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: Graham Allan Coltart

Heard: November 29, 2018 in Toronto, Ontario
Decision: November 29, 2018
Reasons for Decision: February 7, 2019

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Cheryl A. Hamilton	Industry Representative
Jeff J. Page	Industry Representative

Appearances:

Alan Melamud	)	Counsel for the Mutual Fund Dealers Association of Canada
Graham Allan Coltart	)	Respondent, by teleconference

I. BACKGROUND

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The hearing was held on Thursday, November 29, 2018. The full Settlement Agreement, dated July 23, 2018, entered into between Staff of the MFDA and Graham Allan Coltart (the "Respondent") is available on the MFDA website. The Respondent appeared by teleconference and was not represented by counsel.

2. The Panel accepted the proposed Settlement Agreement at the conclusion of the November 29, 2018 hearing, with reasons to follow. These are our reasons for the decision.

3. Between March 2002 and December 29, 2017, the Respondent was registered in Ontario as a mutual fund salesperson (now known as a Dealing Representative) with Quadrus Investment Services Inc. ("Quadrus"), a Member of the MFDA. At all material times, the Respondent conducted business in the London, Ontario, area.

4. In October 2016, Quadrus' compliance staff identified the falsified and pre-signed forms that are the subject of this Settlement Agreement as a result of a regularly scheduled branch audit and subsequent follow-up investigation. As part of its investigation, Quadrus sent letters to all of the clients serviced by the Respondent in order to determine whether the Respondent had engaged in any unauthorized trading. No clients reported any concerns regarding unauthorized trading.

5. On November 8, 2016, Quadrus issued a disciplinary letter to the respondent for his use of falsified and pre-signed forms. On December 8, 2016, Quadrus placed the Respondent under close supervision for a period of one year. On January 4, 2017, Quadrus issued a disciplinary letter to the Respondent for reimbursing deferred sales charge fees to a client.

6. On December 29, 2017, the Respondent resigned from Quadrus, and is no longer registered in the securities industry in any capacity.

Contraventions

7. The Respondent admits in paragraph 4 of the Settlement Agreement that:

a) between June 2011 and September 2016, the Respondent falsified, and used to process transactions, 12 account forms in respect of 8 clients by altering information on the account forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1;

b) between May 2011 and September 2016, the Respondent obtained, possessed, and in some instances, used to process transactions, 41 pre-signed account forms in respect of 11 clients, contrary to MFDA Rule 2.1.1; and

c) in or about April 2016, the Respondent without the prior approval of the Member, directly reimbursed a client for deferred sales charge fees that the client incurred, thereby engaging in personal financial dealings with a client, contrary to the Member's policies and procedures and MFDA Rules 1.1.2, 2.5.1, 2.1.4, 2.1.1, and MFDA Policy No. 3.

The Misconduct

8. The details of the misconduct are set out in paragraphs 10 to 21 of the Settlement Agreement and will not be described in detail here.

9. MFDA Hearing Panels have consistently held that such conduct – using pre-signed forms and altering account forms – constitutes a contravention of the standard of conduct under MFDA Rule 2.1.1. See *Re Price* 2011 CanLII 72458; *Re Symes* 2017 LNCMFDA 104; *Re Owen* 2017 LNCMFDA 287; *Re Lewis* 2018 LNCMFDA 59; *Re Pollon* 2018 LNCMFDA 54; and *Re Garofalo* 2016 LNCMFDA 119.

10. Using these pre-signed and altered forms are proscribed because their use 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.

11. For a number of years, the MFDA has been warning Approved Persons against the use of pre-signed, altered, and re-used account forms. See MFDA Staff Notice, MSN-0066, dated October 31, 2007 (updated January 26, 2017); MFDA Staff Notice MSN-035, dated December 10, 2004 (updated March 4, 2013); and MFDA Bulletin #0661-E, dated October 2, 2015.

12. Directly reimbursing a client without the prior approval of a member is engaging in personal financial dealings with clients, contrary to the policies and procedures of Quadrus and MFDA Rules 1.1.2, 2.5.1, 2.1.4, 2.1.1, and MFDA Policy No. 3. See MFDA Staff Notice MSN-0047, which states: "All monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member. The Member must be notified of any such arrangements, so that the Member is in a position to determine the significance of the benefit and to monitor the activity." Seeking to compensate a client for fees incurred or losses suffered raises an actual or potential conflict of interest between the Approved Person and the client.

