



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: Kenneth Gerard Power

Heard: November 9, 2017 in Calgary, Alberta

Decision: November 9, 2017

Reasons for Decision: February 14, 2018

REASONS FOR DECISION

Hearing Panel of the Prairie Regional Council:

Graham Price, QC

Kathleen Jost

Richard Sydenham

Chair

Industry Representative

Industry Representative

Appearances:

Justin Dunphy

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Counsel for the Mutual Fund Dealers

Association of Canada

Kenneth Power

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Respondent, in person

Introduction

1. By Notice of Settlement Hearing dated September 29, 2017, and duly served upon Kenneth Gerard Power (“Respondent”) by the Mutual Fund Dealers Association of Canada (“MFDA”) a settlement hearing was heard in Calgary, Alberta on November 9, 2017.
2. The relevant facts, the joint settlement recommendations and Staff’s submissions are as follows.
3. The Respondent appeared without counsel.
4. The agreed facts are set out in Section III of the Settlement Agreement (Exhibit 2 in these proceedings) between the MFDA and the Respondent dated September 28, 2017 (“Settlement Agreement”).

The Settlement Agreement

Contraventions

5. The Respondent has admitted that:
 - a) between May 2011 and August 2015, the Respondent altered 10 account forms in respect of 8 clients by altering information on the account forms without having the clients initial the alterations, contrary to MFDA Rule 2.1.1; and
 - b) between April 2012 and August 2015, the Respondent obtained, possessed, and in some instances, used to process transactions, 13 pre-signed account forms in respect of 6 clients, contrary to MFDA Rule 2.1.1.

Settlement Agreement, at para. 4.

Terms of Settlement

6. The Respondent has agreed, as a term of settlement, to pay a fine in the amount of \$5,000 and to pay costs in the amount of \$2,500.

Settlement Agreement, at para. 5.

7. 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.

Law

Applicable Provisions

8. 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
Sections 20, 24.1.1, 24.1.4, 24.2, 24.4 of MFDA By-law No. 1	Power of hearing panels to discipline approved persons and order the payment of costs	Tab 2
Rules 14 and 15 of the MFDA Rules of Procedure	Rules relevant to MFDA settlement hearings	Tab 3
MFDA Notice #MSN-0066 dated October 31, 2007 (updated March 4, 2013)	Notice regarding signature falsification	Tab 4
MFDA Bulletin #0661-E dated October 2, 2015	Bulletin regarding signature falsification	Tab 5

Factors Concerning Acceptance of a Settlement Agreement

9. 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.

10. 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 6.

Milewski (Re), [1999] IDACD No. 17 at p. 12, Ontario District Council Decision dated July 28, 1999, Staff's Book of Authorities, Tab 7.

11. Settlements 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 MFDA and a respondent. Staff submits 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 8.

12. 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 the issues of both 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 6.

MFDA Penalty Guidelines

13. 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.

Excerpts from the MFDA Penalty Guidelines, Staff's Book of Authorities, Tab 9.

14. 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 mutual fund industry into disrepute

Excerpts from the MFDA Penalty Guidelines at p. 27, Staff's Book of Authorities, Tab 9

Appropriateness of the Proposed Penalty

15. 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 10.

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 11.

16. In 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 10.

17. 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 11.

Application in the Present Case

18. Staff have 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 Account Forms

19. The Respondent's misconduct is serious; he altered 10 account forms in respect of 8 clients by altering information on the account forms without obtaining client initials confirming the changes, and also obtained, possessed, and in some cases, used to process transactions, 13 pre-signed account forms in respect of 6 clients.

20. 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 11.

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 12.

21. 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.

22. The MFDA has made clear to Approved Persons since October 31, 2007, in both MFDA Staff Notices and Bulletins, 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 (updated March 4, 2013), Staff’s Book of Authorities, Tab 4.

MFDA Bulletin #0661-E: Signature Falsification, dated October 2, 2015, Staff’s book of Authorities, Tab 5.

23. 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 12.

24. 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 forms of harmful conduct towards a client; and
- 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 12.

25. 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 13.

26. Hearing Panels have also held that altering or falsifying 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 14.

27. Like pre-signed account forms, the creation, possession or use of an altered or falsified form is considered serious misconduct. The reasoning in *Price (Re)*, above, at paragraph 21, for why pre-signed account forms affect the integrity and reliability of account documents also applies to altered and falsified forms. With respect to altered or falsified forms in particular, there also exists the possibility that the changes are made to the forms without the clients' knowledge or consent.

28. On the basis of the foregoing, by obtaining and using pre-signed and altered 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 Experience in the Securities Industry

29. The Respondent has been registered as a mutual fund dealing representative since October 2007.

Settlement Agreement, at para. 8.

iii) The Respondent's Recognition of the Seriousness of his Misconduct

30. 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.

