



**Mutual Fund Dealers Association of Canada**  
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT HEARING  
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF  
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Kenneth John Fialho**

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**SETTLEMENT AGREEMENT**

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**I. INTRODUCTION**

1. By Notice of Settlement Hearing, the Mutual Fund Dealers Association of Canada (“MFDA”) will announce that it proposes to hold a hearing to consider whether, pursuant to section 24.4 of By-law No. 1, a hearing panel of the Central Regional Council (“Hearing Panel”) of the MFDA should accept the settlement agreement (“Settlement Agreement”) entered into between Staff of the MFDA (“Staff”) and Kenneth John Fialho (“Respondent”).

**II. JOINT SETTLEMENT RECOMMENDATION**

2. Staff conducted an investigation of the Respondent’s activities. The investigation disclosed that the Respondent had engaged in 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.

3. Staff and the Respondent recommend settlement of the matters disclosed by the investigation in accordance with the terms and conditions set out below. The Respondent agrees

to the settlement on the basis of the facts set out in Part IV herein and consents to the making of an Order in the form attached as Schedule “A”.

4. Staff and the Respondent agree that the terms of this Settlement Agreement, including the attached Schedule “A”, will be released to the public only if and when the Settlement Agreement is accepted by the Hearing Panel.

### **III. ACKNOWLEDGEMENT**

5. Staff and the Respondent agree with the facts set out in Part IV herein for the purposes of this Settlement Agreement only and further agree that this agreement of facts is without prejudice to the Respondent or Staff in any other proceeding of any kind including, but without limiting the generality of the foregoing, any proceedings brought by the MFDA (subject to Part XI) or any civil or other proceedings which may be brought by any other person or agency, whether or not this Settlement Agreement is accepted by the Hearing Panel.

### **IV. AGREED FACTS**

#### **Registration History**

6. Between November 1, 2002 and December 2016, the Respondent was registered in Ontario as a mutual fund salesperson / dealing representative.<sup>1</sup>

7. From May 2009 to February 2014, the Respondent was an Approved Person of Peak Investment Services Inc. (“Peak” or the “Member”), a Member of the MFDA.

8. Since December 30, 2016, the Respondent has not been registered in the securities industry in any capacity.

9. At all material times, the Respondent carried on business from a sub-branch located in Mississauga, Ontario.

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<sup>1</sup>In September 2009, the registration category mutual fund salesperson was changed to “dealing representative” when National Instrument 31-103 came into force.

## Submitting Trades without Specific Client Instructions

10. At all material times, the policies and procedures of Peak stated:

Peak has offered to its registered representatives the option of using a Trading Authorization as long as the following guidelines are used:

The LTA does not permit the sales representative to act without specific instructions from the investor. A record of clear client instructions for all transactions must be kept on file for audit purposes. Client notes regarding instructions must be kept on file for audit purposes.

...

Discretionary trading is the act of executing a transaction in an account where the client has not initiated the transaction. Discretionary trading is prohibited.

11. Between April 16, 2012 and November 27, 2013, the Respondent submitted the following trades to the Member for processing and purported to rely on a Limited Trading Authorization (“LTA”) in each instance:

- a) On April 16, 2012, the Respondent submitted a trade ticket to process two switches in the account of clients SL and DL in trust for IL and AL;
- b) On August 10, 2012, the Respondent submitted a trade ticket to process two redemptions in the account of client DD;
- c) On November 29, 2012, the Respondent submitted a trade ticket to process five switches in the account of client GD; and
- d) On November 27, 2013, the Respondent submitted a trade ticket to process a switch in the account of client PD2.

12. With respect to each of the trades noted at paragraph 11, the Respondent submitted the trades for processing without obtaining specific instructions from the clients with respect to one or more of the elements of the trade, including the timing of the trade, the amount of the trade, or the securities to be traded.

13. The Respondent states that each of the above noted clients were generally aware of the trades at issue.

14. In each instance the Respondent also failed to maintain records of any client instructions that he had received with respect to each trade.

