



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: Luigi Ciardullo

Heard: November 26, 2010, Toronto, Ontario
Reasons for Decision: February 17, 2011

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Kathleen J. Kelly
Brigitte Geisler
Simon Destrempes

Chair
Industry Representative
Industry Representative

Appearances:

David Halasz)	For the Mutual Fund Dealers Association of
)	Canada
)	
Luigi F. Ciardullo)	In Person
)	
)	

Background

1. By Notice of Settlement Hearing, dated October 22, 2010, a Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) was convened on November 26, 2010 in Toronto, Ontario, to consider whether, pursuant to Section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept a settlement agreement (“Settlement Agreement”) entered into between Staff of the MFDA and Luigi F. Ciardullo (“the Respondent”) on July 30, 2010, with respect to allegations in the Notice of Hearing.

2. The Settlement Agreement was prepared in conformity with Section 24.4 of By-law No. 1 and the Notice of Settlement Hearing had been prepared and publicized in accordance with Rule 15.2(1) of the MFDA Rules of Procedure. Accordingly, the Hearing Panel was in a position to consider whether or not it was appropriate to accept the Settlement Agreement.

3. At the outset of the Settlement Hearing, the Panel considered a joint Motion by Staff and the Respondent to move the proceedings “in camera”. This motion was brought pursuant to Rule 15.2(2) of the Rules of Procedure, which provides as follows:

15.2(2) A Hearing Panel may, on its own initiative or at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8.

4. Rule 1.8(2) provides as follows:

(2) A Panel may order that all or part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

5. We granted the Motion that all submissions and document would be heard and accepted in camera. Both Staff and the Respondent agreed that, should the Hearing Panel accept the Settlement Agreement, we would provide Reasons for our Decision, which, along with the record of the Settlement Hearing, would be available to the public. This is consistent with Rule 15.2(3) of the Rules of Procedure.

6. The Panel noted that the Particulars expressed in the Notice of Settlement Hearing were incomplete. The Panel considered this omission and concluded that its absence did not materially affect the Notice such as to render it invalid.

7. Staff of the MFDA moved to amend the Particulars and the Notice of Settlement Hearing to accurately identify the dates during which the activities, that are the subject matter of the allegations, took place. The Respondent consented to the amendment. This motion was brought pursuant to Rules 1.3, 1.5 and 1.7 of the Rules of Procedure, which provide as follows:

1.3 General Principles

(1) These Rules shall be liberally construed to secure the most expeditious and cost-effective determination of every proceeding on its merits consistent with the requirements of fairness.

(2) Where matters are not provided for in these Rules, the practice may be determined by analogy to them.

1.5 General Powers of a Panel

(1) A Panel may:

(a) exercise any of its powers under these Rules on its own initiative or at the request of a party;

(b) waive or vary any of these Rules at any time, on such terms as it considers appropriate;

(c) issue directions or make interim orders concerning the practice or procedure to be followed during a proceeding, on such terms as it considers appropriate.

1.7 Defect or Irregularity in Form

(1) No proceeding or document, hearing, decision or step in a proceeding is invalid only by reason of a defect or irregularity in form.

8. The Motion was granted and the resulting Order reflected the requested amendment.

9. In the Settlement Agreement the Respondent admits that:

- a) Between December 2005 and March 15, 2008, the Respondent failed to observe high standards of ethics and conduct in the transaction of business by:
 - (i) accepting \$150,000 from an individual, PL, to invest on PL's behalf and then providing monies to another individual, SA, for investment on her behalf, without PL's knowledge and approval; and
 - (ii) failing to return PL's monies to her in accordance with the terms of the Promissory Note, contrary to MFDA Rule 2.1.1

- b) Between February 2006 and March 15, 2008, the Respondent engaged in personal financial dealings with a client, PL, which gave rise to an actual or potential conflict of interest between the Respondent and client PL, which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interests of client PL, contrary to MFDA Rule 2.1.4; and

- c) Between December 2005 and March 15, 2008, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling, referring or facilitating the investment of \$150,000 by PL in an investment owned, managed or arranged by SA or persons unknown, contrary to MFDA Rule 1.1.1(a).

