# Re Lukiwski

**IN THE MATTER OF:**

**The Mutual Fund Dealer Rules**

**and**

**George Maxim Lukiwski**

2024 CIRO 28

Canadian Investment Regulatory Organization
Hearing Panel (Saskatchewan District)

Heard: September 15, 2023 by electronic hearing in Saskatoon, Saskatchewan
Decision and Reasons: February 22, 2024

**Hearing Panel:**
Robert Stack, Chair
Annette Stephens, Industry Representative
Sean Shore, Industry Representative

**Appearances:**
Alan Melamud, Senior Enforcement Counsel
Zachary Pringle, Counsel for the Respondent
George Maxim Lukiwski, the Respondent (not in attendance)

## DECISION AND REASONS ON PENALTY

### I. INTRODUCTION

¶ 1 Below we set out reasons for a Decision of a Canadian Investment Regulatory Organization ("**CIRO**") hearing panel (the "**Hearing Panel**") assembled to determine the appropriate penalty in relation to admitted allegations that CIRO staff ("**Staff**") made against George Maxim Lukiwski (the "**Respondent**" or "**Mr. Lukiwski**").

¶ 2 We note this proceeding was commenced by the new Self-Regulatory Organization of Canada (“**SROC**”). SROC was an amalgamation of the Mutual Fund Dealers' Association of Canada (“**MFDA**”) and the Investment Industry Regulatory Association of Canada (“**IIROC**”), which occurred on January 1, 2023. SROC later became CIRO. Unless it is necessary to identify the specific above-described entity, we refer to these entities globally as the Corporation. Pursuant to transitional rules, CIRO retains jurisdiction over members of the MFDA in relation to violations of MFDA Bylaws or Rules.[1]

### II. ALLEGATIONS

¶ 3 A Notice of Hearing in this matter alleges that:

[1] Amended and Restated By-law No. 1, being a General By-law of the Canadian Investment Regulatory Organization, Section 14.6. As the matter was commenced after January 1, 2023, procedure rules that the Panel will apply are those in force after the amalgamation. See also: Mutual Fund Dealer Rules, Rule 1.A.

a. **Allegation #1**: (the “**Altered Forms Allegation**”) Between March 2017 and November 2020, the Respondent, or his assistant for whom he was responsible, altered and used to process transactions, 31 account forms in respect of 26 clients by altering information on the account forms without having the client initial the alterations, contrary to Mutual Fund Dealer Rule 2.1.1 (formerly MFDA Rule 2.1.1).

b. **Allegation #2**: (the “**Pre-Signed Forms Allegation**”) Between August 2017 and July 2020, the Respondent, or his assistant for whom he was responsible, obtained, possessed, and used to process transactions, 23 pre-signed account forms in respect of 19 clients, contrary to Mutual Fund Dealer Rule 2.1.1 (formerly MFDA Rule 2.1.1).

## III. AGREED STATEMENT OF FACTS

¶ 4 An Agreed Statement of Facts (the “**ASF**”) dated July 12, 2023, was presented to the Panel. In the ASF, the Respondent admits to the Altered Forms Allegation, with the exception that the number of forms involved is slightly different than in the Notice of Hearing. The admission is as follows:

> Between March 2017 and November 2020, the Respondent, or his unlicensed assistant for whom he was responsible, altered and used to process transactions, 29 account forms in respect of 25 clients by altering information on the account forms without having the client initial the alterations.

¶ 5 The ASF provides further details regarding the Altered Forms Allegation:

> The altered forms consist of:
>
> - 11 Transfer Authorization Forms;
> - 8 New Client Application Forms;
> - 4 Order Instruction Forms;
> - 2 Know-Your-Client ("KYC") Update Forms;
> - 1 Non-Financial Instructions form;
> - 1 Systematic Instruction Form; and
> - 1 Systematic Purchases Form.
>
> The alterations made by the Respondent consisted of alterations to risk tolerance, net worth, investment objectives, monetary amounts, account numbers, dates, fund codes, fund numbers, plan types, transfer types, and transaction types.

¶ 6 In the ASF, the Respondent also essentially admits to the conduct described in the Pre-Signed Forms Allegation, with the exception that, again, the number of forms is slightly different than in the Notice of Hearing. The admission is as follows:

> Between October 2017 and July 2020, the Respondent, or his unlicensed assistant for whom he was responsible, obtained, possessed and used to process transactions, 25 pre-signed account forms in respect of 19 clients.

¶ 7 Further details regarding Pre-Signed Forms were provided as follows:

> The pre-signed forms consist of:
>
> - 11 KYC Update Forms;
> - 7 Automatic Conversion of Free Units forms
> - 3 Transfer Authorizations Forms;
> - 2 New Client Application Forms;

- 1 Order Instruction Form; and
- 1 Systematic Instruction Form.

