



**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: Aubrey Reid Wallace**

Heard: December 1, 2016, in Halifax, Nova Scotia  
Reasons for Decision: January 13, 2017

**REASONS FOR DECISION**

Hearing Panel of the Atlantic Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Ann C. Etter	Industry Representative
Susan Nixon	Industry Representative

Appearances:

Paul Blasiak	)	Counsel for the Mutual Fund Dealers
	)	Association of Canada
	)	
Joseph Burke	)	Counsel for the Respondent
	)	
	)	

A. NOTICE OF SETTLEMENT HEARING

1. On October 25, 2016, the Mutual Fund Dealers Association of Canada (“MFDA”) announced that it had issued a Notice of Settlement Hearing (“Notice”) with respect to a proposed Settlement Agreement which had been entered into between the Staff of the MFDA and Aubrey Reid Wallace (“Respondent”).

2. The Notice advised that the Settlement Hearing would take place on December 1, 2016, at a stipulated time and venue in Halifax, Nova Scotia.

3. The Notice complied in all respects with Rule 15.2(1) of the MFDA’s Rules of Procedure.

B. THE SETTLEMENT HEARING

4. At the commencement of the Settlement Hearing, on December 1, 2016, the Hearing Panel granted a joint Motion by Counsel for Staff and the Respondent to move the proceedings “in camera” while we considered the Settlement Agreement, as well as the written and oral submissions of Staff and the oral submissions of Counsel for the Respondent.

5. After a detailed review of the Settlement Agreement, as well as a consideration of the submissions of the parties, we unanimously concluded that it was in the public interest that the Settlement Agreement be accepted.

6. On December 1, 2016, the Hearing Panel executed an Order giving effect to the terms of the Settlement Agreement. At that time, we advised that we would provide Reasons for our Decision. These are those Reasons.

C. THE SETTLEMENT AGREEMENT

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

## **“I. INTRODUCTION**

1. Staff of the Mutual Fund Dealers Association of Canada (“Staff”) and Aubrey Reid Wallace (the “Respondent”), consent and agree to settlement of this matter by way of this agreement (the “Settlement Agreement”).

2. Staff conducted an investigation of the Respondent’s activities which disclosed activity for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel pursuant to s. 24.1 of By-law No. 1.

## **II. JOINT SETTLEMENT RECOMMENDATION**

3. Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement.

4. The Respondent admits to the following violations of the By-laws, Rules or Policies of the MFDA:

a) on June 13, 2014, the Respondent processed three trades in the account of one client without the client’s authorization, contrary to MFDA Rules 2.3.1 and 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 \$10,500 pursuant to s. 24.1.1(b) of MFDA By-law No. 1;

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

c) the Respondent shall in the future comply with MFDA Rules 2.3.1 and 2.1.1; and

d) the Respondent will attend in person 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. Since May 2008, the Respondent has been registered in Nova Scotia as a mutual fund salesperson (now known as a dealing representative) with Investors Group Financial Services Inc. (“Investors Group”), a Member of the MFDA.

8. At all material times, the Respondent conducted business in the Truro, Nova Scotia area.

#### **Discretionary Trading**

9. In November 2012, the Respondent became the mutual fund salesperson at Investors Group responsible for servicing client MC’s accounts.

10. On March 7, 2014, client MC completed a Transfer Authorization Form, which contained instructions to transfer the entire balance in his account at TD Canada Trust (“TD”) to his account at Investors Group. Client MC requested that the Respondent contact him once the transfer was processed so that he could advise the Respondent with respect to how to invest the proceeds from the transfer.

11. On or about May 23, 2014, the entire balance of \$5,889.90 in client MC’s TD account (after deducting transfer fees) was transferred to Investors Group (the “Transfer”).

12. On or about June 13, 2014, the Respondent, without notifying client MC about the Transfer, and without obtaining client MC’s authorization, used the proceeds from the Transfer to process three mutual fund purchases in client MC’s account at Investors Group.

13. The Respondent used his discretion to select which mutual funds to purchase and the date on which the purchases were made.

14. On June 17, 2014, client MC contacted the Respondent to inquire about the status of the Transfer.

15. On June 17, 2014, the Respondent advised client MC that:

- a) the Transfer had already been processed;
- b) the Respondent had used the proceeds from the Transfer to purchase “three different funds” in client MC’s account; and
- c) the Respondent had “forgot that [the Respondent and client MC] were to meet before the money was invested.”