10. The purpose of this hearing is to accept or reject the settlement agreement pursuant to Section 24.4.3 of By-law No. 1 of the MFDA. In performing this task the Panel must be mindful of the public interest. On the other hand, it is clearly established that a Hearing Panel should accept a settlement recommended by Staff of the MFDA unless it falls outside the reasonable range of what is appropriate in the circumstances.

11. The complete background facts are detailed in the settlement agreement and need not be elaborated on further here. On consent of the parties, the Panel obtained further information which was of assistance in making our decision. We are assured by both counsel and the Respondent that the Respondent had not been subject to any previous MFDA disciplinary proceedings. We were told that the MFDA Staff was satisfied that the transactions which the Respondent admitted to were isolated and not part of a wider activity.

12. The Staff of the MFDA submitted that the MFDA considered the following factors in arriving at the settlement agreement proposed.

- a) The nature of the misconduct.
- b) The Respondent's past conduct and level of activity in the capital markets.
- c) The Respondent's recognition of the seriousness of his misconduct.
- d) Client harm, risk to investors and capital markets.
- e) The benefits received by the Respondent.
- f) Previous decisions made in similar circumstances.

FACTORS TO CONSIDER REGARDING PROPOSED PENALTIES

13. The primary goal of securities regulation is the protection of the investor.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 per Iacobucci J. at paras. 59 and 68.

14. Hearing Panels frequently consider the following additional factors when determining whether a penalty is appropriate:

- 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.

In the Matter of Alden M. Kaley, [2009] MFDA Atlantic Regional Council Hearing Panel Decision dated September 28, 2009, File No. 200911 (“*Kaley*”) at para. 11.

Lamoureux (Re), [2002] A.S.C.D. No. 125 at para. 11.

15. In addition, when determining the appropriate penalties to be imposed in disciplinary proceedings, Hearing Panels generally refer to the MFDA Penalty Guidelines. The Penalty Guidelines are not binding but rather are intended to assist Hearing Panels, Staff and Respondents in considering the appropriate penalties in MFDA disciplinary proceedings. The purpose of the MFDA penalty guidelines, is set out in the introduction to the Penalty Guidelines:

Range Is Guideline Only

The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.

16. The MFDA Penalty Guidelines recommend:

- a) a minimum fine of \$5,000 (standard of conduct),
- b) \$5,000 (conflicts of interest),
- c) \$10,000 (personal financial dealings), and
- d) \$10,000 (outside business activity) for the contraventions admitted to in the Settlement Agreement.

In addition, the Penalty Guidelines recommendations include the suspension of an Approved Person as an appropriate penalty in these circumstances.

APPLICATION OF FACTORS IN THE PRESENT CASE

17. Staff took the applicable factors set out above into account in reaching its Settlement

Agreement with the Respondent, as follows:

a) Nature of the Misconduct

18. The admitted contraventions are as noted at paragraph 9 herein.

19. The Respondent repaid the bulk (\$100,000) of the monies (\$150,000, plus 10% interest) in accordance with Promissory Note (within 12 months of December 9, 2005). He repaid the remainder of the monies (\$65,000) through a number of installments which were completed approximately 15 months after expiry of the Promissory Note. At all times, the Respondent maintained in a bank account controlled by him enough monies to repay the monies provided by the client. The Respondent delayed repayment until SA returned the funds, being concerned that SA would not do so if PL had been made whole. It should be noted that SA and PL are related.

20. The Respondent's conduct was isolated and not part of a wider activity.

b) The Respondent's Past Conduct and Level of Activity in the Capital Markets

21. The Respondent has been registered as an Approved Person with the Member since February 2003, and was previously registered as a mutual fund salesperson with other mutual fund dealers since March 2001

22. The Respondent remains registered with the Member, and has no past disciplinary history with the MFDA.

c) The Respondent's Recognition of the Seriousness of his Misconduct

23. The Respondent has cooperated fully with Staff during the course of its investigation and also in this proceeding by entering into the Settlement Agreement.

24. The Respondent recognizes and deeply regrets his conduct in contravening the MFDA Rules that are described in the Settlement Agreement.