15. In each case, the trades were flagged by Peak's compliance system and returned to the Respondent to secure proper client instructions.

16. In each case, the Respondent re-submitted trade tickets signed by the clients to Peak to process the previously submitted trades.

#### **Failure to Follow a Member Directive**

17. On December 10, 2013, Peak advised the Respondent by letter that it was suspending the Respondent's authority to rely on LTAs to process trades for clients until further training could be scheduled to explain the limits and proper uses of an LTA by the Respondent.

18. On January 15, 2014 and on January 17, 2014, the Respondent submitted paperwork to process trades in the account of client AD pursuant to an LTA that was on file with the Member for client AD. The Respondent states that client AD had authorized the two trades prior his receipt of the LTA suspension letter.

19. By submitting two trades in reliance upon client AD's LTA, the Respondent disregarded the suspension that Peak had imposed on his authority to rely on LTAs to process trades in client accounts without client signatures.

20. Peak rejected the trades that the Respondent had submitted because of the suspension that it had placed on the Respondent. On January 23, 2014, the Respondent re-submitted trade tickets signed by client AD to process the previously submitted trades.

## **Accepting Authorization from Someone Other than the Client**

21. From time to time, the Respondent would meet in person with client PD1. During those meetings the Respondent sometimes made investment recommendations or accepted investment instructions from client PD1 concerning the accounts of client PD1's spouse, client PD2 and accounts of their daughter, client MD.

22. The Respondent was aware that client PD1 would sign documents on behalf of client PD2. The Respondent states that client PD2 was aware that client PD1 would sign documents on her behalf.

23. On at least four occasions, the Respondent accepted and submitted account documentation that contained signatures that purported to be those of client PD2, without taking adequate steps to ensure that that the documents had in fact been signed by client PD2. In particular, the Respondent submitted the following documents to the Member:

- a) a Know-Your-Client ("KYC") form dated December 12, 2009 for a joint account of clients PD1 and PD2 that purportedly contained a signature of client PD2 but was in fact signed by client PD1;
- b) a KYC form dated May 10, 2013 for a joint account of clients PD1 and PD2 that purportedly contained a signature of client PD2 but was in fact signed by client PD1;
- c) a KYC form dated September 16, 2013 for an individual account of client PD2 that purportedly contained a signature of client PD2 but was in fact signed by client PD1; and
- d) an undated B2B loan application form that purportedly contained a signature of client PD2 but was in fact signed by client PD1.

24. On October 22, 2013 the Respondent processed a \$2,400 trade in the account of client MD. The Respondent had obtained trade instructions from the client's father, client PD1. Client PD1 did not have authority to provide trading instructions in respect of client MD's account.

## **Client Contact Note**

25. On September 3, 2015, during the course of the investigation of his conduct by Staff of the MFDA, Staff requested that the Respondent produce notes or records of client instructions from Client MD concerning the above-referenced trade that was processed on October 22, 2013.

26. On September 8, 2015, the Respondent provided an email response to Staff in which he stated that he received authorization from client MD prior to the trade. In his response, the Respondent also provided Staff with a copy of a handwritten client contact note (the "Contact Note") that purportedly demonstrated that he had received authorization from client MD in advance of processing the trade.

27. The Respondent had not in fact obtained trading instructions from client MD prior to the October 22, 2013 trade. As noted in paragraph 22 above, the Respondent processed a trade in the account of client MD on October 22, 2013, based on instructions that he had received from client PD1.

## **Additional Factors**

28. The Respondent states that he engaged in the conduct described in this Settlement Agreement for the purposes of client convenience.

29. The Respondent has never been the subject of previous MFDA disciplinary proceedings

30. There is no evidence of client loss in this matter or that the Respondent received any financial benefit from engaging in the misconduct beyond the commissions or fees to which he would have been ordinarily entitled had the transactions in the clients' accounts been carried out in the proper manner.

