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: Carmine Paul Mazzotta and David John Ireland

Heard: September 29, 2016, in Toronto, Ontario
Reasons for Decision: November 15, 2016

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Honourable P. T. Galligan, Q.C.	Chair
Rob Christianson	Industry Representative
Matthew Onyeaju	Industry Representative

Appearances:

Shelly Feld	)	Counsel for the Mutual Fund Dealers Association of Canada
Melissa MacEwan Natalia Vandervoort	)	Counsel for the Respondents

1. The Staff of the Mutual Fund Dealers Association ("MFDA") and Carmine Paul Mazzotta and David John Ireland (the "Respondents") entered into a settlement agreement (the "Settlement Agreement") which they had negotiated pursuant to s. 24.4.1 of MFDA By-law No. 1. They submitted the Settlement Agreement to this Hearing Panel, pursuant to Rule of Procedure 15.1, for approval or rejection. After considering the Settlement Agreement, the other material filed and upon hearing the submissions made by Enforcement Counsel and by counsel for the Respondents, we issued an order accepting the Settlement Agreement. These are our reasons for making that order.

THE CONTRAVENTION

2. The Respondents admit that between December 14, 2012 and February 14, 2013, without the prior written authorization of the Member, they provided a settlement proposal to client complainant JN, contrary to MFDA Rule 2.1.4 and MFDA Policy No. 3.

TERMS OF SETTLEMENT

3. The Respondents agree to the following terms of settlement:

a) the Respondent Mazzotta shall pay a fine in the amount of $10,000 within 7 days of the date when this settlement agreement is accepted by a Hearing Panel of the MFDA;

b) the Respondent Mazzotta shall pay costs in the amount of $5,000 within 7 days of the date when this Settlement Agreement is accepted by a Hearing Panel of the MFDA;

c) the Respondent Ireland shall pay a fine in the amount of $5,000 within 30 days of the date when this Settlement Agreement is accepted by a Hearing Panel of the MFDA;

d) the Respondent Ireland shall pay costs in the amount of $5,000 within 7 days of the date when this settlement agreement is accepted by a Hearing Panel of the MFDA;

e) if Mazzotta or Ireland fails to make a payment specified in this agreement on the date when the payment is due pursuant to the terms of this agreement, then without further notice to the Respondent who is in default of their payment obligations, that Respondent shall summarily be permanently prohibited from conducting securities related business in any capacity while in the employ of or associated with any Member of the MFDA;

f) the Respondents shall in the future comply with MFDA Rule 2.1.4 and MFDA Policy No. 3; and

g) the Respondents will attend the Settlement Hearing in person or by videoconference, on the date set for the Settlement Hearing.

THE CIRCUMSTANCES

4. The circumstances are somewhat complex and are set out in detail in Part IV of the Settlement Agreement. Part IV is attached as Appendix "A" to these Reasons for Decision. What follows is a brief summary of the circumstances.

5. In April 2008, JN and his wife NG became clients of Sterling. Their account was serviced by CB who no longer is employed by Sterling. In May 2008, CB recommended to them and implemented a leveraged investment strategy. The mutual funds purchased were subject to deferred sales charges. Very shortly the value of the investment declined substantially. In August 2008, CB ceased to be an Approved Person with Sterling and the Respondents took over servicing the accounts.

6. On December 5, 2012, JN complained in writing about the conduct of the Respondents and CB. The respondents denied personal responsibility because they were not servicing the account at the time the leveraged investment strategy was recommended and implemented.

Sterling authorized the Respondents to meet with JN and NG and to discuss their complaint with them.

7. A meeting took place on December 14, 2012, and a further one took place on January 25, 2013. During those meetings and through communications which took place until mid-February 2013 the Respondents made a proposal to JN and his wife NG for a resolution of their complaints. The proposed resolution would result in the complaints being withdrawn and the Respondents released from liability. The proposal was not accepted and JN submitted a complaint to MFDA alleging that the Respondents had tried to get him to withdraw his complaints against them.

SERIOUSNESS OF THE CONTRAVENTION

8. The mutual fund investment industry has determined that complaints against a Member or an Approved Person shall be dealt with by the Member. That obligation flows from Member Rule 2.11 and the manner in which that obligation must be fulfilled is specified in MFDA Policy No. 3. Section 10 of Policy No. 3 provides:

> No Approved Person shall, without the prior written consent of the Member, enter into any settlement agreement with, pay any compensation to or make any restitution to a client.