16. Upon learning that the Respondent invested the Transfer proceeds without his authorization, client MC requested that the Respondent process switches in order to transfer his investments from the mutual funds purchased on his behalf to a money market mutual fund. On June 20, 2014, the Respondent processed the switches requested by client MC.

17. Between June 13, 2014, which is the date on which the Respondent made the unauthorized mutual fund purchases in client MC’s account, and June 20, 2014, which is the date on which the Respondent processed the switches requested by client MC described above, client MC’s investments declined by a total amount of \$6.26.

### **Action Taken by the Member**

18. Investors Group became aware of the conduct that is the subject of this Settlement Agreement after it received a complaint from client MC about the unauthorized trades in his account.

19. On January 29, 2015, Investors Group sent a cautionary letter to the Respondent regarding the conduct described above.

20. In May 2015, Investors Group reviewed 25 of the Respondent's client files to determine if the Respondent had processed unauthorized trades in the clients' accounts. No instances of unauthorized trading were identified.

### **Additional Factors**

21. There is no evidence that the Respondent received any financial benefit from engaging in the misconduct described in this Settlement Agreement, beyond the commissions and fees that he would ordinarily be entitled to receive had the transactions been carried out in the proper manner.

22. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

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.”

### **D. APPLICABLE RULES**

8. Rule 2.3.1(a) provides, in part, that “no Approved Person shall . . . engage in any discretionary trading.”

9. Discretionary trading refers to the practice whereby an Approved Person carries out a trade or trades in a client's account without obtaining specific instructions from the client prior to the execution of the trade.

10. As stated by the MFDA Hearing Panel in *O'Brien (Re)*:

“ . . . mutual fund salespersons 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 fund salesperson.”

*O'Brien (Re)*, [2008] Hearing Panel of the Atlantic Regional Council, MFDA File No. 200809, Panel Decision dated November 28, 2008, at para. 19.

11. MFDA Rule 2.1.1 provides, in part, as follows:

“Each . . . Approved Person of a Member shall:

- (a) Deal fairly, honestly and in good faith with [his] 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; . . . .”

12. Previous MFDA Hearing Panels have held that where an Approved Person processes trades in the account of a client without the client’s authorization, the Approved Person has violated the prohibition on discretionary trading set out in MFDA Rule 2.3.1 and the standard of conduct set out in MFDA Rule 2.1.1.

*Griffith (Re)*, [2014] Hearing Panel of the Central Regional Council, MFDA File No. 201329, Panel Decision dated August 19, 2014.

*Moakler (Re)*, [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201571, Panel Decision dated May 24, 2016.

13. The prohibition on discretionary trading advances investor protection in two principal respects. First, it guards against potential abuses by ensuring that a client must give clear and complete directions to an Approved Person prior to a trade being executed in a client’s account. Second, it seeks to prevent clients from being victimized by poor investment decisions being made on their behalf by those who do not possess the necessary proficiencies, training and experience to exercise discretionary trading authority over a client’s investments.

14. In the present case, the Respondent admits that he processed three trades in the account of client MC without client MC's authorization, contrary to MFDA Rules 2.3.1 and 2.1.1.

E. THE LAW RELATING TO SETTLEMENT AGREEMENTS

15. Section 24.4.3 of MFDA By-law No. 1 provides the Hearing Panel with only two options when considering a Settlement Agreement. The Panel must either accept or reject the Settlement Agreement. It does not have the power to modify or vary any part of it.

16. The role of a Hearing Panel at a settlement hearing is fundamentally different than its role at a contested hearing. As the Hearing Panel stated in *Professional Investments (Kingston) Inc.*:

“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.”

*Professional Investments (Kingston) Inc. (Re)*, 2009 LNCMFDA 9, at para. 13.

17. Settlements do assist the MFDA in fulfilling its regulatory objective of protecting the public. They advance this objective by proscribing activities which are harmful to the public, while enabling the parties to reach a flexible remedy to address the interests of both the regulator and the Respondent.

18. Past MFDA Hearing Panels have set out a number of considerations which should be taken into account when determining whether a proposed settlement should be accepted. These include:

- (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 proposed settlement 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.

*Investors Group Financial Services* [2005] MFDA Ontario Regional Council, File No. 200401, Hearing Panel Decision dated October 16, 2004 at pp. 2-3.

19. The primary goal of securities regulation is the protection of the investor.

*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) at paras. 59 & 68.

20. Past MFDA Hearing Panels have also delineated a number of factors which should be considered when determining whether a proposed penalty 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 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.

*Headley (Re)*, 2006 LNCMFDA 3, at para. 85.

