



**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 Richard Showalter**

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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 (the “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 (the “Hearing Panel”) of the MFDA should accept the settlement agreement (the “Settlement Agreement”) entered into between Staff of the MFDA (“Staff”) and the Respondent, Kenneth Richard Showalter (the “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 MFDA 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. Since July 1, 2006, the Respondent has been registered in Ontario, British Columbia, Saskatchewan and Nova Scotia as a mutual fund salesperson / dealing representative<sup>1</sup> and has been an Approved Person with Desjardins Financial Security Investments Inc. (“Desjardins” or the “Member”), a Member of the MFDA. Previously, he was also registered in Newfoundland and Labrador.

7. Between December 1991 and June, 2006, the Respondent was registered in Ontario as a mutual fund salesperson with other mutual fund dealers.

8. At all material times, the Respondent resided in Oshawa, Ontario and carried on business from a sub-branch office located in Courtice, Ontario.

#### **Clients NB And RB**

9. Client NB was born in July 1952. She completed a high school education and had worked as a caregiver for children and as a part time French tutor. She retired in 2007. Her husband, RB,

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<sup>1</sup>On September 28, 2009, as a result of the implementation of National Instrument 31-103, the mutual fund salesperson registration category was changed to “dealing representative – mutual fund dealer”.

was born in November 1942. He worked in construction for most of his career. In 2014, he was providing maintenance services for a company that managed co-operative housing. He subsequently retired in September 2016.

10. In September 2014, following the retirement of the investment advisor who had been servicing the investment accounts of clients NB and RB at another mutual fund dealer, clients NB and RB were referred to the Respondent by client NB's brother, client MR, whose account was serviced by the Respondent.

11. During their initial meeting with the Respondent in September 2014, clients NB and RB told the Respondent that they were prepared to transfer their accounts to Desjardins to evaluate the investment returns that the Respondent could achieve for them over the first couple of years but they wanted to avoid paying fees on their investment accounts. The Respondent and clients NB and RB discussed an annual rate of return that the Respondent believed that the clients could expect to earn on their investments.

12. Clients NB and RB agreed to sign paperwork to transfer their accounts to Desjardins and the Respondent was assigned as the Approved Person responsible for servicing their accounts.

13. On September 10, 2014, clients NB and RB opened several accounts at Desjardins including a registered retirement savings plan ("RRSP") account for NB, a spousal RRSP for NB, a non-registered open account for NB, a registered retirement income fund ("RRIF") account for RB, tax free savings accounts for both NB and RB and a non-registered account in trust for their granddaughter IB, all of which were serviced by the Respondent. At the time that the accounts were opened, client NB was 62 years old and client RB was 71 years old.

14. The Know-Your-Client ("KYC") information recorded on all of the account opening forms identified clients NB and RB as novice investors with a medium risk tolerance and a time horizon of more than 10 years. Their investment objectives were identified as 100% growth.

## **Investments In Funds Subject To Deferred Sales Charge Fees**

15. The Respondent recommended that clients NB and RB invest the money that was transferred into the Member in a few different dividend growth and dividend income funds. Clients NB and RB agreed to accept the Respondent's recommendations.

16. The Respondent structured each account portfolio such that approximately 80% of the money was invested in mutual funds subject to deferred sales charge ("DSC") fees if redemptions were made within 5 years of the purchases. Approximately 20% of the money was invested in mutual funds that were not subject to DSC fees.

17. During their first meeting with the Respondent on September 10, 2014, clients NB and RB signed letters of direction authorizing the mutual fund purchases that the Respondent had recommended. On the front page of each letter of direction, the fund name and fund code was listed but it was not indicated that any of the recommended funds were subject to DSC fees. On the third page of the letters of direction, a fee and cost disclosure section was completed in the Respondent's handwriting indicating that DSC fees would be applicable to any redemptions during the first 5 years that those mutual funds were held.

18. Clients NB and RB acknowledge that they signed the letters of direction but they claim that the Respondent had not explained to them that DSC fees might be applicable to redemptions from their accounts during the five years following the purchases and they claim that he did not bring the fee and costs disclosure sections of the letters of direction to their attention. Client NB told the Respondent during her initial meeting with him that they wanted to avoid paying any fees on their accounts and she claims that she would not have knowingly agreed to purchase mutual funds subject to DSC fees.

## **The Redemption In 2015**

19. In August 2015, client NB instructed the Respondent to redeem the investments that she had purchased in trust for her granddaughter IB. The Respondent processed the redemptions as client NB requested. Client NB incurred a DSC fee in the amount of \$262.19 on the redemption of a mutual fund in that account that was subject to DSC fees.