25. By entering into the Settlement Agreement, the Respondent has accepted responsibility for his misconduct and has avoided the necessity of the MFDA incurring further time and expense conducting a full hearing on the merits.

d) Client Harm, Risk to Investors and Capital Markets

26. In the present case, the Respondent eventually repaid the entirety of the client's investment plus interest.

e) Benefits Received by the Respondent

27. There is no evidence that the Respondent benefitted personally from the transaction with the client.

f) Previous Decisions Made in Similar Circumstances

28. As set out below, in situations involving similar circumstances, Hearing Panels have imposed sanctions within a reasonable range of those sought in the present case:

- a) In MFDA proceeding *Alan Roy Kruss*, the Respondent engaged in securities related business on two occasions with one client by selling an investment of \$50,000 outside the books and records of the member on two occasions. The transactions involving the client were found to be isolated and not part of wider activity. In the context of a settlement hearing, the Respondent agreed to a penalty which included a one-month suspension, repayment to the client of the \$50,000 investment, a \$10,000 fine, and a payment of \$2,500 in costs.

In the Matter of Alan Roy Kruss, [2010] MFDA Central Regional Council, Hearing Panel Decision dated April 5, 2010, File No. 200934.

Settlement Agreement, *In the Matter of Alan Roy Kruss*.

- b) In MFDA proceeding *Carmine Paul Mazzotta*, the Respondent engaged in securities

related business not carried on for the account of or through the facilities of the Member when he sold approximately \$3.46 million of Portus investment products. These investment products were not authorized for sale by the Member, and the Member expressly prohibited its approved persons, including the Respondent, from selling such investment products. In the context of a settlement hearing, the Respondent agreed to: a penalty which included a three-month suspension; rebate each individual who purchased the investment products through the Respondent the total amount of compensation that the Respondent retained in respect of such purchases totaling more than \$70,000; and to pay \$2,500 costs.

In the Matter of Carmine Paul Mazzotta, [2010] MFDA Central Regional Council, Order dated January 22, 2010, File No. 200924.

Settlement Agreement, *In the Matter of Carmine Paul Mazzotta*.

c) In the MFDA proceeding *Kaley*, the Respondent engaged in securities related business when he sold 13 preferred shares in a fishing lodge (for which he was a co-owner), not for the account or through the facilities of the Member. The Respondent was also found to have carried on another gainful experience not properly disclosed to and approved by the Member in his role as co-owner of the fishing lodge. In the context of a settlement hearing, the Respondent agreed to a penalty that included a suspension of six-months; payment of a fine of \$10,000, and payment of \$2,500 in costs.

Kaley, supra.

THE PENALTY PROPOSED

29. The Panel has reviewed the facts, the submissions, and the penalty agreed to by the MFDA and the Respondent. If the Hearing Panel accepts the Settlement Agreement, the following penalty will apply:

a) The Respondent shall pay a fine in the amount of \$10,000, pursuant to section 24.1.1(b) of MFDA By-law No. 1;

- b) The Respondent shall be prohibited from conducting securities related business while in the employ of, or associated with a Member of the MFDA for a period of three months from the date of the Order, pursuant to s. 24.1.1(e) of MFDA By-law No. 1; and
- c) The Respondent shall pay costs in the amount of \$2,500, attributable to the investigation and settlement of this matter, pursuant to section 24.2 of MFDA By-law No. 1.

30. These proceedings are open to the public and the results and penalty is public. The parties reached the proposed Settlement Agreement after discussion and negotiation and we are told it represents what they feel, with their knowledge and experience, is an appropriate resolution.

31. We are of the view that the Settlement Agreement and the proposed penalties are in keeping with the purpose of the MFDA to enhance investor protection and strengthen public confidence in the Canadian Mutual Fund Industry, and capital markets, by ensuring high standards of conduct by its Members and Approved Persons.

32. The Panel finds that there was one event involving one client. The Respondent's actions appear to have been motivated by a desire to be helpful. The Member has not complained about the activity and the client has been made whole.

DISPOSITION

33. The Panel concludes that the Settlement Agreement along with its proposed penalty is reasonable and in the public interest, and accordingly is accepted by the Hearing Panel.

DATED this 17th day of February, 2011.

“Kathleen Kelly”
Kathleen J. Kelly,
Chair

“Brigitte Geisler”

Brigitte Geisler,
Industry Representative

“Simon Destremes”

Simon Destremes,
Industry Representative

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