Re Moody

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

John Dixon Moody

2023 CIRO 32

Canadian Investment Regulatory Organization
Hearing Panel (Alberta District)

Heard: January 24, 2023 and June 21, 2023 by electronic hearing in Calgary, Alberta
Decision (Sanction): June 21, 2023
Reasons for Decision (Sanction): December 1, 2023

Hearing Panel
Robert Stack, Chair
Adam Dudley, Industry Representative
Annette Stephens, Industry Representative

Appearances:
Alan Melamud, Senior Enforcement Counsel for CIRO
Zachary Pringle, Counsel for the Respondent
John Dixon Moody, Respondent

DECISION AND REASONS

Background

¶ 1 On September 9th, 2022, the Mutual Fund Dealers Association of Canada ("**MFDA**"), a predecessor of the Canadian Investment Regulatory Corporation ("**CIRO**") (collectively referred to as the "**Corporation**"), filed a Notice of Hearing naming one of its Approved Persons, John Dixon Moody ("**Mr. Moody**" or the "**Respondent**").

¶ 2 The Notice of Hearing set out two allegations:

> **Allegation #1**: Between January 2016 and July 2020, the Respondent altered and used to process transactions, 29 account forms in respect to 25 clients by altering information on the forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1. ("**Altered Forms Allegation**")
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> **Allegation #2:** Between January 2016 and July 2020, the Respondent obtained, possessed, and used to process transactions, 4 pre-signed account forms in respect of 3 clients contrary to MFDA Rule 2.1.1. ("**Pre-signed Forms Allegation**")

¶ 3 Appearances took place on October 7, 2022, and November 21, 2022, and the matter was set down to be heard on January 24, 2023.

¶ 4 Corporation Staff and counsel for Mr. Moody negotiated an agreed statement of facts. It admitted the merits of the Altered Forms Allegation and the Pre-signed Forms Allegation. However, Staff and Mr. Moody could not agree on what consequences should follow from those admissions.

¶ 5 On January 1, 2023, the MFDA became part of the New Self-Regulatory Corporation of Canada. On June 1, 2023, this entity became the CIRO. For the purposes of this matter, both the substantial and procedural rules governing the proceeding remained the same throughout these organizational changes.[1]

Positions of the Parties and Decision of Panel

¶ 6 In its submissions, Staff sought a fine against the Respondent under s. 24.1.1 of MFDA By-law No. 1 of $23,000, plus costs under s. 24.2 of $5,762.50. It highlighted in its submissions the trend towards greater penalties for violations such as the Altered Forms Allegation and the Pre-signed Forms Allegation.

¶ 7 Counsel for Mr. Moody responded that sanction should be based on the penalties that panels were awarding at the time of the impugned conduct (much of which took place in 2016 and 2017) and proposed a fine of $10,000-$13,000.

¶ 8 For the reasons set out below, we think the appropriate penalty is $18,500.

Agreed Statement of Facts

¶ 9 Mr. Moody and Staff executed an Agreed Statement of Facts on January 16, 2023 (“**ASF**”). It was provided to the panel along with the forms that were the subject of the Altered Forms Allegation and the Pre-signed Forms Allegation.

¶ 10 The ASF disclosed the following:

a. Mr. Moody has been a registrant in the securities industry since 1997;

b. since 2012, he has been registered in Alberta with his current member Corporation, Investia Financial Services Inc. (the “**Member**”);

c. at all times material to the proceeding, he conducted business in the Calgary, Alberta area;

d. the Member in question had policies and procedures indicating that changes to client documentation have to be initialed by the client and Approved Persons cannot hold blank or incomplete forms that have been pre-signed by the client; and

e. Mr. Moody had at the time of commencing employment with the Member signed an acknowledgement that he would follow its policies as well as those of the MFDA. Such acknowledgements were renewed annually in 2018 – 2021.

¶ 11 The ASF recorded that the MFDA, as predecessor of the CIRO, had warned its membership on multiple occasions that obtaining and using pre-signed forms is contrary to the standard of conduct set out for Members and Approved Persons under MFDA Rule 2.1.1. These warnings were expressed in Staff notices and bulletins issued in 2007, 2013 and 2017, which will be discussed briefly below.