## **The Complaint By Client NB And The Unauthorized Payment Of Compensation**

20. After reviewing the trade details that she received following the liquidation of the account, client NB noticed that she had incurred the \$262.19 DSC fee.

21. In September 2015, client NB called the Respondent and told him that she was disappointed with the performance of her investments which had not achieved the rate of return that they had discussed in September 2014. She also claimed that the DSC fee that she had incurred was inconsistent with her direction to the Respondent to avoid fees on her accounts. She told him that she expected him to refund the DSC fee in full and if he refused, she would contact his supervisor.

22. In December 2015, client NB still had not received any compensation or a satisfactory response to her complaint. At the time, she did not have her own e-mail account. She restated her complaint to the Respondent in writing in an e-mail that she sent from the e-mail account of her brother, client MR.

23. The Respondent did not report to the Member that he had received a verbal or written complaint from client NB.

24. On December 26, 2015, the Respondent left a bag outside the front door of the home of clients NB and RB. In the bag, clients NB and RB found approximately \$250 in cash (slightly less than the value of the deferred sales charge that had been incurred), several trade forms and a letter addressed to them that stated as follows:

I take great pride in doing a great job. Though promised two years to earn your confidence and trust it has not worked out that way and as a result has not been optimal. The market is down 9.2% so far this year and we are down 1.4%. We are top quartile in performance and almost 8% above market which is stellar. All my clients, except you, are thrilled with that performance and so am I.

Attached is a bunch of paperwork. I have attached cover notes for each piece. Sign the ones you want, destroy the ones you don't and put the completed ones in the door. I will pick them up in the morning on my way into Toronto. We will process the ones you return to us.

...

If you have any questions or concerns please feel free to call me . . .

25. The Respondent did not inform the Member that client NB had complained about the DSC fee that she incurred upon the liquidation of the investment account that she had opened in trust for NB's granddaughter and he did not request authorization to pay compensation to client NB in respect of the DSC fee that she incurred in order to resolve her complaint.

#### **Discretionary Trades Processed In May 2016**

26. On May 1, 2016, client NB informed the Respondent that she wanted to withdraw \$30,000 from her open account.

27. On May 3, 2016, the Respondent confirmed with client NB that the proceeds of redemption should be deposited into the bank account that he had on file for her account.

28. The Respondent processed a redemption in the amount of \$30,000 in response to client NB's request but he exercised discretion with respect to which mutual fund(s) should be redeemed to comply with the client's request.

29. On May 20, 2016, client NB informed the Respondent that she wanted to withdraw another \$30,000 to apply towards a real estate investment that she intended to make with her daughter. She instructed him to deposit the money in the bank account that he had on file.

30. On May 26, 2016, client NB followed up on her request because it still had not been processed.

31. On May 27, 2016, client NB expressed frustration that she still had not received the money that she had requested and instructed the Respondent to increase the withdrawal request to \$40,000.

32. On May 27, 2016, relying on a limited trading authorization, the Respondent submitted letters of direction on behalf of client NB (but without her signature) in order to process a \$31,000 redemption from a mutual fund held in her open account and a \$9,000 redemption from a mutual fund held in her tax free savings account. Although the Respondent processed the redemptions in response to client NB's request, he exercised discretion with respect to which mutual funds should be redeemed and which accounts the redemptions should be taken from.

33. On June 14, 2016, when client NB received confirmation slips concerning the redemptions that had been processed in her accounts on May 30, 2016, she immediately wrote an e-mail to the Respondent stating:

“I hope to God that you did not take any funds from my TFSA account because you can rest assured that you will have to rectify this forthwith. There is no valid reasoning for there to be funds withdrawn from my TFSA account. . . ”

34. The Respondent replied by stating, among other things, “for the 40K I knew that you would not like any fees so I made sure you were not charged for any transactions.”

35. Later the same day, client NB contacted the Respondent’s branch manager to complain about the fact that mutual funds had been redeemed from her tax free savings account and the fact that many mutual funds had been purchased in her investment accounts subject to DSC fees which she believed was contrary to her instructions and understanding.

36. Following an investigation, Desjardins reversed the trade processed from client NB’s tax free savings account and agreed to reimburse clients NB and RB for any DSC fees that they would incur to transfer their accounts out of Desjardins. Desjardins also issued a warning letter to the Respondent concerning discretionary trading in client NB’s account.

37. The Respondent admits that he was required to obtain instructions from client NB with respect to all elements of the trades that he processed on her behalf in May 2016 including the account in which the transactions were to be processed, the specific securities to be traded, the amount or value of each security to be traded and the timing of the trades. By failing to obtain instructions with respect to which accounts the requested redemptions should be processed in and which mutual funds should be redeemed, he engaged in discretionary trading, contrary to former MFDA Rule 2.3.1(a) [now MFDA Rule 2.3.1(b)] and the policies and procedures of the Member.