9. While the Respondents had their Member's consent to discuss the complaint with the clients, they did not have their authority to attempt to settle the complaint.

10. In our opinion, any attempt by an Approved Person to settle a complaint, without the Member's consent, strikes at the very heart of the process chosen by the mutual fund investment industry to handle client complaints. Thus the attempts by the Respondents to settle the complaint against them must be viewed as serious misconduct.

CIRCUMSTANCES OF AGGRAVATION AND MITIGATION

11. In determining an appropriate penalty it is always necessary to take into account any mitigating and aggravating circumstances.

12. The Respondent Mazzotta does have a prior disciplinary history. See *Mazzotta (Re)*, 2011 LNCMFDA 12. On the other hand the conduct of both Respondents in this matter has already caused them to have suffered a significant penalty. The Member placed them on strict supervision in March 2013 and they have been charged an override on their commissions since that time. The override has cost them approximately $95,000.

13. The Respondent Ireland has no prior disciplinary history.

14. Both Respondents cooperated with the Member's investigation and with the investigation made by MFDA. By agreeing to this settlement, the Respondents have saved the MFDA the time, resources and expenses which a full hearing would have involved.

THE DUTY OF A HEARING PANEL AT A SETTLEMENT HEARING

15. It is well settled that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties in their settlement agreement. Rather, our duty is to determine whether the penalty is a reasonable one and whether it meets the objectives of the disciplinary process which are to maintain the integrity of the Investment Services Industry and to protect the public. In *Re Professional Investments (Kingston) Inc.*, [2009] LNCMFDA 9 at paragraph 13 the following appears:

> 13. In a contested Hearing, the Hearing Panel attempts to determine the correct penalty. In a Settlement Hearing, the Hearing Panel takes into account the settlement process itself and the fact that the parties have agreed to the penalties set out in the Settlement Agreement. In our view, a Hearing Panel should not interfere lightly in a negotiated settlement and should not reject a Settlement Agreement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. As has been said: "The settlement process is one of negotiation and compromise and

> the penalty imposed following a settlement will often be less onerous than one imposed following a Hearing where similar findings are made."
>
> *Clark (Re)*, [1999] I.D.A.C.D. No. 40 at page 3.

16. See also *Re Raymer*, [2009] LNCMFDA 15 at paragraph 4:

> 4. It is generally agreed that hearing panels should not interfere lightly in a negotiated settlement as long as the penalties agreed upon are within a reasonable range of appropriateness given the conduct of the Respondent. (See, for instance, *Re Rodney Jacobson*, June 11, 2007, Prairie Regional Council, No. 200712; *Re Clark*, [1999] I.D.A.C.D. No. 40, and *Re Milewski*, [1999] I.D.A.C.D. No. 17.)

17. The courts have addressed the importance of settlements and have approved of their place in the disciplinary process. See *B.C. Securities Commission v. Seifert*, [2006] BCJ No. 225, where the following appears at p. 49:

> 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. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing. …

18. Finally we refer to the comments of an IIROC Hearing Panel in the recent case of *Re Vorstadt*, [2012] IIROC at p. 4:

> Before leaving this case we wish to stress the importance of respect for the settlement process. Settlement leads to fair, efficient and economical resolution of disciplinary matters. The settlement

process should be encouraged and supported. In *Re Clarke*, [1999] I.D.A.C.D. No. 40, the Hearing Panel stated, at p. 3:

> The panel must be cognizant of the importance of the settlement process and should not interfere lightly in a negotiated settlement. [Emphasis added.]

We subscribe to that view.

GUIDELINES AND OTHER DECISIONS

19. In determining whether a settlement is a reasonable one, a hearing panel is entitled to look at regulatory guidelines and other decisions. Guidelines are not binding upon a hearing panel and they cannot derogate from a hearing panel's responsibility to decide what might be an appropriate penalty in a given case. However guidelines are useful in that they show what penalties Members of the industry consider to be generally appropriate. We have considered the guidelines for conflict of interest and complaint handling. The fines suggested in this case are very much in line with those guidelines.

20. Decisions in other cases can often be of some assistance in helping to indicate what might be a reasonable range of penalties. It is always necessary to be cautious about relying too heavily on decisions in other cases because no two cases are ever the same. Counsel drew our attention to a number of previous decisions in somewhat similar circumstances. We have decided that there is no need to review any of those decisions in detail. The penalties suggested in this case fall within a broad range encompassed by those other decisions.

