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: David MacIver Potter

Heard: September 20, 2011 in Toronto, Ontario
Reasons for Decision: January 24, 2012

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Kathleen J. Kelly	Chair
Paul M. Moore	Industry Representative
Hugh McNabney	Industry Representative

Appearances:

David Halasz	)	Counsel, Mutual Fund Dealers Association of
	)	Canada ("MFDA")
David MacIver Potter	)	In Person
	)	

1. By Notice of Settlement Hearing, dated June 30, 2011, a Hearing Panel of the Central Regional Council of the Mutual Fund Dealers Association of Canada ("MFDA") was convened on September 20, 2011 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 David MacIver Potter ("the Respondent") on July 4, 2011, with respect to allegations in the Notice of Hearing, which are the same as those detailed in paragraph 11 below.

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:

> 1.8(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 documents 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, and the Settlement Agreement, would be available to the public. This is consistent with Rule 15.2(3) of the Rules of Procedure.

Settlement Agreements - Background

6. Settlement agreements are used when a Respondent or Respondents, if more than one, cooperates fully with the Staff of the MFDA in its investigation of allegations brought against the Respondent(s).

7. The Staff of the MFDA and the Respondent(s) meet, discuss the facts, and jointly agree upon the facts and terms of a joint settlement recommendation that is contained in a settlement agreement.

8. The settlement agreement is then presented, reviewed, and discussed at an MFDA disciplinary hearing, conducted by members of the applicable Regional Council of the MFDA. In this case, the Hearing was conducted by a Panel comprised of two industry representatives and chaired by a member of the public, appointed to the Central Regional Council.

The Hearing

9. The Respondent was present for the Hearing and he, as well as Counsel for the MFDA, provided important and helpful information; clarification of the facts and the contraventions; and evidence with respect to the Settlement Agreement. In this regard, although not required to do so, the Respondent gave oral evidence. His willingness to openly, and fully, answer questions posed to him by the Panel, assisted the Panel in better understanding the summary information contained in the Settlement Agreement. His testimony also alleviated concerns the Panel had about the Settlement Agreement. The Panel found the Respondent to be a credible witness and appreciated his willingness to give evidence.

The Settlement Agreement

10. The following are excerpts from the Agreed Facts from the Settlement Agreement:

(a) The Respondent was registered as a mutual fund salesperson with FundEX Investments Inc. (“FundEX”) and its predecessor FundTrade Financial Corp.

("FundTrade"), from April 2004, until he was terminated May 7, 2009, for activities that resulted in this Hearing.

(b) He was previously registered as an Approved Person for two previous mutual fund dealers from February 2001 to April 2004.

(c) The Respondent is not currently registered in the securities industry in any capacity.

(d) The Respondent engaged in a "referral arrangement" and "permitted fee-for service business" while at FundTrade. This type of arrangement/activity was not a permitted business activity at FundEX.

(e) The Respondent nonetheless engaged in a "fee-for service business" while at FundEX, but did not seek Member approval of fee-for service arrangements.

(f) As the Respondent was not registered to provide investment advice to clients, in respect of non-mutual fund securities or individual equities, by conducting his "fee-for service business" he was found to be advising outside his registration.

(g) In addition, it was agreed that the Respondent failed to follow the policies and procedures of FundEX as detailed in the FundEX Compliance Policy and Procedures Manual.

(h) The Respondent advises that he deeply regrets the contraventions of MFDA Rules; acknowledges that while he received fees, the fees represented a "small part" of his overall compensation as a licensed mutual fund salesperson; and, as he is 65 years old, and desires to retire from the mutual fund business he is prepared to accept being permanently prohibited from conducting securities related business while in the employ of, or associated with, any MFDA Member.

