



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: Nicholas Del Plavignano

Heard: November 29, 2018 in Toronto, Ontario

Decision: November 29, 2018

Reasons for Decision: February 7, 2019

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.
Cheryl A. Hamilton
Jeff J. Page

Chair
Industry Representative
Industry Representative

Appearances:

Alan Melamud)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
Nicholas Del Plavignano)	Respondent, in person
)	
)	

Background

1. This is a Settlement Hearing under Section 24.4 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the “MFDA”). The hearing was held on Thursday, November 29, 2018. The full Settlement Agreement, dated October 11, 2018, entered into between Staff of the MFDA and Nicholas Del Plavignano (the “Respondent”) is available on the MFDA website. The Respondent appeared in person and was not represented by counsel.
2. The Panel accepted the proposed Settlement Agreement at the conclusion of the November 29, 2018 hearing, with reasons to follow. These are our reasons for the decision.
3. Between February 23, 2012 and May 25, 2016, the Respondent was registered in Ontario as a Dealing Representative with TD Investment Services Inc. (“TD”), a Member of the MFDA. At all material times, the Respondent conducted business in the Woodbridge, Ontario, area.
4. On May 25, 2016, TD terminated the Respondent’s registration as a result of the conduct that is the subject of this Settlement Agreement. The Respondent is not currently registered in the securities industry in any capacity.

Contraventions

5. The Respondent admits in paragraph 4 of the Settlement Agreement to the following violations of the By-laws, Rules or Policies of the MFDA:
 - a) On March 29, 2016 and March 30, 2016, the Respondent processed a total of two transactions without the client’s authorization, contrary to MFDA Rule 2.1.1;
 - b) On April 4, 2016, the Respondent failed to use due diligence to learn the essential facts of a client, when he completed the client’s Know-Your-Client information on an account form without having met or discussed the information with the client, contrary to MFDA Rules 2.2.1 and 2.1.1;
 - c) On April 4, 2016, the Respondent failed to comply with two Member directives to contact a client to review the client’s Know-Your-Client information and the suitability of investments in the client’s account, contrary to MFDA Rule 2.1.1; and

- d) On April 4, 2016, the Respondent falsely represented to the Member that the client reviewed and approved the risk tolerance for the client's account, contrary to MFDA Rule 2.1.1.

The Misconduct

6. The details of the misconduct are set out in paragraphs 10 to 20 of the Settlement Agreement and will not be described in detail here. Each of the allegations involves conduct which is contrary to the rules of the MFDA.

7. Engaging in unauthorized trading constitutes a contravention of the standard of conduct set out in MFDA Rule 2.1.1. Approved Persons require express instructions from the client to execute any transaction. Without such instructions, it makes no difference whether the Approved Person acted with good intentions, or even if the client benefitted financially. As stated by the Hearing Panel in *Re Tobac*, 2018 LNCMFDA 207 at paragraph 28:

“If a trade is processed without the knowledge or approval of the client (even if it can be shown that the trade was processed with good intentions and even if the client benefits ...financially or otherwise) the trade is unauthorized and the processing of such a trade constitutes a contravention of the regulatory obligations of the Approved Person who processed it.”

8. TD's policies and procedures similarly prohibit Approved Persons from placing an order without client authorization. Accordingly, by carrying out the trades without proper client instructions, the Respondent breached the Member's policies and procedures and MFDA Rule 2.1.1.

9. The Respondent admits that after being directed by the Member to contact his client to do a suitability review concerning the two unauthorized transactions, the Respondent failed to do so and instead submitted a new account form containing the same Know-Your-Client information on file with the Member. When the Member followed up and asked the Respondent to confirm the risk tolerance information, the Respondent falsely responded that the risk tolerances had been reviewed with the client.

10. MFDA Rule 2.2.1 requires Approved Persons to learn the essential facts relative to each client and then ensure that each order accepted or recommendation made is appropriate for the client given those facts.

11. In addition, under Rule 2.2.1 the Respondent had an obligation to his Member to follow the directive he was given. As stated by a Panel in *Re Franco* 2011 LNCMFDA 55 at paragraph 38:

“The obligation of Approved Persons to comply with the policies and procedures of the Members that they are registered with is a cornerstone of the self-regulatory system...When Approved Persons disregard those obligations, the Member’s ability to supervise the conduct of such Approved Persons and protect the interests of clients and the public is undermined.”

12. Finally, the Respondent not only failed to follow the Member’s directive, but he misled the Member by falsely representing to the Member that the client reviewed and approved the risk tolerance for the client’s account.

13. The Respondent’s conduct constituted a contravention of the standard of conduct set out in MFDA Rule 2.1.1.

Terms of Settlement

14. Staff and the Respondent agreed and consented to the following Terms of Settlement (see paragraph 5):

- a) the Respondent shall pay a fine in the amount of \$5,000 pursuant to s. 24.1.1(b) of By-law No. 1;
- b) the Respondent shall be prohibited from conducting securities related business in any capacity while in the employ of or associated with a Member of the MFDA for a period of 18 months, pursuant to section 24.1.1(c), contrary to MFDA By-law No. 1;
- c) the Respondent shall pay costs in the amount of \$2,500 pursuant to s.24.2 of MFDA By-law No. 1;
- d) the Respondent shall in the future comply with MFDA Rules 2.2.1 and 2.1.1; and
- e) the Respondent will attend in person, on the date set for the Settlement Hearing.

Acceptance of Settlement Agreement

15. As stated above, the Hearing Panel accepted the terms of the Settlement Agreement. A Panel can either accept or reject a Settlement Agreement. It cannot modify it.

16. The conduct in the case is serious. Unauthorized trading is wrong and disregarding the instructions of the Member is even more serious. Misleading the Member is particularly egregious.

17. The respondent had been in the mutual fund industry since 2012 and has not previously been the subject of a disciplinary hearing.

18. There was no evidence of client losses as a result of the improper conduct. There is also no evidence that the Respondent received any financial benefit from the misconduct besides commissions and fees that he would have received if the transactions had been properly carried out. TD reviewed the trade activity of 139 clients serviced by the Respondent and did not identify further unauthorized transactions. In May 2016, TD reversed the two transactions.

19. The exclusion from the industry for 18 months is a substantial penalty. The Respondent has already been out of the industry in any capacity since May 2016. This penalty provides a significant deterrent to the Respondent and others.

20. The penalty agreed upon is not out of line with the cases cited by counsel for the MFDA or with the new MFDA Sanction Guidelines that came into effect on November 15, 2018.

21. Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission (*B.C. Securities Commission v. Seifert* [2007] B.C.J. No. 2186, para. 49 (B.C.C.A.)):

“Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation.”

22. Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the

negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are almost always facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel.

23. A Settlement Agreement indicates a recognition of wrongdoing by the Respondent and also saves the MFDA the time, resources, and expense of a contested hearing.

24. As a Panel stated (*Re Keshet*, File No. 201419 at paragraph 7), to take one of many such cases: “It is well established that hearing panels should not interfere lightly in negotiated settlements and should not reject a settlement agreement unless it views the proposed penalty clearly falling outside a reasonable range of appropriateness.” There are many similar statements by MFDA Panels, stemming from the leading decision of *Re Milewski* [1999] I.D.A.C.D. No. 17, which stated: “A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.”

25. The penalty agreed to in this case clearly falls within “a reasonable range of appropriateness.”

26. For the above reasons the panel accepted the Settlement Agreement.

DATED this 7th day of February, 2019.

“Martin L. Friedland”

Martin L. Friedland, C.C., Q.C.
Chair

“Cheryl A. Hamilton”

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Industry Representative

“Jeff J. Page”

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