¶ 12 The ASF included the following admissions regarding the Altered Forms Allegation:

> 23. Between January 2016 and July 2020, the Respondent altered and used to process transactions, 29 account forms in respect to 25 clients by altering information on the forms without having the client initial the alterations.
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> 24. The altered forms included: Know Your Client ("KYC") Update Forms, New Account Application Forms, Systematic Instruction Forms, Order Instruction Forms, Fund Company Application Forms,

[1] See Amended and Restated By-Law No. 1, Being A General By-Law of Canadian Investment Regulatory Organization s. 14.6 and Rule 1A(5) of the Mutual Dealer Rules

and Transfer Forms.

25. The alterations which the Respondent made to the forms included alterations to the net worth, risk tolerance (to increase the client's risk tolerance), annual income, total investment amount, fund company name, and client name.

¶ 13 The ASF included the following admissions regarding the Pre-signed Forms Allegation:

26. Between January 2016 and July 2020, the Respondent obtained, possessed, and used to process transactions, 4 pre-signed account forms in respect of 3 clients.

27. The pre-signed forms included: KYC Update Forms, and Systematic Instruction Forms.

35. By engaging in the conduct described above, the Respondent admits that:

(a) between January 2016 and July 2020, the Respondent altered and used to process transactions, 29 account forms in respect of 25 clients by altering information on the forms without having the client initial the alterations, contrary to MFDA Rule 2.1.1; and

(b) between January 2016 and July 2020, the Respondent obtained, possessed, and used to process transactions, 4 pre-signed account forms in respect of 3 clients contrary to MFDA Rule 2.1.1.

¶ 14 The forms that were the subject of the Pre-signed Forms Allegation and the Altered Forms Allegation were also attached. The bulk of the impugned forms date from 2016 and 2017, but there were occasions of misconduct occurring in 2018-2020. The compliance problem with these forms was discovered during a 2021 review conducted by the Member. The Member placed Mr. Moody on strict supervision for a period of 90 days and issued him a warning letter. It also sent letters to all affected clients.

¶ 15 According to the ASF, there is no evidence that Mr. Moody received any financial benefit from the misconduct in relation to forms, nor is there evidence of loss on the part of clients.

Violations

¶ 16 Based on rulings from the MFDA, the conduct described in the ASF constituted a violation of MFDA Rule 2.1.1. That Rule is as follows:

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; and

(d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

¶ 17 Decisions of hearing panels of the Corporation have held that using pre-signed forms and altering forms without obtaining initials from the client violates Rule 2.1.1. We adopt the comment from *Re: McTavish* that, "[a] multitude of MFDA disciplinary cases have found conduct similar to that of the Respondent in our case to be a contravention of MFDA Rule 2.1.1."

McTavish (Re), 2022 CanLII 115325 (CA MFDAC) at para. 6

Price (Re), 2011 CanLII 72458 (CA MFDAC) at paras. 14-15

Symes (Re), 2017 LNCMFDA 104 (CA MFDAC) at paras. 14-20

¶ 18 The Panel in *Re: Owen* summarized the policy reasons for prohibiting the use of pre-signed forms and the alteration of forms without endorsement by the client, citing *Re: Price, supra*:

> 29 The MFDA hearing panel in *Price (Re) supra*, at paras. 122 - 124, also usefully identified the dangers posed by pre-signed forms that can be summarized as follows:
>
> (a) pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading;
>
> (b) at 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; and
>
> (c) pre-signed forms subvert the ability of a Member to properly supervise trading activity.
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> *Owen (Re),* 2017 LNCMFDA 287 at para. 29

¶ 19 Staff stresses that the Corporation had done much to make clear to Members and Approved Persons that the use of pre-signed or altered forms was prohibited. It notes the following notices to Members and Approved Persons:

(a) Staff Notice "MSN-0066 - Prohibition on Use of Pre-Signed Forms" was published on October 31st 2007. It noted that in the view of MFDA obtaining or using pre-signed forms is contrary to the standards of conduct set out in MFDA rule 2.1.1. and cannot be justified by matters of convenience.

(b) An updated Staff Notice "MSN-0066 – Pre-signed Forms" was issued on March 4, 2013, to reinforce that the use of pre-signed forms could lead to enforcement action against Members and Approved Persons.

(c) MFDA "Bulletin #0661-E - Signature Falsification" was issued on October 2, 2015. It stressed that "signature falsification" includes making any changes to a signed document without the client initialing the record to show approval of the change. It also emphasized that Staff would be seeking increased penalties for signature falsification.

