

Decision and Reasons (Misconduct)

File No. 200814



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: Gary Alan Price

Heard: October 18, 19, 20, 2010 and January 14, 2011 in Toronto, Ontario
Decision and Reasons (Misconduct): April 18, 2011

DECISION AND REASONS (MISCONDUCT)

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.
Gary Legault
Robert Guilday

Chair
Industry Representative
Industry Representative

Appearances:

Michelle Pong)	For the Mutual Fund Dealers Association of
)	Canada
Gary Alan Price)	Attended Personally (January 14, 2011)
)	

I. INTRODUCTION

1. By Amended Notice of Hearing, dated the 23rd day of June, 2008, the following Allegations were made against Gary Alan Price (“Respondent”):

Allegation #1: Between April 2003 and May 2007, the Respondent failed to observe high standards of ethics and engaged in business conduct or practice that was unbecoming by obtaining and possessing pre-signed forms, contrary to MFDA Rules 2.1.1(b) and 2.2.1(c).

Allegation #2: Between April 2003 and May 2007, the Respondent failed to observe high standards of ethics and conduct in the transaction of business by using pre-signed forms to execute trades, contrary to MFDA Rule 2.1.1(b).

Allegation #3: Between April 2003 and May 2007, the Respondent engaged in discretionary trading by selecting mutual funds for purchase without the necessary instructions from clients RH and LH and completing sections of pre-signed forms to process such trades for clients RH and LH, contrary to MFDA Rule 2.3.4 and the terms of his registration as a mutual fund salesperson.

Allegation #4: Between January 2004 and May 2007, the Respondent failed to comply with the Member’s directives to destroy all pre-signed blank investment forms, contrary to MFDA Rules 2.1.1(b), 1.1.2 and 2.5.1.

II. HISTORY OF PROCEEDINGS

2. The original Hearing on the Merits took place on May 11-12, 2009.

3. By Decision and Reasons (Misconduct), given on June 12, 2009, the Hearing Panel dismissed Allegations 1 to 3, but held that Allegation 4 had been proven.

4. The Hearing Panel ordered that argument on the Penalty, with respect to Allegation 4, would be heard on July 23, 2009.

5. On July 22, 2009, one of the members of the original Hearing Panel withdrew from the case.
6. On July 23, 2009, MFDA Staff requested an adjournment of the Hearing with respect to Penalty. After reading certain Affidavit material and hearing submissions of the parties, the Hearing Panel ordered that the Hearing be adjourned to October 13, 2009, at which time it would proceed as a two-member Hearing Panel, pursuant to Section 19.9(6) of MFDA By-law No. 1.
7. On October 8, 2009, Staff brought a Motion for an Order that:
 - (a) The Decision and Reasons with respect to misconduct in this matter, dated June 12, 2009, be declared null and void and removed from the MFDA website;
 - (b) The Hearing Panel be struck; and
 - (c) The disciplinary proceedings against the Respondent be remitted for a new hearing before a reconstituted Hearing Panel.
8. Submissions from both parties were heard by the Hearing Panel on October 13, 2009. On December 1, 2009, the Hearing Panel's Decision and Reasons, dated October 30, 2009, were released. The Hearing Panel set aside its Decision and Reasons, dated June 12, 2009.
9. On June 1, 2010, the First Appearance took place before this Hearing Panel. At that time, the Respondent advised that he wished to bring a number of Pre-Hearing Motions.
10. After hearing submissions from the parties, the Hearing Panel issued an Order, dated June 1, 2010, which established a schedule for the serving and filing of Motion materials by both the Respondent and Staff. This Order also provided that the Hearing on the Merits would commence on October 18, 2010, and continue, if necessary, to October 22, 2010.
11. The Respondent brought six Pre-Hearing Motions, each dated July 26, 2010. The Motions were all made returnable on September 9, 2010. In each case, the Respondent proposed that the Motion be conducted as a written hearing. This is consistent with Rule 6.3(2) of the MFDA Rules of Procedure.

12. By Reasons for Decision, dated the 30th day of September, 2010, the Hearing Panel dismissed the Pre-Hearing Motions.

13. The Hearing on the Merits commenced on Monday, October 18, 2010, as scheduled.

14. On Friday, October 15, 2010, the Respondent forwarded an e-mail to, *inter alia*, the Hearings Coordinator, advising that he would “not be attending in person” at the Hearing on the Merits.

15. The e-mail also advised that: “I understand that I still have an obligation to present a defence and I intend to fulfill that obligation. Given the unprecedented circumstances of my case – and given my current personal circumstances – the most effective defence I can offer at this point is the same defence I put forward at the first Hearing on the Merits almost a year-and-a-half ago. Therefore, I choose to submit the transcript of May 11-12, 2009 as my complete, total and entire defence.”

16. On October 18, 2010, the Hearing Panel adjourned the Hearing to October 19, 2010, and requested that certain information be conveyed to the Respondent. This information included the fact that the Chair of the Hearing Panel declined the invitation, extended by the Respondent in his e-mail, to discuss with him, in confidence, the personal reasons why he would not be attending the Hearing on the Merits.

17. The Respondent was, however, to be advised that, under Rule 1.8(2) of the MFDA Rules of Procedure, it was within the power of the Hearing Panel, in appropriate circumstances, to order that part of the Hearing on the Merits could be held *in camera* to receive information of an intimate personal nature and that this information could be received either in person or by telephone.

18. The Respondent was to be further advised that the Hearing on the Merits would resume on October 19, 2010, at 10:00 a.m. and that the Respondent, if he so chose, could appear in person or by way of telephone.

19. By e-mail, dated October 18, 2010, the Respondent was advised that the Chair of the

Hearing Panel had declined his invitation to discuss, in confidence, the personal reasons why he would not be attending the Hearing on the Merits. He was, however, advised that it was within the power of the Hearing Panel to order that part of the Hearing could be held *in camera* to receive information as to why he would not be attending and that this information could be received either in person or by telephone.

