



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: Scott Elliott Sherman

Heard: January 6, 2021 by electronic hearing in Toronto, Ontario

Decision: January 6, 2021

Reasons for Decision: April 28, 2021

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, QC
Brigitte J. Geisler
Joseph Yassi

Chair
Industry Representative
Industry Representative

Appearances:

David Barbaree)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
Ellen Bessner)	Counsel for the Respondent
)	
)	
Zachary Pringle)	Associate Counsel for the Respondent
)	
)	
Scott Elliott Sherman)	Respondent
)	
)	

I. INTRODUCTION

1. By Notice of Settlement Hearing, dated December 8, 2020, the Mutual Fund Dealers Association of Canada (“MFDA”) gave notice that an electronic hearing would be held before a hearing panel of the Central Regional Council of the MFDA (“Hearing Panel”) on January 6, 2021, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept the settlement agreement (“Settlement Agreement”) entered into between Staff of the MFDA and Scott Elliott Sherman (“Respondent”).

2. Due to the existence of COVID-19, and with the consent of the parties, the Settlement Hearing was conducted by way of electronic hearing on January 6, 2021.

3. At the commencement of the Settlement Hearing, the Hearing Panel granted the joint request of the parties to move the proceedings “in camera” so that the Settlement Agreement could be considered in the absence of the public. This procedure is consistent with Rule 15.2(2) of the *MFDA Rules of Procedure*.

4. The Hearing Panel then considered the provisions of the Settlement Agreement. After hearing submissions both as to the applicable law and as to why this particular Settlement Agreement met the appropriate criteria, the Hearing Panel retired to consider whether we were in a position to accept the Settlement Agreement on the basis of the material before us.

5. After carefully considering the Settlement Agreement and the submissions of the parties, the Hearing Panel unanimously accepted the Settlement Agreement. We made an Order to this effect on January 6, 2021. At that time, we advised that written Reasons would follow. These are those Reasons.

II. THE SETTLEMENT AGREEMENT

6. The salient portions of the Settlement Agreement are as follows:

“4. The Respondent admits to the following violations of the By-laws, Rules or Policies of the Mutual Fund Dealers Association of Canada (“MFDA”):

- a) Between December 8, 2015 and August 31, 2018, the Respondent altered, and used to process transactions, 11 account forms in respect of 9 clients by altering information on the account forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1;

- b) Between June 15, 2015 and February 26, 2019, the Respondent obtained, possessed, and, in some instances used to process transactions, 49 pre-signed account forms in respect of 28 clients, contrary to MFDA Rule 2.1.1; and
 - c) Between December 17, 2015 and January 7, 2016, the Respondent photocopied a client account form that had been signed by 2 clients and altered the form to complete 4 additional transactions, contrary to MFDA Rule 2.1.1.
5. Staff and the Respondent agree and consent to the following terms of settlement:
- a) the Respondent shall pay a fine in the amount of \$20,000 pursuant to section 24.1.1.(b) of MFDA By-law No. 1;
 - b) the Respondent shall pay costs in the amount of \$2,500 pursuant to section 24.2 of MFDA By-law No. 1;
 - c) the Respondent shall in the future comply with MFDA Rule 2.1.1; and
 - d) the Respondent will attend in person or by video conference, on the date set for the Settlement Hearing.
6. Staff and the Respondent agree to the settlement on the basis of the facts set out in Part III herein and consent to the making of an Order in the form attached as Schedule “A”.

III. AGREED FACTS

Registration History

- 7. Commencing in 2005, the Respondent was registered in the securities industry.
- 8. Between May 1, 2014 and December 18, 2019 in Ontario, Quebec, and British Columbia, the Respondent was registered as a dealing representative with IPC Investment Corporation (the “Member”), a Member of the MFDA.
- 9. The Respondent was terminated by the Member on December 18, 2019, and he is not presently registered in the securities industry.
- 10. At all material times, the Respondent conducted business in the Ottawa, Ontario area.

Altered Forms

- 11. Between December 8, 2015 and August 31, 2018, while the Respondent was an Approved Person of the Member, he altered, and used to process transactions, 11 account forms in respect of 9 clients by altering information on the account forms without having the client initial the alterations.