¶ 8 In terms of the Respondent's background conducting securities related business as a registrant, the ASF discloses that he has been registered since 2001. From April 2006 to January 17, 2017, Mr. Lukiwski was registered as a dealing representative in Saskatchewan with Quadrus Investment Services Ltd. ("**Quadrus**") and from March 7, 2017, he was registered in Saskatchewan with Investia Financial Services Inc. ("**Investia**"). Both entities were registered at all material times with the MFDA as dealer members.

¶ 9 In the ASF, Mr. Lukiwski admits that his conduct relating to the Altered Forms Allegation and the Pre-Signed Forms Allegation contravened Mutual Fund Dealer Rule 2.1.1, formerly MFDA Rule 2.1.1. Rule 2.1.1 requires a high level of ethical conduct of members and approved persons, and reads as follows:

> 2.1.1 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.

¶ 10 The ASF also notes that:

> At all material times, Investia's policies and procedures stated that:
>
> (a) If an error is made on any client documentation, the error must be crossed out, changed and initialed by the client. Each individual change must be initialed in cases where multiple changes are made; and
>
> (b) Approved Persons are prohibited from holding blank or incomplete pre-signed forms.

¶ 11 The ASF records that in 2017 the Respondent signed a Compliance Policy and Procedure Manual Acknowledgment according to which Mr. Lukiwski agreed to adhere to Investia's policies and procedures as well as MFDA rules and regulations.

¶ 12 In November 2018 and February 2020, he signed Investia's "Annual Review of Professional Activity" forms for 2017-2018 and 2018-2019. In these documents, the Respondent acknowledged again having reviewed and understood Investia's policies and procedures, which required that clients initial any changes in client documentation and prohibited the holding back of blank or incomplete pre-signed forms.

¶ 13 The ASF also detail many occasions in which the MFDA indicated to members and approved persons that the MFDA considered the use of pre-signed or altered forms to be contrary to required standards of conduct and therefore a violation of MFDA Rule 2.1.1. The first of these announcements was Member Regulation Notice MR–0066 from October 31, 2007. MFDA Staff Notice MSN-0066, an update to MR–0066 issued on March 4, 2013, made the same point. Bulletin #0661-E regarding "signature falsification" sent a similar message in 2015 and indicated that Staff of the MFDA would be seeking higher penalties for this kind of violation. Yet another update to MSN-0066 in January 2017 also issued a warning with regard to this form of misconduct.

¶ 14 The ASF further indicates that the admitted conduct was discovered as part of a member review conducted in December 2020. Investia placed the Respondent on strict supervision from December 21, 2020, to May 5, 2021, issued a warning letter to him and sent audit letters to clients whose accounts had been affected.

The Respondent was obligated to pay $500 as an administrative charge to Investia for this oversight. He also paid some costs for the audit letters.

¶ 15 The parties indicated in the ASF that the Respondent did not receive any financial benefit from the admitted conduct, other than what he otherwise would have been entitled to in commissions or fees connected to the managing of the accounts involved. There is no evidence of client loss or lack of authorization for any transactions. The Respondent has no prior disciplinary history within the context of securities regulation, according to the ASF.

## IV. SENTENCING FACTORS

¶ 16 Staff's Written Submissions set out the factors that Corporation panels are to apply when considering what an appropriate sanction is for misconduct:

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; 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;

i) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and

j) previous decisions made in similar circumstances.[2]

¶ 17 Many of these sanctioning factors are not difficult to apply in the present case. The parties agree that the misconduct was serious. Many Corporation panels have held that the use of altered and pre-signed forms is a serious violation of the obligation to act in an ethical manner. Such conduct can obscure the audit trail, lead to unauthorized or discretionary trading, and potentially lead to (or conceal) fraud.[3] The use of pre-signed or altered forms creates risk for investors and is harmful for the reputation of the investment industry.

¶ 18 None of this should have been a surprise to the Respondent, who has been a registrant since 2001. The many warnings regarding such conduct from Staff are an aggravating factor, as is the fact that the conduct was contrary to Member policies.

¶ 19 At the same time, there is no evidence of investor loss or unauthorized trading in this case. The period of misconduct was short as compared to some other cases that have come before Corporation panels. Why it occurred at this stage of Mr. Lukiwski's career is not clear. We do take this factor into consideration inasmuch as it is relevant to specific deterrence in particular. Further, the Respondent was subject to some consequences imposed by Investia.

¶ 20 The parties discussed the concept and need for general deterrence at length. It would appear to be the issue that separates their positions on sanction the most.

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[2] *Tonnies (Re)*, LNCMFDA 5 at para. 45; *Breckenridge (Re)*, 2007 LCNMFDA 38 para. 71.

[3] *Price (Re)*, 2011 CanLII 72458 at paras. 115-138 (MFDA); Symes (Re), 2017 LNCMFDA 104 at paras. 15-16.