20. By e-mail, dated October 18, 2010, the Respondent stated:

“While I appreciate the opportunity, I see no reason to share my personal life with the panel members if there is no legal obligation to do so.

Thank you again!”

21. The Hearing on the Merits continued on October 19 and 20, 2010, at which time the Hearing Panel reserved its Decision.

22. The Respondent did not appear on October 19 or 20, 2010, either in person or by way of telephone. However, as requested by the Respondent, the transcript of his evidence at the original Hearing on the Merits, in May of 2009, was entered as an Exhibit.

23. It was subsequently brought to the attention of the Hearing Panel that, through inadvertence, the Respondent had not been advised that he could have participated in the Hearing on the Merits on October 19 and 20, 2010 by way of telephone.

24. By Decision, dated December 8, 2010, the Hearing Panel advised that, under the circumstances, it was prepared to receive and consider any written submissions which the Respondent saw fit to make, on the admissible evidence and applicable law, so long as the submissions were received by the Hearings Coordinator, on or before December 31, 2010.

25. The Hearing Panel further provided that, should the Respondent choose to file written submissions, MFDA Staff would have the right to make written Reply Submissions, on or before January 7, 2011.

26. In addition, or in the alternative, the Hearing Panel advised that it was prepared to hear

oral submissions from the Respondent on January 14, 2011. It was further provided that, if the Respondent made oral submissions on January 14, 2011, MFDA Staff would be afforded an oral right of reply.

27. The Respondent took the opportunity afforded him by the Hearing Panel and made very fulsome written Submissions. Staff filed written Reply Submissions.

28. Both parties made oral submissions on January 14, 2011.

III. THE EVIDENCE

29. The evidence in this matter was extensive. It was both documentary and testamentary.

30. During the course of the proceedings, several issues arose as to the admissibility of evidence. In their final submissions, both oral and written, the parties differed on three components of the evidence. The Hearing Panel has made the following rulings:

A. Extent of the Evidence to be Considered

31. It was the position of the Respondent that the only evidence which the Hearing Panel should receive and consider was the evidence which was before the original Hearing Panel, in May of 2009. He submitted that the most appropriate course of action would be to give the Hearing Panel the transcripts of the May 11-12, 2009 Hearing and let it make its decisions based on those transcripts.

32. In our Reasons for Decision of September 30, 2010, we traced, in detail, the series of events which led the remaining Members of the original Hearing Panel to set aside their Decision and Reasons of June 12, 2009.

33. We ordered that the matter was to be heard afresh, according to the MFDA Rules, Regulations and By-laws. We stated, in part, as follows:

“Consequently, this Hearing Panel, at the moment, has heard no evidence

whatsoever against the Respondent. The hearing of evidence commences on October 18, 2010. At that time, the Respondent will have a full opportunity to object to, test and respond to any admissible evidence presented against him with respect to all four Allegations. This Hearing Panel will then make a determination, based on the evidence, both testamentary and documentary, which it receives.”

34. The Respondent was cognizant of this decision when he stated, in part, in his e-mail of October 15, 2010: “I understand that I still have an obligation to present a defence and I intend to fulfill that obligation.”

35. The parties were free to conduct their case as they saw fit. MFDA Staff filed five Affidavits before us and called the deponents of the Affidavits as *viva-voce* witnesses. The Respondent, initially, took the position that the transcript of his evidence on May 11-12, 2009, was his “complete, total and entire defence.” The transcript was entered as Exhibit 11 at the Hearing on the Merits.

36. At the commencement of the Oral Argument, on January 14, 2011, we reminded the Respondent of our earlier Decision and that we would not be revisiting it.

B. New Evidence

37. In his Written Submissions, the Respondent requested that the Hearing Panel receive and consider certain “Additional Evidence”. This evidence included the Affidavit of Jeffrey Yewer, sworn July 22, 2009, as well as the *in camera* and in public transcripts of the proceedings before the remaining Members of the original Hearing Panel on July 23, 2009 and October 13, 2009.

38. In its Written Reply, Staff did not oppose the admission of the portions of those transcripts dealing with matters held in public, although it took the position that they were irrelevant to the case. The Hearing Panel admitted these portions of the transcript and reviewed them for weight and relevance.

39. After considering the written and oral Submissions of the parties, the Hearing Panel ruled, on January 14, 2011, that it would receive, *in camera*, the Affidavit of Jeffrey Yewer, as well as the *in camera* portions of the transcripts of July 23, 2009 and October 13, 2009.

40. On October 18, 2010, an Affidavit of Peter Anagnostopoulos, which was sworn on October 13, 2010, was entered as Exhibit 8 at the Hearing on the Merits. On October 19, 2010, Mr. Anagnostopoulos, a Manager in the Compliance Department of the MFDA, testified *viva voce* before the Hearing Panel.

41. In his Written Submissions, dated December 31, 2010, the Respondent raised, for the first time, the issue of the admissibility of the evidence of Mr. Anagnostopoulos.

42. The Respondent submitted three reasons why this evidence should be declared inadmissible:

- (a) it does not apply to the material period of time (i.e. prior to May 2007);
- (b) it was allegedly secured following what the Respondent described as a “threat” to him; and
- (c) the Respondent stated that he had “written assurance” from Mr. Anagnostopoulos that the compliance examination, which took place on September 2, 2010, was not related to the proceedings before this Hearing Panel, which were set to commence on October 18, 2010.

43. The Respondent then sought to provide his version of certain events. This version was proffered by way of submissions, rather than in Affidavit or *viva voce* form, where MFDA Staff would have an opportunity to test it by way of cross-examination. However, the Respondent’s position can be gleaned from certain third-party communications, which were attached to his Submissions.

44. The communications consisted of:

- (a) a letter, dated August 26, 2010, from Mr. Anagnostopoulos to Deryl Drysdale, the President of Select Financial Services Inc., with a copy shown to the Respondent; and
- (b) a letter, dated August 27, 2010, from Ms. Drysdale to the Respondent.