12. The altered account forms included: 6 trade tickets; 4 order entry forms; and 1 trade authorization for registered investments form
13. The alterations made by the Respondent consist of alterations to: investment instructions; fund codes; account numbers; and client signature dates.

Pre-Signed Forms

14. At all material times, the Member's policies and procedures prohibited the use of pre-signed forms.
15. Between June 15, 2015 and February 26, 2019, while the Respondent was an Approved Person of the Member, he obtained, possessed and, in some instances, used to process transactions, 49 pre-signed account forms in respect of 28 clients.
16. The pre-signed account forms included: 25 Know-Your-Client ("KYC") forms, 6 new account application forms ("NAAF"); 11 order entry forms; 3 trade tickets; 2 transfer application forms; and 1 pre-authorized approval contribution form.

Re-Using Client Account Forms

17. Between December 17, 2015 and January 7, 2016, while the Respondent was an Approved Person of the Member, the Respondent photocopied an order entry form that had been signed by 2 clients and altered the form to complete 4 additional transactions.

The Member's Investigation

18. In July 2019, the Member conducted a branch review and identified the pre-signed forms, altered forms, and re-used account forms that are the subject of this Settlement Agreement.
19. On July 10, 2019, as a result of the Member's findings during its branch review, the Member suspended the Respondent until his termination on December 18, 2019.
20. In October 2019, the Member sent audit letters to all clients whose accounts were serviced by the Respondent. This audit letter included a two-year transaction summary and the clients KYC information for each of their accounts, and requested the client contact the Member if they did not authorize any of the transactions or if they had any concerns regarding their recorded KYC information. The Member did not receive any client responses that indicated there were unauthorized transactions within any client accounts or that incorrect KYC information had been recorded.

Additional Factors

21. There is no evidence that the Respondent received any financial benefit from engaging in the misconduct described above beyond any commissions and fees that he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.
22. There is no evidence of client loss or lack of authorization.
23. By entering into this Settlement Agreement, the Respondent has saved the MFDA the time, resources and expenses associated with conducting a full hearing of the allegations.”

IV. THE LAW

7. MFDA Rule 2.1.1 states, in part, as follows:

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

- a) deal fairly, honestly and in good faith with its clients;
- 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; . . .”

Pre-Signed Account Forms are Not Permissible

8. “Pre-Signed Forms” is a generic term that applies to account forms that were incomplete at the time they were signed. Members and Approved Persons are only permitted to obtain, use and rely upon forms that are executed by the client after all information on the form has been properly completed.

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

Owen (Re), 2017 LNCMFDA 287 at para. 27.

Lewis (Re), 2018 Can LII 43822 at para. 24

10. The MFDA has previously warned Approved Persons against the use of pre-signed forms. Among other things, the use of pre-signed forms adversely affects the integrity and reliability of account documents, leads to the destruction of the audit trail, has a negative impact on Member complaint handling, and has the potential for misuse in the form of unauthorized trading, fraud and misappropriation.

MFDA Notice #MSN-0066 dated October 31, 2007 (updated March 4, 2013 and January 26, 2017).

MFDA Bulletin #0661-E dated October 2, 2015.

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

“Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading....At its worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client...Pre-signed forms also subvert the ability of a Member to properly supervise trading activity. They destroy the audit trail. The presence of the client’s signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account.”

Price (Re), [2011] Hearing Panel of the Central Regional Council, MFDA File No. 200814, Panel Decision (Misconduct) dated April 18, 2011 at paras. 122-124.

12. The prohibition on the use of pre-signed account forms applies regardless of whether:

- a) the client was aware, or authorized the use, of the pre-signed account forms; and
- b) the forms were used by the Approved Person for discretionary trading or other improper purposes.

13. In the case before us, the Respondent obtained, possessed and, in some instances, used to process transactions 49 pre-signed account forms in respect to 28 clients.