(d) Staff Notice "MSN-0066 – Signature Falsification" was updated and reissued on January 26, 2017. It stressed that Staff continued to uncover examples of signature falsification and the use of altered forms and warned that Staff would "seek enhanced penalties for conduct that occurs after the release of MFDA Bulletin #0661-E."

(collectively the "**Staff Notices**")

Sanction Considerations:

¶ 20 This is not a case where Staff and the Respondent have agreed to a penalty, so the Panel will set it based on the facts and admissions disclosed in the ASF.

¶ 21 The Supreme Court of Canada has emphasized that sanctions in the area of securities regulation are "preventive in nature and prospective in orientation". The goal is protection of the public through the application of penalties that will effect deterrence specifically on the respondent in question and generally on other market participants.

> *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 45

¶ 22 In determining what is an appropriate sanction, Corporation hearing panels have considered factors such as the following:

(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.

Milewski (Re), [1999] I.D.A.C.D. No. 17 at p. 12, Ontario District Council Decision dated July 28, 1999 at p. 25.

Laverdiere (Re), [2010] Hearing Panel of the Pacific Regional Council, MFDA File No. 200936, Panel Decision dated May 12, 2010, at para. 22

¶ 23 On a number of these points there would not seem to be serious debate between Staff and the Respondent.

¶ 24 The misconduct was serious. As panels have stated in the past, signature falsification and the alteration of documents without written client approval can have pernicious effects on capital markets. Further, Mr. Moody was very experienced and simply should have known better. The distribution of the Staff Notices also indicates a degree of intentional disregard for compliance that requires greater specific deterrence.

¶ 25 The pattern of Mr. Moody's misconduct, diminishing after 2017 but persisting into 2020, suggests that Mr. Moody knew his use of altered and pre-signed forms was an inappropriate, but he was willing to resort to such practices in certain circumstances. The pattern and duration of misconduct also suggests a need for somewhat heightened specific deterrence.

¶ 26 On the other hand, there is no evidence of harm suffered by the investors whose forms were altered and no evidence of gain on the part of the Respondent, except the fees that he otherwise earned. We have heard no evidence of prior misconduct.

¶ 27 What appears to separate Staff and Mr. Moody is which cases the Panel should consider when formulating an appropriate fine. Staff emphasizes that Corporation hearing panels have been increasing penalties for signature falsification and unauthorized alterations of forms, while Mr. Moody argues it would be procedurally or substantively unfair for him to receive a fine higher than those that were imposed at the time most of his misconduct occurred. He points to cases decided in the period 2016-2020 as establishing a more appropriate "per form" rate for the Panel to consider in this case.

¶ 28 There was some suggestion in the arguments of Mr. Moody that the position of Staff is not tenable for administrative law reasons or reasons relating to the rule of law. In general, however, this Panel thinks the issue raised by Mr. Moody can be dealt with by examining sanction considerations, particularly general deterrence and consistency with past decisions.

Issue of Increase in Penalties:

¶ 29 Staff submitted that it has been seeking higher penalties for signature falsification and use of altered, unauthorized forms and that Corporation hearing panels have been awarding higher penalties. Based on authorities and figures provided by the parties, there would seem to be some truth to this statement.

¶ 30 Mr. Moody seems to suggest that Staff cannot seek higher penalties than had been awarded in the past without some form of notice having been provided earlier; a party should know at the time of a potential violation what the likely consequences of misconduct will be. There was a reference in Mr. Moody's submissions to the "going rate" for certain infractions.

¶ 31 There is perhaps an echo in Mr. Moody's arguments of the "lesser penalty" entitlement set out in s. 11(i) of the *Canadian Charter of Rights and Freedoms*. This provision states that anyone "charged with an offence has the right":

> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.[2]

¶ 32 Indeed s. 11(i) of the *Charter* was at issue in one of the cases cited by the Respondent.[3] However, Mr. Moody has not been charged with an "offence" within the meaning of the *Charter* and this provision does not apply to this proceeding.[4] Further, the maximum fine applicable to Mr. Moody under s. 24.1.1 of MFDA By-law No. 1 did not change from the earliest examples of his misconduct to the time of hearing, nor is Staff suggesting a penalty anywhere near that maximum. So he had notice of the consequences of his conduct in the sense that the maximum fine is clearly set out in By-law No. 1.

