement Counsel, Mutual Fund Dealers Association of Canada
Ellen Bessner	)))	Counsel for the Respondent

1. By Notice of Settlement Hearing dated October 7, 2013, a hearing panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada ("MFDA") was convened to consider whether, pursuant to section 24.4 of By-law No. 1 of the MFDA, the Panel should accept a Settlement Agreement, dated October 5, 2013, entered into by the Staff of the MFDA and the Respondent, Brian Louis Poncelet.

2. At the outset of the proceedings, we considered a joint motion by Staff and Counsel for the Respondent to move the proceedings *in camera*. We granted that motion. We then considered the provisions of the Settlement Agreement aided by submissions as to the applicable law which should guide this Panel in determining whether to accept or reject the Settlement Agreement.

THE ALLEGATIONS

3. The Respondent admits that:

a) between January 5, 2010 and March 5, 2012, he obtained, maintained and maintained approximately 44 blank pre-signed forms bearing signatures of 18 different clients, contrary to MFDA Rule 2.1.1; and

b) between January 5, 2010 and August 14, 2011, he used 11 forms associated with the investment accounts of 6 different clients to process transactions that were either:

(i) signed by clients prior to the completion of the forms; or

(ii) altered in content after being signed without evidence of client consent to the changes made to the forms after the forms were signed;

for the purpose of processing trades or updating client KYC information for the 6 clients, contrary to MFDA Rule 2.1.1.

FACTS

4. The Respondent, who was first registered as a mutual fund salesperson on May 19, 1994, has been registered with FundEX Investments Inc., a Member of the MFDA, since August 14,

2008. A branch review was conducted in March 2012. The auditor conducted a branch review of 35 of the Respondent's client files which contained approximately 54 instances where the Respondent used, reused or maintained blank pre-signed forms or altered forms after they had been signed by the clients.

5. In particular, there were 41 blank pre-signed forms, five forms containing whiteout that had been used to record changes, and 8 forms on which no date was recorded or a date that had been filled in after the client had signed the form.

6. The Respondent used the forms described above to process trades and update KYC information. The Respondent's files also contained one fax cover sheet dated January 27, 2011 instructing a client to sign a blank form and fax it to the Respondent and one order entry form in which the client's signature had been cut out of the document. The Respondent could have reused the signatures on another form although there is no evidence that this in fact occurred. The Respondent acknowledged that he sometimes maintained and used the pre-signed forms for the convenience of clients and in order to be able to process trades more rapidly. He stated he did not use pre-signed forms to process discretionary or unauthorized trades.

THE MEMBER'S RESPONSE

7. The Member, in response to all of this information, sent letters to 260 clients of the Respondent requesting that they review a three-year transaction history and report any unauthorized transactions. No one responded to these letters. The Member issued a disciplinary letter of reprimand dated June 6, 2012. The Respondent was required to review the files of all clients he serviced and to remove and destroy any pre-signed forms in the files.

8. The Respondent was subjected to strict supervision from June 7, 2012 to September 30, 2013 during which time all transactions processed by the Respondent had to be pre-approved by the Regional Branch Manager. A fine of $500 per month was imposed for a nine-month period, but because no concerns came to light during the supervision period the Member refunded $3,000 to the Respondent such that the total financial penalty paid to the Member totaled $1,500.

9. The Respondent was required to acknowledge receipt of the most recent version of the Member's policies and procedures manual and agree to adhere in the future to the Member's policies and procedures.

10. There is no evidence that the Respondent received any financial benefit, processed any trades or changes to client information without the knowledge or authorization of the client, or any client suffered any financial harm.

ACCEPTANCE OF THE SETTLEMENT AGREEMENT

11. As a Panel, we are obviously concerned with this type of conduct, however we believe that the Settlement Agreement fairly addresses those concerns.

12. In determining whether the Settlement Agreement should be accepted, we have considered a number of factors. These include the following:

a) The public interest and whether the penalty imposed will protect investors.
b) Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement.
c) Whether the Settlement Agreement addresses the issues of both specific and general deterrence.
d) Whether the proposed settlement will prevent the type of conduct which is set out 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 Mutual Fund Dealers Association of Canada.
g) Finally, whether the Settlement Agreement will foster confidence in the regulatory process itself.

13. We believe that each and every one of these factors is dealt with in an appropriate fashion by the Settlement Agreement.

SUBMISSIONS AS TO PENALTY

14. Counsel for the MFDA confirmed a number of matters for the Panel: There was no evidence of material harm to any clients; no clients have complained; no clients have lost any funds or money; and, after his initial failure to disclose, the Respondent made a full and complete admission of his misconduct and cooperated with the MFDA investigators.

15. Enforcement Counsel submitted that there were a number of factors that should be considered as to the acceptance of the Settlement Agreement:

a) The Respondent clearly admits his contraventions.
b) The admissions by the Respondent reduced the cost and time involved in the process and led to certainty as to the procedures to be followed.
c) The fine represents a substantial penalty to the Respondent having consideration of his financial income and resources.
d) The Respondent has no past disciplinary history with the MFDA.
e) The Respondent's misconduct has not caused any financial loss to clients.
f) The Respondent did not process any trades or changes to client information without the knowledge or authorization of his clients.

16. For all of these reasons, and notwithstanding the conduct of the Respondent, we have concluded that the Settlement Agreement is reasonable. In our considerations we have been mindful of the words found in *Re Milewski*, [1999] I.D.A.C.D. No. 17, decided on July 28, 1999. The Panel made these comments at page 9:

> Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement

agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

PENALTY

17. The following penalty and costs will be imposed upon the Respondent:

a) The Respondent will pay a fine in the amount of $3,500, pursuant to section 24.1.1(b) of MFDA By-law No. 1; and

b) The Respondent shall pay costs in the amount of $2,500, pursuant to section 24.2 of MFDA By-law No. 1.

18. We were advised by Enforcement Counsel that the Respondent has tendered two bank drafts, one in the amount of $3,500 and one in the amount of $2,500, in payment of the fine and the costs to be held in escrow pending the acceptance of the Terms of Settlement.

19. After accepting the Settlement Agreement, we rescinded the *in camera* order and signed the order as prepared and presented by Enforcement Counsel. We advised counsel that we would prepare brief reasons for our approval of the Settlement Agreement, which are set forth herein.

DATED this 11th day of December, 2013.

"John B. Webber"
The Hon. John B. Webber, Q.C.,
Chair

"Terrence Bourne"
Terrence Bourne,
Industry Representative

"Selwyn Kossuth"

Selwyn Kossuth,
Industry Representative

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