11. In the Settlement Agreement, the Respondent admits to the agreed facts set out in Part IV (paragraphs 6-36) and the contraventions set out in Part V (paragraph 40) of the Settlement Agreement. Specifically, the Respondent admits that:

(a) between May 2006 and May 7, 2009, he accepted remuneration directly from 36 clients in the amount of approximately $61,330 in respect of a fee-for-service business he engaged in providing investment advice to clients, contrary to MFDA Rules 2.4.1(a) and 2.1.1;

(b) between May 2006 and May 7, 2009, he engaged in securities related business beyond the terms of his registration as a mutual fund salesperson by providing investment advice to certain of these 36 clients in respect of publicly traded equity securities, contrary to MFDA Rules 1.1.2, 1.1.5(a) and 2.1.1;

(c) between May 2006 and May 7, 2009, he engaged in securities related business that was not carried on for the account and through the facilities of the Member by carrying on a fee-for-service business that provided investment advice to certain of these 36 clients in respect of publicly traded equity securities, contrary to MFDA Rules 1.1 .1(a) and 2.1.1;

(d) in communications with the Member leading up to and including November 19, 2007, he misled the Member by representing to the Member, among other things, that he did not "generally" charge a fee-for-service to clients, when he knew that to be a misleading or untrue statement at the time and in the circumstances he made it, in that he omitted material facts from his statement, which were required to make his statements to the Member not true or misleading, thereby interfering with the ability of the Member to conduct a reasonable supervisory investigation of his activities and failing to observe high standards of ethics and conduct in the transaction of business, contrary to MFDA Rules 1. 1.2 and 2.5.1, and MFDA Rule 2.1.1; and

(e) between September 1, 2006 and May 7, 2009, he failed to comply with the policies and procedures of the Member prohibiting fee-for-service arrangements, contrary to MFDA Rules 1.1.2 and 2,5.1, and MFDA Rule 2.1.1.

General Principles Regarding Acceptance of Settlements

12. 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. This task differs from that of a Hearing Panel at a contested hearing. 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. See:

Professional Investments (Kingston) Inc. (Re), [2009] MFDA Central Regional Council, Hearing Panel Decision dated March *24, 2009,* File *200836*

See also:

> *Sterling Mutuals Inc. (Re), [2008]* MFDA Central Regional Council, Hearing Panel Decision dated August *21, 2008*, File No. *200820*

13. In *British Columbia Securities Commission* v. *Seifert,* [2007] B.C. J. No. 2186 at paras. 44 to 45, the British Columbia Court of Appeal recognizes that settlements advance the objective of protecting the public, and permit parties to reach settlements that are responsive to the respective needs and interests of both the regulator and a respondent.

14. As noted in *Professional Investments (Kingston) Inc.,* MFDA hearing panels consider the following issues when determining whether to accept a proposed settlement:

(a) Is the proposed settlement in the public interest?

(b) Will the penalty imposed protect investors?

(c) Is the settlement agreement reasonable and proportionate, having regard to the conduct of the Respondent, as set out in the settlement agreement?

(d) Does the settlement agreement address both specific and general deterrence?

(e) Will the proposed settlement prevent the type of conduct, described in the settlement agreement, from occurring again in the future? and

(f) Will the settlement agreement foster confidence in the integrity of the Canadian capital markets, the MFDA, and the regulatory process itself?

15. The complete background facts are detailed in the Settlement Agreement and need not be elaborated on further here. As noted above, 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.

General Principles Regarding the Appropriateness of the Penalty

16. 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.

17. 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.

Headley (Re), [2006] MFDA Ontario Regional Council, Case No. 200509, Decision dated February 21, 2006 at pp. 25-26

18. 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.

19. The MFDA Penalty Guidelines recommend the following penalties for the misconduct alleged in this case:

- *Policies and Procedures*: minimum fine of $5,000; write or rewrite an appropriate industry course; suspension; and permanent prohibition in egregious cases.

- *Provincial Securities Requirements*: minimum fine of $5,000; write or rewrite an appropriate industry course; suspension; permanent prohibition in egregious cases.