IMPACT OF THE PENALTY

21. Monetary penalties are imposed to act as specific and general deterrence. The penalties imposed are sufficient to act as a specific deterrent to these Respondents and should be sufficient to alert all Members and Approved Persons that similar conduct will attract significant consequences.

DECISION

22. At the conclusion of the hearing we withdrew from the hearing room. We considered the circumstances of this case and reached the conclusion that the settlement was a reasonable one. Therefore we accepted it.

DATED this 15th day of November, 2016.

"P. T. Galligan"

The Honourable P. T. Galligan, Q.C.
Chair

"Rob Christianson"

Rob Christianson
Industry Representative

"Matthew Onyeaju"

Matthew Onyeaju
Industry Representative

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APPENDIX "A"

IV. AGREED FACTS

Registration History - Mazzotta

6. Since June 2002, the Respondent, Mazzotta, has been registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with Sterling Mutuals Inc. ("Sterling" or the "Member"), a Member of the MFDA.

7. At all material times, Mazzotta has carried on business from a branch office of Sterling located in Ottawa, Ontario (the "Branch"). Mazzotta uses the approved trade name, the Innovative Financial Group in his dealings with clients of Sterling.

8. In addition to selling mutual funds, Mazzotta is authorized by the Member to offer other financial services to clients including the sale of insurance products.

Registration History - Ireland

9. Since July 2002, the Respondent, Ireland, has been registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with Sterling. In August 2008, Ireland also became registered as a Branch Manager and acted as Branch Manager of the Branch until March 2011.

10. Ireland also carries on business from the Branch and uses the approved trade name the Innovative Financial Group in his dealings with clients of Sterling.

Background – The Complainant's Experience As A Client

The Complainant's Dealings With CB

11. Client JN and his wife NG became clients of Sterling in April 2008.

12. In 2008, two other Approved Persons of Sterling worked with Mazzotta. One Approved Person was Ireland and the other was former Approved Person CB. Ireland and CB assisted Mazzotta with the provision of financial services for clients including trading in mutual funds.

13. When JN became a client of Sterling in April 2008, his account was serviced by CB. The Respondents had no dealings with JN until CB ceased working at the Branch and Mazzotta purchased CB's book of business.

14. JN's insurance agent had referred JN to Mazzotta. CB told JN that he worked for Mazzotta and that Mazzotta had reviewed the recommendations that he presented to JN. In fact, Mazzotta did not meet JN at that time and had no involvement with the recommendations that CB presented to JN.

15. In May 2008, CB recommended and implemented a leveraged investment strategy for JN that resulted in JN and his wife NG borrowing $175,000 by way of an investment loan and investing the proceeds of the loan in mutual funds in amounts recommended by CB (the "Leveraged Investment Strategy"). The mutual funds were purchased subject to deferred sales charges ("DSC fees"). JN claims that CB did not inform him that the mutual funds were subject to DSC fees and did not explain the circumstances in which DSC fees would be applicable or the cost that he would incur if DSC fees were applicable in the event that he decided to discontinue the Leveraged Investment Strategy prior to the expiry of the DSC fee schedule.

16. The Respondents were not aware of or involved in preparing the recommendations that CB presented to JN.

17. By the end of July 2008, less than three months after implementing the Leveraged Investment Strategy, the value of JN's investment portfolio had declined from $175,000 to approximately $157,000 and as a result, the value of the mutual funds was less than the outstanding amount of the loan. JN sent e-mails to CB in July 2008 that reflected a high level of anxiety about the substantial losses that JN had incurred in his account.

The Complainant's Dealings With The Respondents

18. In August 2008, CB ceased to be an Approved Person of Sterling and terminated his relationship with the Innovative Financial Group and the Respondents took over responsibility for servicing JN's investment account and Leveraged Investment Strategy.

19. At the first meeting that was scheduled after CB's departure from Sterling, the Respondents told JN that:

(a) CB was no longer working at their office;
(b) they had taken over responsibility for servicing JN's account when Mazzotta purchased CB's book of business;
(c) they had no knowledge of JN's account prior to CB's departure from Sterling;
(d) they had no involvement with the recommendations that were made by CB to JN prior to CB's departure from Sterling and did not consider themselves responsible for his investment losses;
(e) they would not have recommended the Leveraged Investment Strategy to JN and his wife NG in light of the couple's financial circumstances; and
(f) If JN and NG intended to discontinue or unwind the Leveraged Investment Strategy, they would incur approximately $10,000 in DSC fees upon the sale of their mutual funds and they would have to repay the outstanding investment loan owed to B2B which exceeded the value of the investments available to be sold even before factoring in the impact of the DSC fees.