45. In its Written Reply Submissions, Staff did not take issue with the authenticity of this correspondence.

46. The letter from Mr. Anagnostopoulos to Ms. Drysdale of August 26, 2010, states, in part, as follows:

“On August 19, 2010, you informed us that Mr. Price would not allow MFDA access to the London sub-branch office until November after the ongoing MFDA Enforcement proceeding involving Mr. Price was completed.

The MFDA compliance examination of the London sub-branch is not related to the proceedings involving Mr. Price as we will be examining the activity at the sub-branch subsequent to the matters addressed in the Notice of Hearing.

. . . Please . . . provide us with a copy of the communication to Mr. Price directing him to provide access to MFDA staff on the specified date and describing the consequences if Mr. Price does not comply with Select’s direction.”

47. The letter from Ms. Drysdale to Mr. Price of August 27, 2010, states, in part, as follows:

“Gary, if you are unwilling to provide access to the MFDA compliance staff on any of the above-mentioned dates, Select Financial Services Inc. will be forced to suspend your licence immediately until further notice.”

48. As indicated, the compliance examination took place on September 2, 2010. During the course of that examination, the Respondent allegedly provided certain information to Mr. Anagnostopoulos. Paragraphs 8, 9, 10, 14, 15 and 16 of the October 13, 2010 Affidavit of Mr. Anagnostopoulos, along with Exhibits “C” and “G” to the Affidavit, detail this alleged information and certain subsequent events.

49. The remainder of the Affidavit, as well as the *viva voce* testimony of Mr. Anagnostopoulos, deal with historical matters relating to the issues raised by the Amended Notice of Hearing and, in our view, were properly admissible before us.

50. In its written Reply, Staff dealt with the disputed evidence as follows:

“The Respondent was provided with Staff’s witness list which included Mr. Anagnostopoulos and his anticipated evidence on September 16, 2010 in accordance with Rule 11 of the MFDA *Rules of Procedure*. Mr. Anagnostopoulos’ evidence is admissible under Rule 13.4 of the MFDA *Rules of Procedure*. Mr. Anagnostopoulos’ evidence was entered as new additional facts. Mr. Anagnostopoulos’ evidence was not entered to support or substantiate the

four allegations in the Amended Notice of Hearing not was it used to support a new allegation against the Respondent. It is up to the Hearing Panel to determine the appropriate weight and degree of relevance to attach to Mr. Anagnostopoulos' evidence. In Staff's view, Mr. Anagnostopoulos' evidence may be relevant to the Hearing Panel's assessment of the Respondent's credibility in so far as it speaks to his claims that he would have complied with prior MFDA and Member directives had they been communicated to him. In Staff's view, Mr. Anagnostopoulos' evidence is also relevant to the issue of penalty (if misconduct is found) in so far as it speaks to the Respondent's willingness to comply with regulatory requirements and Member directives going forward. In Staff's view, it would be inappropriate to keep Mr. Anagnostopoulos' evidence from the Hearing Panel having regard to all of the circumstances."

51. When we marked the Affidavit of Mr. Anagnostopoulos as an Exhibit, we were not made aware of the correspondence referred to in paragraphs 46 and 47 *supra*.

52. In late August of 2010, the Respondent and Staff had just finalized their written Submissions on a series of Pre-Hearing Motions. The Hearing on the Merits was scheduled to commence on October 18, 2010.

53. Owing to the unusual series of events, which resulted in the setting aside of the Decision and Reasons of the original Hearing Panel, the Respondent was, in all likelihood, apprehensive about having any further contact with the MFDA Compliance Department until, at least, the evidence portion of the current proceedings was completed.

54. The Respondent, rightly or wrongly, read the letter from Mr. Anagnostopoulos of August 27, 2010, as confirming that nothing he said in the proposed compliance examination of September 2, 2010, would be used against him in the current proceedings.

55. The evidence of Mr. Anagnostopoulos, in the paragraphs and Exhibits, outlined above, does not support or substantiate any of the four Allegations against the Respondent. It might, however, be relevant to the issue of Penalty.

56. After a careful review of all relevant factors, we have decided that we will not consider any of the evidence contained in paragraphs 8, 9, 10, 14, 15 and 16 or Exhibits "C" and "G" of the October 13, 2010 Affidavit of Mr. Anagnostopoulos in determining either misconduct or penalty.

57. Should Staff seek to introduce the same or similar evidence, obtained in a different manner, at the Penalty portion of this Hearing, we will consider its admissibility at that time.

IV. FINDINGS

58. After carefully considering the admissible evidence, we have made the following factual findings.

A. Registration History

59. The Respondent has been registered in Ontario, as a mutual fund salesperson, since February 6, 1991.

60. Although the evidence was, at times, conflicting, the most recent information from the Ontario Securities Commission indicated that the Respondent was registered with Select Financial Services Inc. (“Select”), as a Branch Manager, from August 22, 1993, to March 14, 2003, and from November 18, 2003, to January 23, 2009.

61. During the relevant period of time, Select was registered in Ontario as a mutual fund dealer, as well as an exempt market dealer. It has been a Member of the MFDA since 2002.

B. Pre-signed Forms

62. On April 22, 2003, Alex Khosrovaneh, then a Compliance Officer with the MFDA Compliance Department, assisted with an MFDA compliance examination of Select’s branch office on Colborne Street in London, Ontario.

63. Part of the examination consisted of an interview with the Respondent, who was the Branch Manager. This interview was conducted by Mr. Khosrovaneh.

64. During the course of the interview, when asked how he handled verbal purchase and redemption requests, the Respondent advised that he had pre-signed redemption forms in his

possession.

65. Mr. Khosrovaneh then reviewed a random sample of the Respondent's client files. He found that the Respondent was in possession of blank investment instruction forms, to which the signatures of two identified clients had been completed.