Settlement Agreement, at para. 26.

iv) Client Harm and Benefits Received by the Respondent

31. 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.

Settlement Agreement, at paras. 21 and 24.

v) Deterrence

32. As of the date of the Settlement Agreement, the Respondent has paid the Member a supervision fee of approximately \$5,348.90 on commissions earned as a result of the misconduct set out above.

Settlement Agreement, at paras. 22.

33. A fine of \$5,000, when viewed in conjunction with the amounts already paid by the Respondent to the Member due to the supervision fee, is sufficient to achieve the goals of specific and general deterrence, having regard to the aggravating factors described above.

34. 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.

vi) Penalty Guidelines

35. Staff is seeking a \$5,000 fine, which is the minimum fine recommended by the Penalty Guidelines for an Approved Person's breach of the standard of conduct.

vii) Previous Decisions in Similar Cases

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

Case	Facts	Outcome
<i>Estabrooks (Re)</i> ¹	<ul style="list-style-type: none">• The Respondent admitted that he:<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	The Hearing Panel approved the settlement agreement with the following terms: <ul style="list-style-type: none">• Fine of \$7,500• Costs of \$2,500
<i>Nguyen (Re)</i> ²	<ul style="list-style-type: none">• The Respondent admitted that she:<ul style="list-style-type: none">○ falsified 1 client account form in respect of 2 clients without obtaining client initials authorizing the changes; and○ obtained, possessed, and in 11 cases used to	The Hearing Panel approved the settlement agreement with the following terms:

¹ *Estabrooks (Re)*, MFDA File No. 201638, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated August 31, 2016, Staff's Book of Authorities, Tab 15.

² *Nguyen (Re)*, MFDA File No. 2016105, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated April 18, 2017, Staff's Book of Authorities, Tab 16.

	process transactions, 16 pre-signed account forms in respect of 9 clients	<ul style="list-style-type: none"> • Fine of \$7,500 • Costs of \$2,500
<i>Gibson (Re)</i> ³	<ul style="list-style-type: none"> • The Respondent admitted that he: <ul style="list-style-type: none"> ○ falsified 5 client account forms in respect of 6 clients without obtaining client initials authorizing the changes; and ○ obtained, possessed, and in 1 case used to process a transaction, 19 pre-signed account forms in respect of 16 clients 	<p>The Hearing Panel approved the settlement agreement with the following terms:</p> <ul style="list-style-type: none"> • Fine of \$10,000 • Costs of \$2,500
<i>Dias Pereira (Re)</i> ⁴	<ul style="list-style-type: none"> • The Respondent admitted that she: <ul style="list-style-type: none"> ○ altered 3 client account forms in respect of 3 clients without obtaining client initials authorizing the changes; and ○ obtained, possessed, and in some cases used to process transactions, 8 pre-signed account forms in respect of 7 clients 	<p>The Hearing Panel approved the settlement agreement with the following terms:</p> <ul style="list-style-type: none"> • Fine of \$7,000 (payable by installment) • Costs of \$2,500 (payable by installment)
<i>Georgijev (Re)</i> ⁵	<ul style="list-style-type: none"> • The Respondent admitted that he: <ul style="list-style-type: none"> ○ falsified 3 client account forms in respect of 3 clients without obtaining client initials authorizing the changes; and ○ obtained, possessed, and in some cases used to process transactions, 24 pre-signed account forms in respect of 13 clients • The Member imposed a \$750 fine on the Respondent. 	<p>The Hearing Panel approved the settlement agreement with the following terms:</p> <ul style="list-style-type: none"> • Fine of \$10,000 • Costs of \$2,500

Summary

37. Having regard to all of the foregoing factors, the Panel concludes 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 or altered account 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.

³ *Gibson (Re)*, MFDA File No. 201620, Hearing Panel of the Pacific Regional Council, Decision and Reasons dated May 2, 2017, Staff's Book of Authorities, Tab 17.

⁴ *Dias Pereira (Re)*, MFDA File No. 201652, Hearing Panel of the Central Regional Council, Decision and Reasons dated September 18, 2017, Staff's Book of Authorities, Tab 18.

⁵ *Georgijev (Re)*, MFDA File No. 201721, Hearing Panel of the Central Regional Council, Decision and Reasons dated July 10, 2017, Staff's Book of Authorities, Tab 19.

38. The Settlement Agreement is accepted.

DATED this 14th day of February, 2018.

“Graham Price”

Graham Price, QC
Chair

“Kathleen Jost”

Kathleen Jost
Industry Representative

“Richard Sydenham”

Richard Sydenham
Industry Representative

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