20. JN and NG decided that they could not afford to discontinue or unwind the Leveraged Investment Strategy given the extent of the applicable DSC fees and the shortfall between the loan value and the investment value.

21. Between August 2008 and October 31, 2012, the value of JN's investment account declined from approximately $157,000 to approximately $83,000. JN also received distributions

during the period. JN became increasingly concerned about the fact that the value of his investment account was insufficient to cover the costs of the loans that he had obtained to implement the Leveraged Investment Strategy.

JN's December 5, 2012 Complaint

22. By letter dated December 5, 2012, JN submitted a complaint that was addressed to Mazzotta and copied to the Chief Executive Officer (the "CEO") and Ultimate Designated Person of Sterling (the "UDP"). The complaint concerned the conduct of Mazzotta, Ireland and CB with respect to the suitability of the Leveraged Investment Strategy, the adequacy of disclosure that JN received with respect to fees and the risks of the strategy and the manner in which the Respondents had serviced his account since August 2008.

23. In the letter, JN requested that Mazzotta provide him with "concrete evidence that the current portfolio is on the right path and show me how it will ever do more than just pay distributions that are close to the interest costs on the loan that I have."

24. The Respondents disagreed with many of the assertions that JN had set out in his letter and they denied personal responsibility for others in light of the fact that they had not been servicing JN's account when the Leveraged Investment Strategy was implemented.

The Complaint Handling Process After JN's Complaint Was Received

25. On Friday, December 7, 2012, the Chief Compliance Officer of Sterling (the "CCO") requested a written statement from the Respondents concerning the complaint of JN. He also scheduled a call with the Respondents that took place on Monday, December 10, 2012.

26. On December 10, 2012, the CCO sent a letter to the complainant acknowledging receipt of his complaint letter.

27. During the December 10, 2012 call between the CCO and the Respondents, the Respondents communicated their disagreement with the assertions in the complaint letter to the

CCO and the CCO recommended that the Respondents meet with the complainant to discuss his complaint and ensure that the complainant understood the rationale for the Leveraged Investment Strategy and how it was performing.

28. Accordingly, with the knowledge and approval of Sterling, the Respondents scheduled a meeting with JN and his wife NG on December 14, 2012 to discuss the content of JN's complaint.

29. On December 13, 2012, the Respondents were informed by the CCO that the MFDA had been notified by Sterling that the complaint of JN had been received.

30. During the December 14, 2012 meeting between the Respondents and JN and his wife NG, the Respondents:

(a) explained to JN why they believed that the complaint should have been directed at CB for recommending the Leveraged Investment Strategy and against Sterling for approving the loan and should not have been directed against the Respondents;
(b) told JN and his wife NG that Mazzotta was pursuing legal action against CB;
(c) proposed that subject to JN retracting his complaint against the Respondents, Mazzotta is willing to provide a written guarantee to JN and his wife NG that they will share in any award that Mazzotta receives in his lawsuit against CB; and
(d) offered to provide aid and support in writing a new complaint to Sterling in regards to [CB].

31. On December 18, 2012, the Respondents reported to the CCO and the CEO/UDP that:

> "[The December 14, 2012 Meeting with the complainant] went well. Their complaint is against [CB] and we went through the things since. We will have a response shortly."

They did not otherwise report to the CCO or CEO/UDP in respect of the December 14, 2012 meeting discussions.

32. On December 19, 2012, the CCO (copying the CEO/UDP) sent the Respondents an e-mail in response that read as follows:

> "Thanks for the update . . .
> Did or will the client put in writing they are withdrawing the complaint? As I stated in our call recently, you guys are somewhat joined at the hip with [CB] on this one. If you guys took over account (*sic*) at $157K and the loan was for $175K . .. then [CB] cannot be held accountable for the difference between $157K and the current market value of $83K. As you know, this loan could have been shut down at that time."

33. On December 19, 2012, the Respondents (copying the CEO/UDP) replied to the CCO's e-mail stating:

> "We will be providing a full summary of our meeting back to the client and have him acknowledge that and then resubmit on the facts."