66. The results of the compliance examination were subsequently summarized in a Compliance Examination Report, dated December 10, 2003. This Report was delivered to Select, the Member, but a copy was not, at this time, sent to the Respondent.

67. In the Report, under the heading of "Pre-signed forms", the existence of the forms in the two client files was identified. The Report then stated:

"Maintaining pre-signed, blank, investment instruction forms could be viewed as having discretionary trading authority over a client's account and is contradictory to MFDA Rule 2.3.4.

Please state what action the Member will take to address this matter and confirm that all pre-signed forms have been destroyed."

68. On January 13, 2004, Select sent an "Urgent" e-mail to all of its Approved Persons, including the Respondent. The heading of the message stated:

"A reply is mandatory by January 21, 2004. Failure to reply by this date will result in ALL trades being withheld."

69. The body of the e-mail stated, in part, as follows:

"According to MFDA rules, the following changes will be implemented immediately:

9. NO pre-signed, blank investment instruction forms are to be held in client files. All such forms are to be destroyed immediately.

The undersigned has read the above and agrees to abide by the afore-mentioned MFDA rules."

70. The Respondent signed and returned the e-mail to Select on January 14, 2004. By letter, dated January 29, 2004, Select provided a copy of the signed e-mail to MFDA Compliance Staff.

71. In September of 2006, the MFDA commenced a further compliance examination of Select. On September 26, 2006, Lou Tantalo, then a Compliance Officer with the MFDA, assisted with the compliance examination of Select's branch office on Colborne Street in London.

72. As part of this examination, Mr. Tantalo conducted an interview with the Respondent, who was still the Branch Manager at this location.

73. Mr. Tantalo and his colleagues also conducted a random sample of the Respondent's client files. They found that he was in possession of several photocopies of a blank trade order form on which the signature of a client had been completed.

74. The results of this second compliance examination were subsequently summarized in a Compliance Examination Report, dated January 5, 2007. This Report was delivered to Select, the Member, but a copy was not, at this time, sent to the Respondent.

75. In the Report, under the heading of "Pre-signed forms", a specific client file was identified and it was indicated that the file contained a "duplication of her signature on several trade order forms."

76. The Report made reference to the previous Compliance Examination Report of December 10, 2003, and the steps which were taken, and which were to be taken, as a result of the existence of pre-signed forms.

77. The Report requested confirmation that all pre-signed forms had been destroyed and requested Select to devise an action plan to ensure that all client files were reviewed to ensure that no pre-signed or altered trade forms existed.

78. On May 4, 2007, Select distributed a memorandum to all of its Approved Persons dealing with this issue.

79. Earlier, on May 3, 2007, Stephan Glanville, an MFDA Investigator, attended upon the

Select office where the Respondent was the Branch Manager. He was accompanied by John James Gallimore, another MFDA Investigator.

80. Mr. Glanville provided evidence to the Hearing Panel by way of two Affidavits, as well as *viva voce* testimony. Mr. Gallimore provided *viva voce* testimony.

81. During the inspection of the Select premises on May 3, 2007, the Respondent was found to have in his possession 81 blank investment instruction forms on which the signatures of the clients had been completed.

82. Copies of the pre-signed forms were entered into evidence before us. They consisted of the following:

	Client (s)	Form(s)	Date
1	JH & MM	Letter from the Respondent instructing clients to simply sign at each 'X'. (2) Pre-signed Select Redemption Forms	Not Dated
2	JH	(a) Pre-signed Select Redemption Form	Not Dated
3	JA	(2) Pre-signed Select Exchange Forms (1) Pre-signed MRS Trade Ticket	Not Dated
4	SA	(1) Pre-signed Select Redemption Form	Feb. 6, 1998
		(1) Pre-signed Select Redemption Form	Not Dated
5	LA	(1) Pre-signed Select Redemption Form	Not Dated
6	MB	(1) Pre-signed Select Order Form	Not Dated
7	SB	(5) Pre-signed Select Redemption Forms	Not Dated
8	NB	(1) Pre-signed Select Redemption Form	Not Dated
9	JB	(1) Pre-signed Select Redemption Form	Not Dated
11	WC	(2) Pre-signed MRS Trade Tickets	Not Dated
12	HD	Email from HD instructing the Respondent to use the pre-signed redemption forms being held by the Respondent to redeem money.	February 3, 2006
		(1) Pre-signed Select Redemption Form	Feb. 6, 2006
		(1) Pre-signed Select Redemption Form (2) Pre-signed Select Exchange Forms	Not Dated
13	KD	(1) Pre-signed Select Exchange Form	Not Dated
14	JE	(1) Pre-signed MRS Trade Ticket	Not Dated
15	SE	(2) Pre-signed Select Redemption Forms	Not Dated
16	SE	(4) Pre-signed Select Redemption Forms	Not Dated
17	RE	(3) Pre-signed Select Financial Redemption Forms	Not Dated
18	EE	(3) Pre-signed Select Order Form (1) Pre-signed Fidelity Application	Not Dated