Terms of Settlement

13. Staff and the Respondent agreed and consented to the following Terms of Settlement (see Paragraph 5):

a) the Respondent shall be prohibited from conducting securities related business in any capacity in the employ of or associated with a Member of the MFDA for a period of 6 months, pursuant to section 24.1.1(c) of By-law No. 1;
b) the Respondent shall pay costs in the amount of $2,500 in certified funds, pursuant to s.24.2 of MFDA By-law No. 1;
c) the Respondent shall in the future comply with MFDA Rule 2.1.1, 1.1.2, 2.5.1, 2.1.4, and 2.1.1; and
d) the Respondent will attend in person, on the date set for the Settlement Hearing.

Acceptance of Settlement Agreement

14. As stated above, the Panel accepted the terms of the Settlement Agreement. A Panel can either accept or reject a Settlement Agreement. It cannot modify it.

15. The conduct in the present case is serious. Altered forms are especially serious because, unlike pre-signed forms that the client knows are blank when he or she signs the form, an alteration may be done without the client's knowledge. Compensating a client without the Member's knowledge and consent prevents the Member from investigating the matter.

16. The respondent had been in the mutual fund industry with Quadrus since 2002 and has not previously been the subject of a disciplinary hearing.

17. There was no evidence of client losses as a result of the improper conduct. There is also no evidence that the Respondent received any financial benefit from the misconduct besides commissions and fees that he would have received if the transactions had been properly carried out. Further, there is no evidence of lack of authorization for the underlying transactions.

18. Some of the improper conduct relating to pre-signed and altered forms took place after the publication of MFDA Bulletin #0661-E, dated October 2, 2015, in which the MFDA advised Members and Approved Persons that Staff would be seeking enhanced penalties at MFDA disciplinary proceedings for conduct that occurred after the publication of the Bulletin on October 2, 2015.

19. A substantial monetary fine would be expected on these facts. The problem is that the Respondent states in the Settlement Agreement that he is 'impecunious and unable to pay any additional amounts towards a fine or costs.' This is not disputed by MFDA Counsel. The Respondent has agreed to pay costs of $2,500. He acknowledges, however, that 'absent his inability to pay, it would have been appropriate for him to be subject to a penalty that included a fine due to the seriousness of the misconduct.'

20. The parties have taken this into account in their negotiations and have agreed on a six months prohibition from conducting securities related business in any capacity in the employ of or associated with a member of the MFDA.

21. A penalty of a six-month prohibition, coupled with the inevitable financial loss from being out of the industry for a significant period of time, provides to the Respondent and others in the industry a large measure of deterrence against engaging in improper conduct.

22. The penalty agreed upon is not out of line with the numerous cases cited by counsel for the MFDA or with the new MFDA Sanction Guidelines that came into effect on November 15, 2018. There are a number of comparable cases where a fine was not imposed. See, for example, *Re Joudrey* 2017 KBCNFDA 46; *Re Gilboord* 2017 LNCMFDA 3; and *Re Hounsome* 2015 LNCMFDA 63; and *Re Peters* 2012 LNCMFDA 27. The New Sanctions Guidelines now contains

a specific provision (section 11) under the heading "Ability to pay is a consideration when imposing an appropriate monetary sanction."

23. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission (*B.C. Securities Commission v. Seifert* [2007] B.C.J. No. 2186, para. 49 (B.C.C.A.)):

> "Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation."

24. Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel.

25. A Settlement Agreement indicates a recognition of wrongdoing by the Respondent and also saves the MFDA the time, resources, and expense of a contested hearing.

26. As a Panel stated (*Re Keshet*, File No. 201419 at paragraph 7), to take one of many such cases: "It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness." There are many similar statements by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated: "A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness."

27. The penalty agreed to in this case clearly falls within "a reasonable range of appropriateness."

28. For the above reasons the panel accepted the Settlement Agreement.

DATED this 7th day of February, 2019.

"Martin L. Friedland"
Martin L. Friedland, C.C., Q.C.
Chair

"Cheryl A. Hamilton"
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Industry Representative

"Jeff J. Page"
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