¶ 33 Further, no authority is cited for the proposition that a regulatory authority must regularly give notice of exactly what range of fines (under a maximum amount set out in a bylaw, rule or regulation) it will be seeking in relation to specific conduct or that administrative fairness somehow restricts the prosecutor from seeking a higher fine in a specific case than may have been sought or awarded in the past. As well, the Corporation has issued the Staff Notices to Members and Approved Persons that signature falsification and use of altered forms will be the subject of enforcement and greater penalties may be sought in the future.

¶ 34 In general, we are of the view that this issue should be dealt with not on constitutional or administrative law grounds, but pursuant to sanctioning considerations. One sanctioning principle may lend some weight to the Respondent's concerns: similar cases should be decided in a similar fashion and past decisions on fines inform present decisions. There is also some authority in criminal sentencing that a court deciding whether a proposed sentence is "in the range" should consider penalties courts have applied to infractions *reasonably contemporaneous* with the commission of the offence in question.[5]

¶ 35 However, we think the question of how contemporary the cases cited by the parties are to the impugned conduct is only one consideration among many when determining sanction. In a regulatory context, the "contemporary" factor may not be easy to apply. Unlike many criminal offences that occur at a single point-in-time, regulatory misconduct often stretches over many years and may not be detected until more years have passed. Sanction ranges may move during these times and panels will have to take those changes into consideration. They will also want to consider current views on general deterrence at the time the sanction is determined. Of course, a prime consideration will be what sanction is needed to deter the specific respondent over which the panel has jurisdiction.

¶ 36 Further, we are persuaded by the argument of Staff that the Respondent's position, if taken to the

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[2] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. ("*Charter*").

[3] *R.* v. *K.R.J.*, [2016] 1 S.C.R. 906.

[4] An "offence" for the purposes of the Charter involves a contravention of some law that could result in the offender being subject to a "true penal consequence" as opposed to a merely regulatory one, such as a fine. See *R v Wigglesworth*, [1987] 2 S.C.R. 541.

[5] *Garnhum; Kilcup*, [1983] P.E.I.J. No. 47, 42 Nfld. & P.E.I.R. 65 (P.E.I.S.C. *in banco*); *Cusack*, [1977] P.E.I.J. No. 46, 14 Nfld. & P.E.I.R. 181 (P.E.I.C.A.).

extreme, would restrict Staff from ever seeking greater penalties. Such a result would be inconsistent with the requirement to consider general deterrence when determining sanction; in some situations there may be evidence that general deterrence considerations require increased fines. Sentencing ranges may also need to evolve to reflect changing perceptions of certain kinds of conduct or to deal with more practical matters (such as changes in the real value of money). As with criminal sentence ranges, sanction ranges are not set in stone and are expected to evolve.[6]

¶ 37 We would also note that both Staff and the Respondent seem to base their arguments on the idea that the Panel should approach the issue of sanction by focusing on a "per form" amount. While the number of forms may be an important consideration, and it may be somewhat useful to look at past cases in terms of what was awarded in relation to the number of forms that were signed in advance or altered without authorization, Corporation hearing panels are not bound to apply any kind of specific "per form" formula when setting an appropriate fine.

¶ 38 We have a final point to make on general deterrence. Staff has pointed out that the Corporation considers that enhanced deterrence is necessary for signature falsification and unauthorized alteration of forms. Some panels appear to have accepted this view when considering settlements. However, Staff provided no additional or general evidence justifying its position. It might have been useful to have statistics or information regarding compliance review results, complaints or investigations opened in this area. There is some authority for the idea that when a prosecutor is seeking to extend ranges in the name of enhanced general deterrence, it should provide some evidence.[7] The lack of this evidence influenced the Panel's decision not to order a fine as high as Staff requested.

Conclusion

¶ 39 In light of a consideration of sanction factors set out in paragraph 22, the Panel is of the view that the appropriate fine is $18,500. We make particular note of the duration of misconduct and the Respondent's experience in the industry as indicating a need for specific deterrence in this case.

¶ 40 The issue of costs was not fully addressed by the parties at the hearing. We would direct them to make written submissions of no more than two pages (not including bills of costs and authorities) within 21 days of the release of these reasons. If the parties are able to make a joint submission on this issue, the Panel would welcome it.

Dated at Calgary, Alberta this 1st day of December, 2023.

"Robert Stack"

Robert Stack, Chair

"Adam Dudley"

Adam Dudley, Industry Member

"Annette Stephens"

Annette Stephens, Industry Member

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[6] *R.* v. *Wright*, [2006] O.J. No. 4870 at para. 22.

[7] *R.* v. *Neubert*, 2001 BCCA 371