## **V. CONTRAVENTIONS**

38. The Respondent admits that between September and December 2015, he received a complaint from client NB verbally and in writing that he failed to report to the Member and without the prior written authorization of the Member, he paid compensation to client NB to resolve her complaint, contrary to section 4.1(a) of MFDA Policy No. 6, sections 9-1, 9-2 and 10 of MFDA

Policy No. 3, MFDA Rules 2.1.1, 2.1.4, 2.5.1 and 1.1.2 and the policies and procedures of the Member.

39. The Respondent admits that in May 2016, he engaged in discretionary trading by processing three trades in the investment accounts of client NB without first obtaining instructions from the client with respect to all elements of the trades, contrary to former MFDA Rules 2.3.1(a) [now MFDA Rule 2.3.1(b)]<sup>2</sup>, 2.1.1, 2.10 and 1.1.2 and the policies and procedures of the Member.

## **VI. TERMS OF SETTLEMENT**

40. The Respondent agrees to the following terms of settlement:

- a) the Respondent shall pay a fine in the amount of \$18,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 which shall be payable in instalments as follows:
  - (i) \$6,000 payable on the date that the Settlement Agreement is accepted by the Hearing Panel;
  - (ii) 2,000 payable on the first day of each month from April 1, 2019 to September 1, 2019;
- b) the Respondent shall pay costs to the MFDA in the amount of \$5,000, pursuant to s. 24.2 of MFDA By-law No. 1 on the day that this Settlement Agreement is accepted by a Hearing Panel of the MFDA;
- c) the Respondent shall use due diligence in the future to comply with MFDA Rules 2.1.1, 2.1.4, 2.3.1(b), MFDA Policies No. 3, MFDA Policy No. 6 and the policies and procedures of the Member that he is associated with;
- d) the Respondent will attend in person, on the date set for the Settlement Hearing.

## **VII. STAFF COMMITMENT**

41. 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 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

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<sup>2</sup>On January 19, 2017, MFDA Rule 2.3.1 was amended. The prohibition on discretionary trading was moved from MFDA Rule 2.3.1(a) to MFDA Rule 2.3.1(b).



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 VII, 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**

42. 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).

43. 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.

44. 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.

45. 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**

46. 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**

47. 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 MFDA By-law No. 1, unaffected by this Settlement Agreement or the settlement negotiations.

48. 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**

49. 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.

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

**XII. EXECUTION OF SETTLEMENT AGREEMENT**

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

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

**DATED** this 8<sup>th</sup> day of February, 2019.

“Kenneth Richard Showalter”

Kenneth Richard Showalter

“VS”

Witness – Signature

VS

Witness – Print Name

“Shaun Devlin”

Shaun Devlin

Staff of the MFDA

Per: Shaun Devlin

Senior Vice-President,

Member Regulation – Enforcement

**Schedule “A”**

**Order**

**File No. 201906**



**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 Richard Showalter**

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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 Walter Showalter (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) between September and December 2015, the Respondent received a complaint from his client NB verbally and in writing that he failed to report to the Member and without the prior written authorization of the Member, he paid compensation to his client NB to resolve her complaint, contrary to section 4.1(a) of MFDA

Policy No. 6, sections 9-1, 9-2 and 10 of MFDA Policy No. 3, MFDA Rules 2.1.1, 2.1.4, 2.5.1 and 1.1.2 and the policies and procedures of the Member; and

- (b) in May 2016, the Respondent engaged in discretionary trading by processing three trades in the investment accounts of his client NB without first obtaining instructions from the client with respect to all elements of the trades, contrary to former MFDA Rules 2.3.1(a) [now MFDA Rule 2.3.1(b)]<sup>3</sup>, 2.1.1, 2.10 and 1.1.2 and the policies and procedures of the Member.

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

1. The Respondent shall pay a fine in the amount of \$18,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 which shall be payable in instalments as follows:
  - a) \$6,000 payable on the date that the Settlement Agreement is accepted by the Hearing Panel; and
  - b) \$2,000 payable on the first day of each month from April 1, 2019 to September 1, 2019;
2. The Respondent shall pay costs to the MFDA in the amount of \$5,000, pursuant to s. 24.2 of MFDA By-law No. 1 on the date of this Order.
3. 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*.

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<sup>3</sup>On January 19, 2017, MFDA Rule 2.3.1 was amended. The prohibition on discretionary trading was moved from MFDA Rule 2.3.1(a) to MFDA Rule 2.3.1(b).

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

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

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

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

DM 666503