Altered Account Forms

14. When an Approved Person alters information on an account form without having the client initial the form to show that the client is aware of the change and has authorized it, the Approved Person engages in conduct that is contrary to MFDA Rule 2.1.1.

Owen (Re), *supra*, at paras. 32-33.

Lewis (Re), *supra*, at paras. 29-30.

15. Altered forms present a risk that they may be used by an Approved Person to: (a) engage in discretionary trading; (b) engage in acts of fraud, theft or other forms of harmful conduct; (c) subvert the ability of a Member to properly supervise trading activity; and (d) make changes to the forms without the clients' knowledge or consent. The prohibition on altered account forms applies regardless of whether the client was aware or authorized the use of the proscribed form.

Owen (Re), *supra*, at para. 33, citing *Price (Re)*, *supra*, at paras. 122 – 124.

16. As with “pre-signed forms”, the MFDA previously warned Approved Persons against altering account forms without having the client initial the form to show that they are aware of the change.

MFDA Notice #MSN-0066 dated October 31, 2007 (updated March 4, 2013 and January 26, 2017).

MFDA Bulletin #0661-E dated October 2, 2015.

17. In the case before us, the Respondent admits to altering information on 11 account forms in respect of 9 clients, without having the clients initial the alterations.

Reusing Client Signatures to Process Transactions

18. The prohibition against reusing client signatures to process transactions exists regardless of the existence of client authorization or the motive behind the use of the form. The MFDA has been warning Approved Persons against photocopying and re-using forms for a number of years.

Member Staff Notice 0066: Signature Falsification

MFDA Bulletin #0661-E: Signature Falsification

19. Past hearing panels have held that the re-use of client signatures is a contravention of MFDA Rule 2.1.1.

Heide (Re), MFDA File No. 2018122, Prairie Region, April 15, 2019 at paras. 4 and 22.

Cruz (Re) 2019 CanLII 23945.

20. Like pre-signed account forms, the re-use of client signatures is considered serious misconduct. The reasoning in *Price* for why pre-signed account forms affect the integrity and reliability of account documents also applies to this type of conduct. The replication of a client signature or initials is particularly serious. The authenticity of client signatures is one of the foundations upon which client trust is established and client instructions are carried out.

21. In the case before us, the Respondent admits to photocopying a client account form that had been signed by 2 clients and altering the form to complete 4 additional transactions.

V. PRINCIPLES REGARDING THE ACCEPTANCE OF SETTLEMENT AGREEMENTS

22. Investor protection is the primary goal of securities regulation. Settlements play an important and necessary role in meeting this objective.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at para. 59.

23. In our view, the role of a Hearing Panel in a Settlement Hearing is not the same as its role in making a penalty determination after a contested Hearing. In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

24. Previous MFDA Hearing Panels have determined the factors which should be considered in determining whether a Settlement Agreement should be accepted. These include the following:

- (i) Whether acceptance of the Settlement Agreement would be in the public interest and whether the penalty imposed will protect investors;
- (ii) Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement;
- (iii) Whether the Settlement Agreement addresses the issues of both specific and general deterrence;
- (iv) Whether the proposed settlement will prevent the type of conduct described in the Settlement Agreement from occurring again in the future;
- (v) Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets;
- (vi) Whether the Settlement Agreement will foster confidence in the integrity of the MFDA;
- (vii) Whether the Settlement Agreement will foster confidence in the regulatory process itself.

Jacobson (Re), [2007], Hearing Panel of the Prairie Regional Council, MFDA File No. 200712, Reasons for Decision, dated July 13, 2007, at para. 70.

25. Previous Hearing Panels have also identified a number of additional factors which should be considered when determining whether the penalty sought to be imposed is appropriate. These include:

- a) The seriousness of the allegations proved against the Respondent;
- b) The Respondent's past conduct, including prior sanctions;
- c) The Respondent's experience in the capital markets;
- d) The level of the Respondent's activity in the capital markets;
- e) Whether the Respondent recognizes the seriousness of the improper activity;
- f) The harm suffered by investors as a result of the Respondent's activities;
- g) The benefits received by the Respondent as a result of the improper activity;
- h) The risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;
- i) The damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;
- j) 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;
- k) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
- l) Previous decisions made in similar circumstances.