31. There have been no client complaints in relation to the conduct described in this Settlement Agreement, and no evidence of unauthorized trading undertaken by the Respondent.

32. The Respondent has cooperated fully with Staff during the course of the investigation, and by agreeing to this settlement, has avoided the necessity of a full hearing on the merits.

## **V. CONTRAVENTIONS**

33. The Respondent admits that between April 16, 2012 and November 27, 2013, he submitted four trades in four client accounts to the Member, without sufficient authorization or evidence of instructions from the clients, contrary to the policies and procedures of the Member and MFDA Rules 2.1.1, 2.3.1, 2.10 and 1.1.2.

34. The Respondent admits that in January 2014, he attempted to process two trades in reliance upon LTAs in contravention of a direction from the Member prohibiting the use of LTAs by the Respondent, contrary to MFDA Rule 2.1.1(b) and (c).

35. The Respondent admits that between December 2009 and October 2013, he:

- a) submitted four client account forms to the Member containing signatures or initials that of someone other than the account holder;
- b) did not take adequate steps to ensure that the four client account forms had been signed by the account holder; and
- c) processed a trade based on instructions that he received from someone other than the account holder,

contrary to MFDA Rules 2.1.1, 2.3.1 and 1.1.2.

36. The Respondent admits that on September 8, 2015, he provided notes to MFDA Staff during the course of its investigations that purported to demonstrate that he had obtained instructions from a client to process a trade, when he knew or ought to have known he had processed the trade in question based on the instructions of someone other than the client, contrary to MFDA Rule 2.1.1.

## **VI. TERMS OF SETTLEMENT**

37. Staff and the Respondent agree and consent to the following terms of settlement:

- i) The Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member shall be prohibited

- for a period of two years from the date of the order, pursuant to section 24.1.1(e) of MFDA By-law No. 1;
- ii) the Respondent shall pay costs in the amount of \$5,000 pursuant to section 24.2 of By-law No. 1 upon acceptance of this Settlement Agreement;
  - iii) the payment by the Respondent of the costs described above in subparagraph (ii) shall be made to and received by MFDA Staff in certified funds as follows:
    - a) \$1,250 (costs) shall be paid upon acceptance of the Settlement Agreement by the Hearing Panel;
    - b) \$1,250 (costs) shall be paid on or before the last business day of the second month following the acceptance of the Settlement Agreement by the Hearing Panel;
    - c) \$1,250 (costs) shall be paid on or before the last business day of the fourth month following the acceptance of the Settlement Agreement by the Hearing Panel;
    - d) \$1,250 (costs) shall be paid on or before the last business day of the sixth month following the acceptance of the Settlement Agreement by the Hearing Panel;
  - iv) if the Respondent fails to make any of the payments described above in subparagraph (iii) then:
    - (a) any outstanding balance of the costs owed by the Respondent shall immediately become due and payable to the MFDA; and
    - (b) the Respondent shall continue to be prohibited from conducting securities related business while in the employ of or associated with a Member of the MFDA until such time as the total amount outstanding of the costs owed by the Respondent is paid to the MFDA, pursuant to section 24.3.13(c) of MFDA By-law No. 1; and
  - v) the Respondent will attend in person, on the date set for the Settlement Hearing.



## **VII. STAFF COMMITMENT**

38. If this Settlement Agreement is accepted by the Hearing Panel, Staff will not initiate any proceeding under the By-laws of the MFDA against the Respondent in respect of the facts set out in Part IV and the contraventions described in Part V of this Settlement Agreement, subject to the provisions of Part IX below. Nothing in this Settlement Agreement precludes Staff from investigating or initiating proceedings in respect of any facts and contraventions that are not set out in Parts IV and V of this Settlement Agreement or in respect of conduct that occurred outside the specified date ranges of the facts and contraventions set out in Parts IV and V, whether known or unknown at the time of settlement. Furthermore, nothing in this Settlement Agreement shall relieve the Respondent from fulfilling any continuing regulatory obligations.