- *Securities Related Business (outside business activity)*: minimum fine of $10,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; and permanent prohibition; and

- *Standard of Conduct*: minimum fine of $5,000; write or rewrite an appropriate industry course; period of increased supervision; suspension; permanent prohibition.

Extract from the MFDA Penalty Guidelines

TERMS OF SETTLEMENT

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

(a) a permanent prohibition from conducting securities related business while in the employ of, or associated with, any MFDA Member, pursuant to s. 24.1(e) of MFDA By-law No. 1;

(b) payment of a fine in the amount of $12,500, pursuant to s. 24.1(b) of MFDA By-law No. 1;

(c) payment of costs in the amount of $5,000, pursuant to s. 24.2 of MFDA By-law No. 1; and

(d) attendance in person at this Settlement Hearing.

Application of Factors and Principles in this Case

21. Staff advises that the MFDA considered the following factors in arriving at the Settlement Agreement with the Respondent:

(a) The Nature of the Misconduct

MFDA Rule 2.4.1 stipulates that any remuneration in respect of business conducted by an Approved Person on behalf of a Member must be paid by the Member directly to and in the name of the Approved Person. In this case the Respondent billed and received payments directly from clients and not through the Member.

To ensure investor protection, Approved Persons are to sell only investment products for which he or she is registered or licensed under the applicable legislation in the province or territory where he or she is registered or licensed. By engaging in securities related business, beyond the terms of his registration as a mutual fund salesperson, the Respondent was advising beyond the terms of his registration, contrary to MFDA Rules

1.1.2, 1.1.5, and 2.1.1. Likewise, as the Respondent engaged in securities related business outside the Member, and thus outside the review and supervision of the Member, he contravened MFDA Rule 1.1.1(a).

By not being open and forthcoming to the Member, the Respondent misled the Member as to his activities, which is serious misconduct. The Respondent undermined the ability of the Member to fulfill its obligation to supervise the Respondent's conduct, in accordance with the MFDA By-laws, Rules and Policies, contrary to MFDA Rule 2.1.1. Lastly, the Respondent failed to follow the policies and procedures of the Member.

(b) The Respondent's past conduct and level of activity in the capital markets

The Respondent has been registered in the Canadian mutual fund industry since 2001, and has no past disciplinary history with the MFDA. He is 65 years old and states that he does not intend to return to the mutual fund industry.

(c) The Respondent's recognition of the seriousness of his misconduct

The Respondent represents that he deeply regrets the contraventions of MFDA Rules described in the Settlement Agreement. He cooperated with Staff during the course of its investigation and also in this proceeding by entering into the Settlement Agreement, as well as by attending this Hearing.

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

There is one client complaint about the Respondent's conduct, as described in the Settlement Agreement. Staff advises this complaint has been reviewed, by Staff, as part of this proceeding and has been brought to the Member's attention. Staff advises that

there is currently insufficient evidence to assess the extent of client loss, if any, arising from the Respondent's misconduct.

If the Settlement Agreement is accepted, which imposes a permanent prohibition on the Respondent, by operation of the Settlement Agreement, the MFDA would be precluded from commencing further disciplinary action against the Respondent, with respect to the subject matter of the complaint. The MFDA does not provide compensation for client losses. As a result, in the event the Respondent's conduct has given or is later determined to give rise to client losses, such matters would be resolved through the Member, the Ombudsman for Banking Services and Investments, or through civil proceedings, as the client(s) direct(s).

(e) Benefits received by the Respondent

The Respondent accepted remuneration directly from 36 clients, in the amount of approximately $61,330, in respect of the fee-for-service business he engaged in by providing investment advice to certain clients.