	Client (s)	Form(s)	Date
		(1) Pre-signed Fidelity Transfer Document	
19	JF	(1) Pre-signed Select Exchange Form	Not Dated
20	PG	(1) Pre-signed MRS Trade Ticket	Not Dated
21	MG	(2) Pre-signed Select Order Forms (1) Pre-signed MRS Trade Tickets (1) Pre-signed MRS Deregistration Request	Not Dated
22	MG	(2) Pre-signed Select Redemption Forms (2) Pre-signed Select Exchange Forms	Not Dated
23	WH	(3) Pre-signed Select Redemption Forms	Not Dated
24	LH	(1) Pre-signed Select Redemption Form	Not Dated
25	RH	(1) Pre-signed MRS Trade Ticket	Not Dated
26	SB	(2) Pre-signed Select Order Forms (2) Pre-signed Select Redemption Forms	Not Dated
27	JB	(1) Pre-signed Select Redemption Form	Not Dated
28	NLB	Note from the Respondent instructing NLB to sign each form at the 'X' and return with a void cheque.	Mar. 30, 2004
		(2) Pre-signed Select Redemption Forms	Not Dated
29	RC	(1) Pre-signed Select Order Form (3) Pre-signed Select Exchange Forms	Not Dated
30	GC	(1) Pre-signed Select Redemption Form	Not Dated
31	BC	(1) Pre-signed Select Redemption Form	Not Dated
32	LC	(1) Pre-signed Select Redemption Form	Not Dated
36	BJC	(1) Pre-signed MRS Systematic Instruction Form	Not Dated
37	SC	(2) Pre-signed Select Redemption Forms	Not Dated
38	DM	(1) Pre-signed Select Order Form (1) Pre-signed BPI Application	Not Dated
39	MM	(2) Pre-signed Select Exchange Forms	Not Dated
40	LC	(1) Pre-signed Select Exchange Form	Not Dated
41	DC	(3) Pre-signed Select Redemption Forms (2) Pre-signed Select Exchange Forms	Not Dated

83. On November 22, 2007, the Respondent forwarded a letter to Mr. Glanville, at the MFDA, in which he stated, *inter alia*, the following:

- “1) I acknowledge that I have kept pre-signed forms in some client files and have done so ever since I entered the mutual fund industry in 1991.
- 2) I confirm that my motive in keeping such pre-signed forms was two-fold: a) as a convenience to both my client and myself, and b) to speed up the process when the form was actually needed, especially in the case of redemptions.
- 3) I confirm that, in some specific instances, my client actually directed me to hold pre-signed forms in his/her file for possible future use.
- 4) Although I have never abused the pre-signed forms in any way, I acknowledge that some Approved Persons might be tempted to do so, and that some may actually succumb to that temptation.

- 5) I acknowledge that the presence of pre-signed forms in client files is a violation of MFDA Policies and Procedures.”

84. On January 23, 2008, the Respondent was interviewed by Messrs. Glanville and Gallimore with respect to his practice concerning the use of pre-signed forms, as well as what steps he took following the receipt of the e-mail from Select, dated January 13, 2004. A copy of the transcript of this interview was marked as Exhibit 10 at the Hearing on the Merits.

85. During the course of the interview, the Respondent confirmed that for each of the pre-signed forms listed in paragraph 82, *supra*, he had secured the signatures of the clients on the forms, which he then kept in the files to be used at a later date when he would fill in the details.

86. At the interview, the Respondent acknowledged that, on numerous occasions, he had received cheques from his clients, RH and LH, for the purpose of purchasing mutual funds for their accounts. The cheques were forwarded by mail with instructions as to how much money was to go in each of their respective investment accounts. The mutual funds to be purchased for the accounts were left totally to the discretion of the Respondent. The clients did not know which funds the Respondent had purchased until they received their trade confirmation forms

87. The Respondent advised the investigators that the Select Head Office never received a blank pre-signed form as, by the time it received the form, the Respondent had filled in all of the information.

88. The Respondent stated that, on many occasions, a client would telephone him with a request for funds. The Respondent would then select which mutual fund would be sold, complete the pre-signed form and submit the form to Select for trade execution. The client would only learn which fund had been sold when the trade confirmation was received.

89. The Respondent admitted that, in one account, he had blank pre-signed mutual fund trade tickets signed by the wife but he took trading instructions from the husband who was not his client. There was no signed trading authorization in the file permitting him to take instructions from the husband.

90. The Respondent acknowledged that he was still engaging in the practice of using pre-signed forms at the time of the interview on January 23, 2008.

91. The Respondent admitted using pre-signed forms from clients he had never met.

92. The Respondent acknowledged that he had executed and returned a copy of the e-mail from Select of January 13, 2004, which advised, *inter alia*, that “No pre-signed, blank investment instruction forms are to be held in client files. All such forms are to be destroyed immediately.” The Respondent conceded that he did not take any steps to comply with this directive.

93. The Respondent also acknowledged that he received a memorandum from Select, dated April 30, 2007, which stated, in part, that: “All pre-signed client forms are to be destroyed immediately.” He stated that he did “nothing” in response to this directive.

V. THE RESPONDENT’S POSITION

94. The Respondent did not present any direct evidence, either in *viva voce* or Affidavit form, from any of his clients.

95. The Respondent clearly and candidly admits that, during the period of time set out in the Allegations, he obtained, possessed and used pre-signed forms and that he did not comply with written directives from Select to destroy all pre-signed blank investment forms in his possession.

96. However, he clearly and unequivocally denies that he has engaged in unethical or unbecoming behaviour.

97. His position is that:

“there is nothing unethical about acquiring, holding and using pre-signed forms. . . . A pre-signed form, in and of itself, is not unethical in the same way that a knife, in and of itself, is not a weapon. It is only when the form is used for a hurtful purpose that it becomes unethical.”

98. The Respondent, in his Written Submissions, states that he has used:

. . . “hundreds of pre-signed forms. My clients and I have never had a problem. There has been no unethical behaviour. I have lots of happy and trusting clients. I run a most efficient business. No clients were ever forced to pre-sign a form. All did it willingly because they recognized the service to them and the benefit to them. Some even initiated the service. The pre-signed form served to respect their time and money by meeting their needs as quickly and efficiently as possible. It was a demonstration of trust.”

99. The Respondent further submitted that:

“My office is on the second floor of my building. There is no elevator. I have elderly clients, a handicapped client and clients who do not like to drive, especially in the winter. I have clients who live out of town and, during the material time period, out of province. I have snowbird clients and one young client who travels the world, depending on me to provide her with her funds on a periodic basis. I have served all of these clients as well as possible now for years. No problems. No unethical behaviour. No complaints.

We all have an obligation in this business to do everything we can to build trust and confidence in the investing public. How does an Approved Person like me actually do that? What does that look like on a daily basis? I get to know my clients. I listen carefully to them. I understand their needs. I tell them the truth. I give them good information. I keep up to date on the financial strategies and products which are available. I do all of that. I do all of that to build trust and confidence.