## **VIII. PROCEDURE FOR APPROVAL OF SETTLEMENT**

39. Acceptance of this Settlement Agreement shall be sought at a hearing of the Central Regional Council of the MFDA on a date agreed to by counsel for Staff and the Respondent. MFDA Settlement Hearings are typically held in the absence of the public pursuant to section 20.5 of MFDA By-law No. 1 and Rule 15.2(2) of the MFDA Rules of Procedure. If the Hearing Panel accepts the Settlement Agreement, then the proceeding will become open to the public and a copy of the decision of the Hearing Panel and the Settlement Agreement will be made available at [www.mfda.ca](http://www.mfda.ca).

40. Staff and the Respondent may refer to any part, or all, of the Settlement Agreement at the Settlement Hearing. Staff and the Respondent also agree that if this Settlement Agreement is accepted by the Hearing Panel, it will constitute the entirety of the evidence to be submitted respecting the Respondent in this matter, and the Respondent agrees to waive his rights to a full hearing, a review hearing before the Board of Directors of the MFDA or any securities commission with jurisdiction in the matter under its enabling legislation, or a judicial review or appeal of the matter before any court of competent jurisdiction.

41. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, then the Respondent shall be deemed to have been penalized by the Hearing

Panel pursuant to s. 24.1.1 of By-law No. 1 for the purpose of giving notice to the public thereof in accordance with s. 24.5 of By-law No. 1.

42. Staff and the Respondent agree that if this Settlement Agreement is accepted by the Hearing Panel, neither Staff nor the Respondent will make any public statement inconsistent with this Settlement Agreement. Nothing in this section is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

#### **IX. FAILURE TO HONOUR SETTLEMENT AGREEMENT**

43. If this Settlement Agreement is accepted by the Hearing Panel and, at any subsequent time, the Respondent fails to honour any of the Terms of Settlement set out herein, Staff reserves the right to bring proceedings under section 24.3 of the By-laws of the MFDA against the Respondent based on, but not limited to, the facts set out in Part IV of the Settlement Agreement, as well as the breach of the Settlement Agreement. If such additional enforcement action is taken, the Respondent agrees that the proceeding(s) may be heard and determined by a hearing panel comprised of all or some of the same members of the hearing panel that accepted the Settlement Agreement, if available.

#### **X. NON-ACCEPTANCE OF SETTLEMENT AGREEMENT**

44. If, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel or an Order in the form attached as Schedule "A" is not made by the Hearing Panel, each of Staff and the Respondent will be entitled to any available proceedings, remedies and challenges, including proceeding to a disciplinary hearing pursuant to sections 20 and 24 of By-law No. 1, unaffected by this Settlement Agreement or the settlement negotiations.

45. Whether or not this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement or the negotiation or process of approval of this Settlement Agreement as the basis for any allegation against the MFDA of lack of jurisdiction, bias, appearance of bias, unfairness, or any other remedy or challenge that may otherwise be available.

**XI. DISCLOSURE OF AGREEMENT**

46. The terms of this Settlement Agreement will be treated as confidential by the parties hereto until accepted by the Hearing Panel, and forever if, for any reason whatsoever, this Settlement Agreement is not accepted by the Hearing Panel, except with the written consent of both the Respondent and Staff or as may be required by law.

47. Any obligations of confidentiality shall terminate upon acceptance of this Settlement Agreement by the Hearing Panel.

**XII. EXECUTION OF SETTLEMENT AGREEMENT**

48. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.