Headley [Re], 2006, Hearing Panel of the Central Regional Council, MFDA File No. 200509, Reasons for Decision dated February 21, 2006 at para.85.

26. When determining whether a penalty agreed upon by the parties is appropriate, the Hearing Panel may also consider the MFDA's Sanction Guidelines ("Guidelines") which came in to effect on November 15, 2018. The Guidelines are not mandatory or binding on the Hearing Panel, but provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the same factors that are listed above, which have been considered in previous decisions of MFDA Hearing Panels, are also reflected and described in the Guidelines.

MFDA Sanction Guidelines.

VI. CONSIDERATIONS IN THE PRESENT CASE

27. Staff made very detailed submissions as to how these principles applied to the case before us. These submissions included the following.

Nature of the Misconduct

28. We agree with the submission of Staff that the Respondent's misconduct was serious. The use of altered and pre-signed forms, and the photocopying of client signatures to process subsequent transactions, have been repeatedly recognized by MFDA hearing panels as serious misconduct. The misconduct here is further aggravated by the fact that the Respondent's conduct occurred after MFDA Bulletin #0661-E.

Owen (Re), supra at para. 44.

MFDA Bulletin #0661-E, *supra*.

The Respondent's Recognition of the Seriousness of the Misconduct

29. The Respondent has acknowledged that his conduct constitutes a serious contravention of MFDA Rules. By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct, and has saved the MFDA the time, resources and expenses associated with a full disciplinary hearing.

Harm Suffered by Investors

30. We accept the submission of Staff that there is no evidence of client loss or lack of authorization with respect to the Respondent's conduct described in the Settlement Agreement.

Benefits Received by the Respondent

31. We, further, accept the submission of Staff that there is no evidence that the Respondent received a financial benefit from engaging in the admitted misconduct beyond any commissions and fees that he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.

Deterrence

32. Deterrence is intended to capture both specific deterrence of the wrongdoer and general deterrence of other participants in the capital markets in order to protect investors.

33. Staff submitted that the proposed fine of \$20,000 and costs in the amount of \$2,500 is necessary and sufficient to achieve the goals of both specific and general deterrence. It will reinforce the message that the use of altered and pre-signed forms and the photocopying of client signatures to process subsequent transactions will not be tolerated within the mutual fund industry.

Previous Decisions Made in Similar Circumstances

34. Staff provided the Hearing Panel with a detailed chart seeking to show that the proposed resolution is within the reasonable range of appropriateness with regards to other decisions made by MFDA Hearing Panels in similar circumstances.

35. The following cases were discussed:

- a) *Sonne (Re)*, MFDA File No. 202013, Central Region, May 11, 2020.
- b) *Lewis (Re)*, *supra*.
- c) *Heide (Re)*, *supra*.
- d) *Williams (Re)*, MFDA File No. 201864, Pacific Region, August 30, 2018.
- e) *Dick (Re)*, MFDA File No. 201818, Central Region, July 20, 2018.

VII. DECISION

36. After a thorough review of the factors by which we should be guided, and the facts of this case, as reflected in the Settlement Agreement, we were, unanimously, of the view that this Settlement Agreement was reasonable and in the public interest and should be accepted by the Hearing Panel. We so informed the parties at the conclusion of the Settlement Hearing.

VIII. ORDER

37. After accepting the Settlement Agreement, we made the following Order:

- a) The Respondent shall pay a fine in the amount of \$20,000 pursuant to section 24.1.1.(b) of MFDA By-law No. 1;
- b) The Respondent shall pay costs in the amount of \$2,500 pursuant to section 24.2 of MFDA By-law No. 1;
- c) The Respondent shall in the future comply with MFDA Rule 2.1.1; and

- d) 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 28th day of April, 2021.

“Thomas J. Lockwood”

Thomas J. Lockwood, Q.C.
Chair

“Brigitte J. Geisler”

Brigitte J. Geisler
Industry Representative

“Joseph Yassi”

Joseph Yassi
Industry Representative

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