## V. POSITIONS OF PARTIES AND KEY ARGUMENTS

¶ 21 In relation to the admitted misconduct, Staff is seeking a fine of at least $30,000 pursuant to Mutual Fund Dealer Rule 7.4.1.1(b) as well as recovery of $7,500 in costs.

¶ 22 The Respondent submits that a reasonable fine would be $20,000 and proposes to have costs dealt with separately once there is a decision on sanction.

¶ 23 In support of its position, Staff cites a number of decisions since 2016 in which panels reviewed settlements and approved penalties, while in the process commenting on persistence of form violations in the industry. An example is from the *Gilchrist* decision.[4]

> Despite MFDA diligence, the use of pre-signed forms appears to be an ongoing and common form of misconduct frequently the subject of consideration by hearing panels. The panel queries whether penalties imposed by settlement are sufficient in present day circumstances and whether the MFDA Penalty Guidelines are in need of modification in order to effectively combat this kind of misconduct.

¶ 24 Staff refers to decisions from a number of other panels that have expressed similar thoughts and accepted settlement involving relatively high fines compared to earlier precedents, at least in relation to the number of forms involved in the violation.[5]

¶ 25 In response, counsel for Mr. Lukiwski notes settlement decisions with lower “per form” penalties. He also asserts that Staff's own Enforcement Reports indicate that form violations of the kind we are dealing with here have been falling for years, when measured by the number of enforcement files that Staff have opened. He notes that MFDA files involving pre-signed form violations fell from a high of 103 in 2016 to 12 in 2022. The 2016 figure represented 23% of all enforcement files opened by the MFDA in that year, whereas pre-signed form violations files represented only 3% of files opened in 2022. In terms of altered forms, the high point was 54 in 2014, representing 13% of all files opened, whereas in 2022 there were only 12 files representing 3% of files opened.

¶ 26 Therefore, the Respondent argues, general deterrence has been achieved and the increase in penalties seen in some recent settlements may not have been necessary.

¶ 27 Staff replies with several arguments. First, it notes that if rising penalties have had some deterrent effect, it is no time to stop using them. Second, it notes that the COVID pandemic may have had an impact on investigations generally; in particular, it may have impacted the auditing practices of firms, and it is audits that often lead to the discovery of such misconduct. Finally, Staff notes that form violations continue to occur often as "secondary" violations within the Corporation's categorization system. As an example, if one includes secondary form violations, total numbers for proceedings involving such misconduct were 34 in 2020 and 40 in 2021.

## VI. ANALYSIS

¶ 28 As general deterrence is an issue in this and other cases at the present time, the Panel found it useful to have such information as the parties provided regarding enforcement activity in this area. It is not easy, however, to draw conclusions from the material.

¶ 29 As an investigator did not testify, the Panel had limited information regarding when Staff opens a matter, when the matter proceeds to a full investigation and when it may become a prosecution. We agree with Staff that the COVID pandemic *may* have had an impact on some of the statistics we saw. The Panel is aware that member audits did not function as before during the pandemic. As a result, the degree to which increases in penalties after 2016 have affected greater general deterrence and reduced form violations is somewhat obscure.

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[4] *Gilchrist (Re)*, 2017 LNCMFDA 91 at para. 16.

[5] Ramjohn (Re), 2021 LNCMFDA 158 at para. 1; Myers (Re), 2022 LNCMFDA 1 at para. 29; Kachur (Re), 2022 LNCMFDA 67 at paras. 21, 24-26; Garg (Re), 2022 LNCMFDA 73 at para. 26; Hamer (Re), 2022 LNCMFDA 102 at para. 40.

¶ 30 Further, we are sympathetic to the argument of Staff that there is industry expertise on the Panel for a reason. Members of this Panel have expressed continued frustration that such misconduct in relation to altered and pre-signed is still occurring.

¶ 31 Having said that, the statistics that were presented do not indicate that industry conduct is heading in the wrong direction. We do note that the enforcement figures we were provided show form violations shrinking as a percentage of total enforcement files opened.

¶ 32 As a result, the Panel in this case will exercise its own judgement as to what penalty it thinks should affect both specific deterrence in relation to this Respondent and general deterrence in relation to this sort of conduct.

¶ 33 The parties both cited a large number of decisions, almost all of them MFDA settlements that were approved by a panel. In general, they show some increase in penalties over the last few years for form violations, but even within the last five years there is a significant range among penalties that staff has negotiated with respondents if considered in light of the size of the penalty versus the number of forms involved.