More than all of that, however, I must demonstrate to them every day that I am an honest and trustworthy person, and the pre-signed form is by far the single most critical tool that I have used to do that. It allows me to prove over and over again that I am a completely trustworthy person. And so, the pre-signed form actually represents the highest of ethics, the highest of ethical behaviour.”

100. The Respondent further submitted:

“The question before the panel is whether or not, during the timeframe of the allegations, i.e. April 2003-May 2007, my use of pre-signed forms constituted ‘conduct unbecoming’ as defined by the rules and regulations of the MFDA. MFDA counsel will cite a number of previous decisions to support her position. However, in each of those cases, the forms were used for improper or illegal purposes, were used to make trades in over-leveraged accounts, were used for improper transfers between accounts or were used to conduct discretionary trading. The unethical, unbecoming behaviour was not in the form itself, but rather in the specific conduct related to the actual use of the form. In my case, I have never used a form for any purpose other than for what it was intended.”

101. The Respondent also submitted that:

“The most significant point, however, is that during the entire material time period, there was, in fact, no rule on the MFDA books against the use of pre-signed forms. The MFDA cannot produce any rules, policy statements, regulations, information bulletins or anything else of any kind which indicates in any way that the use of pre-signed forms was considered unacceptable.”

102. The Respondent’s position is that, subsequent to the material period of time in these proceedings, namely October 31, 2007, Member Regulation Notice (MR-0066) came into effect. He submits:

“Such notice was entitled ‘Prohibition on Use of Pre-Signed Forms’. At that point, for the very first time, the MFDA had issued something in writing which clearly put forth its position with respect to pre-signed forms. However, regulation notices do not have any retroactive authority and, as a result, the provisions of MR-0066 cannot be applied to anything which took place prior to October 31, 2007.”

103. With respect to Allegation #3, the Respondent denies that there was any discretionary trading.

104. He submits that Rule 2.3.4, as it existed at the time, prohibited discretionary trading but it did not define what “discretionary trading” consists of.

105. In his Written Submissions, the Respondent provided his version of the type of oral instructions he received from RH and LH when they became his clients 15 years ago.

106. With respect to Allegation #4, the Respondent’s position is that he had no obligation to comply with the directives of January 14, 2004, from his Member.

107. He stated his position, as follows:

“In this case, does the Member have the authority to actually give the direction she is giving? The answer in this case, of course, is no. Members do not have carte blanche authority over Approved Persons. There are literally hundreds (sic) of directives the Member could give me that I have absolutely no obligation to follow. For example, the Member could direct me to open my office on Sundays, to hire an assistant, to sell only one type of mutual fund, to communicate with my clients on a weekly basis, etc, etc, etc. ad infinitum. There is no obligation on my part to comply with any of these directives because the

Member does not have the authority to give such directives. If Approved Persons were obligated to comply with every directive from their Members, it would fundamentally change the nature of that relationship and fundamentally change our industry. It could even create a chaotic situation under which an Approved Person might actually be obligated to comply with an illegal directive.”

108. The Respondent’s position is that he had a right not to comply with the January 2004, directive. He chose to exercise that right.

109. The Respondent acknowledged that he could have chosen to advise Select that he would not comply with the directive and state the reasons for his position. He chose to acknowledge the memo and agree to comply with its terms. However, as, in his view, there was no MFDA prohibition in existence at the time, he had nothing to comply with.

110. The Respondent, finally, made submissions with respect to the circumstances surrounding the withdrawal from the original Hearing Panel of one of its Members.

VI. THE LAW

111. The relevant facts in this case are clear and, largely, undisputed. What is in issue, between the parties, is the law which is to be applied to those facts.

112. To arrive at a decision with respect to the Allegations, requires an analysis of various MFDA Rules, including the following: Rule 1.1.2, 2.1.1(b), 2.1.1(c), 2.3.4 (as it was between April of 2003 and May of 2007) and 2.5.1.

113. These Rules provide as follows:

“1.1.2 **Compliance by Approved Persons.** Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.”

“2.1.1 **Standard of Conduct.** Each Member and each Approved Person of a Member shall:

- (b) observe high standards of ethics and conduct in the transaction of business;
- (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and”

“2.3.4 No Discretionary Trading. A limited trading authorization shall not in any way confer general discretionary trading authority upon a Member, an Approved Person or any person acting on behalf of the Member.”

Rule 2.3.4 was removed by way of Bulletin #0346-P, dated December 11, 2008.

“2.5.1 Member Responsibilities. Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.”

114. In addition to Rule 1.1.2, on May 22, 2001, the Respondent executed an Agreement of Approved Person, which provided, in part, as follows:

“I (Respondent) acknowledge that I am an Approved Person in respect of an application for membership in the Mutual Fund Dealers Association of Canada (the “MFDA”) or a Member of the MFDA (“Member Firm, which term involves any other Member of the MFDA in respect of which I am approved from time to time), and hereby agree:

. . .

- 2) to be bound by, observe and comply with the MFDA Rules as they are from time to time amended or supplemented;
- 3) that I am conversant with the MFDA Rules, and to keep myself fully informed about the MFDA Rules as they are amended or supplemented from time to time; and
- 4) to submit to the jurisdiction of the MFDA and, wherever applicable, the Board of Directors, Officers, Committees and Councils thereof . . .”

A. Pre-signed Forms

115. The Respondent freely acknowledges that, throughout the relevant period of time (i.e. between April 2003 and May 2007), he obtained and possessed pre-signed forms from clients for the purpose of using these forms to execute trades for those clients in the future.

116. His position is that there was no prohibition on the use of pre-signed forms until October 31, 2007, when Member Regulation Notice (MR-0066) came into effect. This Notice was entitled “Prohibition on Use of Pre-Signed Forms”.