(f) Previous decisions made in similar circumstance

With respect to previous decisions made in similar circumstances, Staff submitted that in situations involving similar circumstances, Hearing Panels have imposed sanctions within a reasonable range of those sought in the present case. Three prior decisions of Hearing Panels were referenced:

- *In the Matter of Brian Somerset Campbell (2008)* (the "Campbell case"), a decision of a Hearing Panel of the Pacific Regional Council, Reasons for Decision dated June 26, 2007, MFDA File No. 200805, the Respondent faced 6 allegations, mostly relating to portfolio management activity and discretionary trading, starting in 2002, for which he collected fees directly from clients of the Member. Mr. Campbell was not only not licensed, or permitted, to conduct portfolio management activity, or discretionary trading, he did so in contravention of an agreement he made with the British Columbia

Securities Commission in 2001, that he would not carry out these activities. In addition, Mr. Campbell was found to have not cooperated in the MFDA investigation because he made false and misleading statements, and he failed to produce the requested documents and other information relevant to matters being investigated by the MFDA.

The Campbell case is distinguishable from the present case in several important aspects: Mr. Campbell failed to cooperate with the MFDA investigation; he failed to enter into a settlement agreement; and he failed to attend the disciplinary hearing. His lack of cooperation was reflected in the penalty imposed.

- *In the Matter of Joseph Zollo (2006),* a decision of a Hearing Panel of the Central Regional Council, Decision and Reasons dated April 16, 2007 and Settlement Agreement dated February 16, 2007, MFDA File No. 200610, the Respondent cooperated with the MFDA investigation; the parties entered into a negotiated settlement agreement; and each affected client received, at a minimum, the full amount of their original purchase/investment. This Respondent's cooperation was reflected in the penalty imposed.

- *In the Matter of Domenic Fanelli and Michele Torchia (2011*), another decision of a Hearing panel of the Central Regional Council, Reasons for Decision dated January 17, 2011 and Settlement Agreement dated September 10, 2010, MFDA File No. 200811, involved two respondents with divided results. With respect to Domenic Fanelli, there was full cooperation with the MFDA investigation; the MFDA offer to enter into a settlement agreement process, which contained the elements of accepted MFDA settlement agreements; and attendance at the MFDA disciplinary Hearing. The second Respondent failed to cooperate and failed to attend the disciplinary hearing. The penalties for each Respondent were based on and reflected their respective levels of cooperation

THE PENALTY PROPOSED AND RESULTING ORDER

22. These proceedings are open to the public. The results and the penalty imposed are 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.

23. The Panel has reviewed the facts, the submissions, the evidence, including the Respondent's oral evidence; and the penalty agreed to by the MFDA and the Respondent. The Panel also reviewed and considered previous decisions, as noted above. The Hearing Panel finds that the Settlement Agreement falls within the reasonable range of what is appropriate in the circumstances. Accordingly, the Hearing Panel accepts the Settlement Agreement, and orders that:

(a) The Respondent shall be permanently prohibited from conducting securities related business while in the employ of, or associated with any MFDA Member, pursuant to Section 24.1.1(e) of MFDA By-law No. 1;

(b) The Respondent shall pay a fine in the amount of $12,500, pursuant to Section 24.1.1 (b) of MFDA By-law No. 1;

(c) The Respondent shall pay costs in the amount of $5,000, pursuant to Section 24.2 of MFDA By-law No. 1; and

(d) If at any time, a non-party to this proceeding requests production of, or access to, any materials filed in, or the record of this proceeding, including all exhibits and transcripts, then the MFDA Corporate Secretary shall not provide copies of, or access to, the requested documents to the non-party without first redacting from them any and all intimate financial or personal information, pursuant to Rules 1.8(2) and (5) of the MFDA Rules of Procedure.

24. 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.

DISPOSITION

25. 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 24th day of January, 2012.

"Kathleen J. Kelly"
Kathleen J. Kelly,
Chair

"Paul M. Moore"
Paul M. Moore, Q.C.,
Industry Representative

"Hugh McNabney"
Hugh McNabney,
Industry Representative

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