¶ 34 The Respondent also cited a few decisions from the "IIROC" side of the Corporation where Staff negotiated a settlement that the panel endorsed.[6] These cases involved a larger number of form violations compared to more standard MFDA cases cited to the Panel. The IIROC cases were somewhat unique as there seems to have been a widespread and systemic issue with form violations at the member involving several individuals. Further, as the IIROC panel noted, it had little in the way of IIROC precedents to consider when determining if the penalties proposed were in a reasonable range. Finally, these decisions approved settlements and the panel did not opine on what it thought a fitting penalty would be in the circumstances.

¶ 35 A panel's role in relation to settlement hearings is to accept or reject a joint position on sanction recommended by the parties. It does so on the basis of whether the settlement is within a reasonable range. A panel in such circumstances does not determine what it considers the appropriate penalty. While it needs access to enough information to determine if the proposed sanction is within a reasonable range, it may not be privy to all of the factors that went into concluding the settlement. We reviewed the many settlement decisions presented by the parties to determine what panels considered a reasonable range of sanction in relation to pre-signed and altered forms, but these decisions could only provide so much guidance in terms of determining a fit penalty in this case.

¶ 36 The only contested penalty decision put to the Panel is that of *Re: Moody*.[7] In that case the approved person admitted to using 29 altered forms and 4 pre-signed forms over four and a half years. As in this case, there was no evidence of investor loss. The panel imposed a fine of $18,500. It cited the respondent's industry experience and the fact that the misconduct seemed to attenuate and then reoccur as suggesting a need for specific deterrence.

¶ 37 In this case, we are dealing with more form violations in a shorter period of time. The misconduct occurred after the 2015 Bulletin No. 0661-E and other notices from Staff regarding altered and pre-signed forms. There is some suggestion in the ASF that a staff member employed by the Respondent may have been somewhat at fault for some of the altered and pre-signed forms, but little information was provided to indicate whether this factor should be considered as mitigating.

¶ 38 When comparing the current circumstance to the facts of *Moody* and the settlement decisions we reviewed, the Panel kept in mind the "totality principle." In the Corporation Sanction Guidelines, the totality principle is described as follows:

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[6] *Re Morrison*, 2022 IIROC 33 (CanLII); *Re Harvey*, 2022 IIROC 32 (CanLII); *Re Arnold*, 2023 CIRO 02

[7] Re *Moody, John*, 2023 CIRO 32

> Depending on the facts of the case, the existence of multiple or similar violations may be treated as an aggravating factor or may warrant higher sanctions. The totality principle should be considered where there are multiple violations; the overall sanction imposed should not be excessive or disproportionate to the gravity of the total misconduct. Hearing Panels may adopt a global approach to sanctioning where the imposition of a sanction for each contravention would have the effect of imposing an excessive sanction on the Respondent.

¶ 39 The panel in *Moody* cautioned against assessing sanctions based solely or simply on a "per form" approach and the totality principle would suggest that panels cannot simply apply a formula to come up with a penalty.

¶ 40 In the circumstances of this case, we conclude the Respondent should pay a fine of $22,500.00 to the Corporation. We view this amount as being sufficient to affect specific deterrence and to warn others of the consequences of holding and using pre-signed and altered forms. We view this result as broadly consistent with *Moody* when applying the totality principle.

## VII. COSTS

¶ 41 Brief submissions were made on costs in this matter at the Hearing. Staff requested $7,500 based on a Bill of Costs of $13,262.50. It emphasized the need for respondents to pay some portion of investigation and hearing costs that result from their violations of Corporation rules. Staff properly conceded that the Respondent should get some credit for agreeing to the admissions set out in the ASF.

¶ 42 The Respondent suggested costs of $1,000. His counsel questioned whether an interview conducted by Staff was necessary in the context of a form violation file. He also asserted that the issues in this case were similar to those in *Moody* and should not have required a duplication of effort on the part of Staff.

¶ 43 We do think that the Respondent should be given some credit for entering into the ASF. He should also not be unduly penalized for wanting to explore the issue of increased penalties for pre-signed and altered form violations with the Panel.

¶ 44 At the same time, the broader membership should not be unduly burdened with the cost of enforcement proceedings that stem from a violation by a member or approved person. The issues in this case were somewhat different than those in *Moody* insomuch as enforcement statistics were not part of that case. Without access to the interview transcript, it is difficult to tell the degree to which the examination was necessary and connected to the allegations that Staff brought. We do note the reference in the ASF to an "unlicensed assistant" being involved in the transgressions, and presumably Staff had to ask questions in that regard.

¶ 45 In all the circumstances, we conclude that the Respondent should pay $5,000 for investigation and litigation costs.

## VIII. ORDER

¶ 46 We therefore direct that the Respondent shall pay $22,500 to the Corporation as a penalty and $5,000 for costs.

Dated at Saskatoon, Saskatchewan this 22 day of February 2024.

"Robert Stack"

Robert Stack, Chair

"Annette Stephens"

Annette Stephens, Industry Representative

"Sean Shore"

Sean Shore, Industry Representative

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