117. The Respondent’s position is that Member Regulation Notices do not have retroactive effect and thus, during the relevant period of time, his actions did not contravene either Rule

2.1.1(b) or (c).

118. The position of Staff is that Rule 2.1.1 articulates the standard of conduct imposed upon all Members and Approved Persons. The rule encompasses the fundamental obligations of all registrants in the securities industry and is designed to protect the public interest.

119. Staff submits that the Rule has intentionally been drafted broadly so as to permit it to be interpreted and applied in a purposive manner in a wide range of circumstances.

120. It is Staff's position that Member Regulation Notices provide detailed guidance with respect to the interpretation and application of MFDA Rules. These Notices, in and of themselves, do not and cannot create the prohibition.

121. We agree with Staff's position.

122. Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading. As will be discussed more fully *infra*, the Respondent, in this case, did not have the proper authority to engage in discretionary trading of any nature or kind on behalf of his clients.

123. 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. While there is absolutely no suggestion that the Respondent engaged in any of these activities, the rationale for the prohibition on pre-signed forms becomes clear.

124. 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.

125. Rule 2.3.2 provides a mechanism whereby a Member or an Approved Person can accept a limited trading authorization from a client and thereby avoid the requirement to obtain a client

signature to accept trade orders from the client. This Rule provides as follows:

“2.3.2 **Limited Trading Authorization.** A Member or Approved Person may accept a limited trading authorization from a client for the express purpose of facilitating trade execution. In such circumstances a form of limited trading authorization as prescribed by the Corporation must be completed and approved by the compliance officer or branch manager, and retained in the client’s file.”

126. The Respondent in this case chose not to use Limited Trading Authorizations.

127. As indicated, Member Regulation Notices do not create new offences or prohibitions. They provide guidance with respect to offences and prohibitions which already exist.

128. For example, the opening paragraphs of MR-0066 provide as follows:

“The purpose of this Notice is to emphasize that it is contrary to MFDA requirements for Members and Approved Persons to obtain pre-signed forms from their clients. Members may only use forms that are duly executed by the client after information on the form has been properly completed.

As indicated in Bulletin #0183-C and Bulletin #0056-C, where MFDA staff find pre-signed forms in the course of completing compliance reviews, these deficiencies may be referred directly to the MFDA Enforcement Department. Despite providing these cautions, MFDA staff continues to find evidence of pre-signed forms, resulting in referrals to Enforcement.

Some examples of pre-signed forms noted by staff include blank trade order forms, cheques or account application forms pre-signed by clients, or blank pre-signed forms indicating branch manager or head office approval that have no other information filled in. In other cases, information on legitimately completed and signed forms may be subsequently altered or removed, or signatures may be physically cut from other documents and then used to create photocopied forms that appear to have been signed by the client.

Use of Pre-Signed Forms

The existence of pre-signed trade order forms in client files may be evidence that an Approved Person is engaging in discretionary trading. Under securities legislation and MFDA Rules Members and Approved Persons are not permitted to accept discretionary trading authority from a client.”

129. These paragraphs clearly speak to a prohibition already in place at the date of the issuance of the Notice.

130. Bulletin #0056–C, referred to in MR-0066, discusses certain “types of deficiencies” that resulted in a referral to the Enforcement Department. These include “the existence of pre-signed trade order forms in client files.” This Bulletin was issued on February 5, 2004.

131. This point was again emphasized in Bulletin #0183–C, which was issued on January 27, 2006. Under the heading “Referrals to the Enforcement Department of the MFDA”, the existence of pre-signed trade order forms in client files is indicated as a matter that would be referred to the Enforcement Department.

132. Member Regulation Notice MR-0035 was issued on December 10, 2004. It was entitled “Recording and Maintaining Evidence of Client Trade Instructions”. Under the heading “Background”, the Notice provided:

“During compliance examinations performed to date, the MFDA has noted that many Members and their Approved Persons are not recording and maintaining adequate records of client trade instructions. In many cases, Members cannot produce evidence of client authorization or client instructions for trades. In reviewing client files during compliance examinations, MFDA staff has also found pre-signed trade order forms, forged client signatures and photocopied client signatures. MFDA Rules and securities legislation prohibit mutual fund dealers and their salespersons from having discretionary trading authority over a client account.”

133. Thus, the Respondent was incorrect, in his submission, when he stated that it was not until October 31, 2007 and MR-0066 that “for the first time, the MFDA has issued something in writing which clearly put forth its position with respect to pre-signed forms.”

134. MFDA Hearing Panels have consistently applied the principles enunciated in Rule 2.1.1 as the standard of conduct required of all Members and Approved Persons. This Rule has been applied to prohibit a large range of misconduct, including misappropriation, forgery, preferring their own interests when engaging in business dealings with clients, failing to invest money received from clients, failing to disclose referral arrangements and unauthorized access to Member’s client database.

135. In addition, in Decisions issued before, during and after the relevant period of time in the case before us, both MFDA and Investment Dealers Association (“IDA”) [now the Investment

Industry Regulatory Organization of Canada (“IIROC”)] Hearing Panels, as well as provincial securities commissions, have held that the use of pre-signed forms is prohibited. See, for example:

- (a) *Re Woods*, [1996] I.D.A.C.D. No. 4
- (b) *Re Florence* (2004), 27 OSCB 7583
- (c) *Re Cornwall, et al* (2007), 30 OSCB 10063
- (d) *In the Matter of John A. Moro*, [2007] MFDA File No. 200714
- (e) *Re Daubney* (2008), 31 OSCB 4817
- (f) *In the Matter of Brian Somerset Campbell*, [2008] MFDA File No. 200805
- (g) *Re Hopper* (2009), 32 OSCB 1645
- (h) *In the Matter of IPC Investment Corporation*, [2009] NSSC
- (i) *In the Matter of Hill & Crawford Investment Management Group Ltd. and Albert Rodney Hill*, [2009] MFDA File No. 200834
- (j) *Re Steinhoff*, [2010] IIROC No. 8.