49. A facsimile copy of any signature shall be effective as an original signature.

**DATED** this 13<sup>th</sup> day of April, 2018.

“Kenneth John Fialho”  
\_\_\_\_\_  
Kenneth John Fialho

\_\_\_\_\_  
Witness – Signature

\_\_\_\_\_  
Witness – Print Name

“Shaun Devlin”  
\_\_\_\_\_  
Shaun Devlin  
Staff of the MFDA  
Per: Shaun Devlin  
Senior Vice-President,  
Member Regulation – Enforcement



**Mutual Fund Dealers Association of Canada**  
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A SETTLEMENT HEARING  
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF  
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

**Re: Kenneth John Fialho**

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**ORDER**

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**WHEREAS** on [date], the Mutual Fund Dealers Association of Canada (the "MFDA") issued a Notice of Settlement Hearing pursuant to section 24.4 of By-law No. 1 in respect of Kenneth Fialho (the "Respondent");

**AND WHEREAS** the Respondent entered into a settlement agreement with Staff of the MFDA, dated [date] (the "Settlement Agreement"), in which the Respondent agreed to a proposed settlement of matters for which the Respondent could be disciplined pursuant to ss. 20 and 24.1 of By-law No. 1;

**AND WHEREAS** on the basis of the admissions made by the Respondent in the Settlement Agreement, the Hearing Panel is of the opinion that:

- a) The Respondent admits that between April 16, 2012 and November 27, 2013, he submitted four trades in four client accounts to the Member, without sufficient authorization or evidence of instructions from the clients, contrary to the policies and procedures of the Member and MFDA Rules 2.1.1, 2.3.1, 2.10 and 1.1.2.

- b) The Respondent admits that in January 2014, he attempted to process two trades in reliance upon LTAs in contravention of a direction from the Member prohibiting the use of LTAs by the Respondent, contrary to MFDA Rule 2.1.1(b) and (c).
- c) The Respondent admits that between December 2009 and October 2013, he:
  - i. submitted four client account forms to the Member containing signatures or initials that of someone other than the account holder;
  - ii. did not take adequate steps to ensure that the four client account forms had been signed by the account holder; and
  - iii. processed a trade based on instructions that he received from someone other than the account holder,contrary to MFDA Rules 2.1.1, 2.3.1 and 1.1.2.
- d) the Respondent admits that on September 8, 2015, he provided notes to MFDA Staff during the course of its investigations that purported to demonstrate that he had obtained instructions from a client to process a trade, when he knew or ought to have known he had processed the trade in question based on the instructions of someone other than the client, contrary to MFDA Rule 2.1.1.

**IT IS HEREBY ORDERED THAT** the Settlement Agreement is accepted, as a consequence of which:

1. 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*.

2. the Respondent's authority to conduct securities related business in any capacity while in the employ of or associated with any MFDA Member shall be prohibited for a period of two years from the date of the order, pursuant to section 24.1.1(e) of MFDA By-law No. 1.

3. the Respondent shall pay costs in the amount of \$5,000 pursuant to section 24.2 of By-law No. 1 upon acceptance of this Settlement Agreement.

4. the payment by the Respondent of the costs described above in paragraph 3 shall be made to and received by MFDA Staff in certified funds as follows:

- a) \$1,250 (costs) shall be paid upon acceptance of the Settlement Agreement by the Hearing Panel;
- b) \$1,250 (costs) shall be paid on or before [date];
- c) \$1,250 (costs) shall be paid on or before [date];
- d) \$1,250 (costs) shall be paid on or before [date];

5. if the Respondent fails to make any of the payments described above in paragraph 4, then:

- a) any outstanding balance of the costs owed by the Respondent shall immediately become due and payable to the MFDA; and
- b) the Respondent shall continue to be prohibited from conducting securities related business while in the employ of or associated with a Member of the MFDA until such time as the total amount outstanding of the costs owed by the Respondent is paid to the MFDA, pursuant to section 24.3.13(c) of MFDA By-law No. 1.

**DATED** this [day] day of [month], 20[ ].

Per: \_\_\_\_\_  
[Name of Public Representative], Chair

Per: \_\_\_\_\_  
[Name of Industry Representative]

Per: \_\_\_\_\_

[Name of Industry Representative]

DM 607358