21. The MFDA Penalty Guidelines, while not mandatory, are an additional source which Hearing Panels can refer to in determining the appropriateness of the proposed penalties.

22. Where an Approved Person engages in discretionary trading, contrary to Rule 2.3.1, the Penalty Guidelines recommend one or more of the following: a minimum fine of \$5,000; a period of increased supervision; writing or re-writing an appropriate industry course; suspension; a permanent prohibition in egregious cases.

23. Where an Approved Person fails to adhere to the standard of conduct, set out in Rule 2.1.1, the Penalty Guidelines recommend one or more of the following: a minimum fine of \$5,000; writing or re-writing an appropriate industry course; suspension; a permanent prohibition in egregious cases.

#### F. CONSIDERATIONS IN THE PRESENT CASE

- (a) Nature of the Misconduct

24. The Respondent engaged in serious misconduct. The seriousness of discretionary trading as a form of misconduct arises from the fact that discretionary trading undermines the ability of a client to make decisions for and control his or her account.

25. We do not believe that the Respondent intended to take advantage of his client MC. However, discretionary trading is prohibited because control over trading decisions must rest solely with the client at all times. Nothing permits that control to be exercised by an Approved Person absent explicit client instructions.

(b) Client Harm

26. Although the client only suffered a nominal direct financial loss, the Respondent's conduct prevented him from exercising control over his investments.

(c) Benefits Received by the Respondent

27. In the Settlement Agreement, Staff conceded that there is no evidence that the Respondent received any financial benefit from engaging in the misconduct at issue in this proceeding, beyond the commissions and fees that he would ordinarily have been entitled to receive had the transactions been carried out in the proper manner.

(d) The Respondent's Experience and Level of Activity in the Capital Markets

28. The Respondent has been registered in the mutual fund industry since 2008. Consequently, he ought to have known and respected the MFDA's compliance requirements.

(e) Deterrence

29. Staff submits, and we agree, that the proposed penalties will act as a general deterrent and reinforce the message that discretionary trading is not tolerated by the MFDA and the mutual fund industry.

30. The proposed penalties, along with the experience of being involved in the current enforcement proceedings will, in our view, act as a deterrent with respect to the Respondent engaging in misconduct in the future.

31. In terms of further specific deterrence, we note that the Member sent a cautionary note to the Respondent with respect to his conduct. It also reviewed a number of client files to determine if there were other instances of unauthorized trading.

(f) The Respondent's Past Conduct Including Prior Sanctions

32. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

(g) The Respondent's Recognition of the Seriousness of the Misconduct

33. By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and has saved the MFDA the time, resources and expense associated with conducting a full disciplinary proceeding.

34. We were also advised that the Respondent has made arrangements for immediate payment of both the fine and costs should the Settlement Agreement be accepted by this Hearing Panel.

(h) Penalty Guidelines

35. The proposed penalties are consistent with the MFDA Penalty Guidelines.

(i) Previous Decisions Made in Similar Circumstances

36. Staff provided the Hearing Panel with previous Decisions made in similar circumstances to demonstrate that the proposed resolution was within the reasonable range of appropriateness. These Decisions included:

- (a) *Griffith (Re), supra.*
- (b) *MacDonald (Re)*, [2016], Hearing Panel of the Prairie Regional Council, MFDA File No. 201506, Panel Decision dated September 21, 2016.

G. DECISION

37. Sanctions are intended to be preventative, protective and prospective in nature. An appropriate sanction is one which will protect the public interest and prevent future conduct detrimental to the integrity of the capital markets. We believe that, in the particular circumstances of this case, the proposed penalties accomplish these goals.

38. After a detailed consideration of the Settlement Agreement, the applicable law, the submissions of the parties, as well as the factors specific to the Respondent, we unanimously concluded that it was in the public interest that the Settlement Agreement be accepted.

H. PENALTIES IMPOSED

39. As a result of the acceptance of the Settlement Agreement, the following penalties were imposed upon the Respondent:

- (a) The Respondent shall pay a fine in the amount of \$10,500 pursuant to s.24.1.1(b) of MFDA By-law No. 1;
- (b) The Respondent shall pay costs in the amount of \$2,500 pursuant to s.24.2 of MFDA By-law No. 1;
- (c) The Respondent shall in the future comply with MFDA Rules 2.3.1 and 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 13<sup>th</sup> day of January, 2017.

“Thomas J. Lockwood”

---

Thomas J. Lockwood, QC  
Chair

“Ann C. Etter”

---

Ann C. Etter  
Industry Representative

“Susan Nixon”

---

Susan Nixon  
Industry Representative

DM 519430 v1