136. The Respondent takes particular issue with the Moro Decision, stating, in part, that it “was a settlement agreement and the issue of “conduct unbecoming” was never argued before the hearing panel. As such, the Moro case is irrelevant as a precedent.”

137. In the Moro case, an MFDA Hearing Panel approved a Settlement Agreement in which an Approved Person admitted that by obtaining and possessing pre-signed blank trading forms, he acted contrary to MFDA Rules 2.1.1(b) and 2.1.1(c) and by using pre-signed blank trading forms to execute trades, he acted contrary to MFDA Rule 2.1.1(b). In our view, the Hearing Panel would not have accepted the Settlement Agreement if it did not agree that the conduct admitted to breached the Rules in question. In our view, the Moro case is a viable precedent.

138. After a detailed consideration of the relevant facts and the applicable law, we unanimously find that Allegations #1 and #2 are established.

B. Discretionary Trading

139. An MFDA Hearing Panel has, succinctly, described the legal inability of a mutual fund

salesperson to engage in discretionary trading as follows:

“Individuals registered as investment counsel or portfolio managers have discretionary trading authority, and investment advisors are permitted to conduct discretionary trades in managed or discretionary accounts, provided they have explicit written consent. However, mutual fund salespeople are not permitted to conduct discretionary trades and must always contact the client prior to making any transactions. Where an Approved Person fails to obtain client instructions prior to executing a trade, he engages in discretionary trading beyond the terms of his or her registration as a mutual funds salesperson.”

Re: *In the Matter of Leo Alexander O'Brian and David Baxter Snow*, [2008] MFDA File No. 200809, Decision dated November 25, 2008 at para. 19.

140. The Respondent was not registered as either an investment counsel or a portfolio manager. Consequently, he had no authority to engage in discretionary trading.

141. MFDA Rule 2.3.4 makes it clear that even a Limited Trading Authorization (“LTA”) does not provide a mutual fund salesperson with discretionary trading authority. As indicated above, the Respondent did not use LTA’s. Thus, he had no authority to engage in the type of trading which he did for RH and LH as outlined in paragraph 86 above.

142. The Respondent made the following closing submission in writing:

“In the case of clients RH and LH, there was absolutely no discretionary trading regardless of what definition you wish to assign. RH and LH have been my clients since about 1995. They were close personal friends before they became clients and they remain close personal friends today. When they became my clients about 15 years ago, they made deliberate decisions on which mutual funds they wished to hold for the long term. They also set specific portfolio targets with respect to asset allocation, risk, company diversification, management style and foreign content. Therefore, when RH and LH send me their cheques by mail, my directions are very clear. "Gary, add these proceeds to our respective RRSP accounts by adding it to the funds we already hold and in ways which rebalance our portfolios to the pre-determined targets.' I do not have the discretion to invest in one or more of 6,000 mutual funds. There are only four funds in their accounts. My instructions are to add the contribution amounts to their RRSP accounts in ways which respect their original decisions, i.e. to rebalance to the targets which they identified for asset allocation, risk, diversification and foreign content. I do that.”

143. Even accepting everything the Respondent states in this submission as being factually

correct, he is still engaging in discretionary trading. He was selecting which funds to purchase, the quantum of each fund to be purchased, the price at which the funds were to be purchased, as well as the timing of the transactions. He was employing pre-signed forms to complete the transactions.

144. Allegation #3 is established.

C. Member's Directives

145. The Respondent has clearly and unequivocally admitted that between January of 2004 and May of 2007, he consciously and deliberately failed to comply with the Member's directives to destroy all pre-signed blank investment forms.

146. His position, in essence, is that as, in his view, the Member had no right or authority to issue the directive, he had no obligation to comply.

147. Rule 2.5.1 provides a positive obligation on a Member to establish, implement and maintain policies and procedures to ensure the handling of its business is in accordance with the MFDA By-laws, Rules and Policies, as well as with applicable securities legislation.

148. Where, as here, inquiries had been raised by the regulator as to what action the Member would take to correct certain perceived deficiencies, it was entirely appropriate for the Member to send a directive to its Approved Persons indicating what steps had to be taken immediately to correct those deficiencies and to request written confirmation from the Approved Persons that in fact the directive had been received, understood and complied with.

149. Here, the Respondent received, read and understood the directive of January 13, 2004, from his Member. On January 14, 2004, he executed the directive and returned it to the Member. One of the items of the directive, which was checked off by the Respondent, was that "no pre-signed, blank investment instructions forms are to be held in client files. All such forms are to be destroyed immediately."

150. The Respondent has advised that he had no intention of complying with this directive.

He knowingly continued to obtain, possess and use pre-signed forms after January of 2004. He deliberately deceived his Member.

151. It is clear to us that when, between January of 2004 and May of 2007, the Respondent deliberately failed to comply with the Member's directives to destroy all pre-signed blank investment forms, he did not observe the "high standards of ethics and conduct in the transaction of business" mandated by Rule 2.1.1(b).

152. Allegation #4 is established.

VII. PENALTY HEARING

153. We have concluded that the four Allegations, which were made against the Respondent, have been established. We have not, as yet, decided what, if any, penalties should be imposed upon the Respondent, pursuant to section 24.1 of MFDA By-law No. 1.

154. In this regard, we would request that the Hearings Coordinator consult with the parties in order to establish a convenient date for the holding of a Penalty Hearing.

155. If either or both of the parties believe that it would be of assistance, we are prepared to agree to a reasonable schedule for the filing of written submissions in advance of the oral Penalty Hearing.

156. If the Hearings Coordinator encounters any difficulties in establishing a reasonable schedule, we will convene a telephone conference call with the parties to make the appropriate Orders.

DATED this 18th day of April, 2011.

"Thomas J. Lockwood"
Thomas J. Lockwood, Q.C.,
Chair

“Gary Legault”

Gary Legault,
Industry Representative

“Robert Guilday”

Robert Guilday,
Industry Representative

Doc 250864