34. On December 19, 2012, the CEO/UDP sent the Respondents an e-mail that stated, among other things, that:

> ". . .because a complaint was made, [Sterling] would have been obligated to report it [to the MFDA]. Even if a client later withdraws their complaint, the MFDA will still conduct a full review and there is nothing we can do about that."

35. On January 14, 2013, the CCO (copying the CEO/UDP) requested another update from the Respondents.

36. On January 16, 2013 at 4:14 p.m., the Respondents sent an e-mail to JN "to recap our meeting of [December] 14th and get agreement on the next steps." The e-mail contained a detailed summary of topics of discussion that were addressed during the December 14, 2012 meeting. Among other things, the summary described the points listed in paragraph 30 above. At the conclusion of the summary, the Respondents requested a follow-up meeting with the

complainant the following week to review the next steps. The Respondents did not send a copy of this e-mail to the Member.

37. On January 16, 2013 at 4:39 p.m., the Respondents reported to the CCO in an e-mail (copying the CEO/UDP) that:

> "We met with the client in [December], have followed up with more details regarding distributions, spoken to again via email last week and will be meeting with them again in the next week."

38. In response, on January 16, 2013 at 9:59 p.m., the CCO (copying the CEO/UDP) informed the Respondents by e-mail that:

> "Under regulations we have a time limit on when to respond to [JN's] original complaint. If we don't receive something in writing confirming his change of the complaint soon then we must proceed with the original complaint in terms of the investigation and our substantive response.
> Keep us posted."

39. On January 17, 2013, the Respondents informed the CCO by e-mail (copied to the CEO/UDP), that the "[n]ext meeting is setup for next Friday. The written change of complaint will come shortly thereafter."

40. With the knowledge of the Member, on January 25, 2013, the Respondents met with JN to further discuss the complaint.

41. During the January 25, 2013 meeting, the Respondents discussed in further detail the subject-matter of the January 16, 2013 e-mail that they had sent to JN (as described in paragraph 30 above).

42. The Member did not:

(a) take any steps to supervise the meetings or communication between the Respondents and the complainant concerning his complaint; or

(b) direct the Respondents to discontinue their discussions with the complainant about his complaint.

43. By e-mail dated January 31, 2013, the Respondents sent JN a draft letter that they had prepared. The covering e-mail stated:

> "We have attached a copy of the letter to be sent to Sterling. Please review and feel free to provide any comments or feedback on the letter.
>
> As discussed, [Mazzotta's] lawyer is preparing a letter with [Mazzotta's] assurances to you that anything recovered from his legal actions against [CB] will be turned over to you."

44. The Member was not provided with a copy of the draft letter or this e-mail.

45. Among other things, the draft complaint letter that the Respondents attached to the January 31, 2013 e-mail to JN stated as follows:

> "having more closely reviewed the documents it is unequivocally clear that the original recommendation for our investment loan was made by [CB] and no one else. . . Neither [Mazzotta] nor [Ireland] had any part in recommending the loan, the amount of the loan, the funds chosen or the fact that the funds were sold on a deferred sales charge basis and were not privy to any of the information."
>
> . . .
>
> "At this time, I hereby withdraw my complaint against Mazzotta and Ireland. However, I am redirecting my complaint against CB. . . . I also wish to put [Sterling] on notice that they have a hand in this by approving this leverage program and allowing it to be put into place."

46. On February 5, 2013, without the prior written authorization of the Member, the Respondents sent the complainant a draft assignment agreement that had been prepared by Mazzotta's lawyer.

47. The assignment agreement stated, among other things, that:

> "Whereas [JN] is willing to accept the assignment of [Mazzotta's] claims or potential claims against [CB] as good and valuable consideration for the release of his claims or potential claims against [CB]
>
> . . . the parties agree as follows:
>
> [Mazzotta] hereby assigns to [JN] as of the 1st day of February, 2013 all claims he now has against [CB] and arising from their business/professional relationship to and including the date of this assignment. . .
>
> [JN] agrees to release [Mazzotta] from and against any and all claims he now has or may hereafter acquire against [Mazzotta] in relation to any loss arising or originating from [JN's] dealings with [CB]."

48. By e-mail dated February 5, 2013, JN responded to the Respondents. In his response, JN raised questions and concerns about the content of the draft agreement and informed the Respondents that he wanted to have a lawyer review it.

49. On February 14, 2013, the Respondents called the complainant to find out if he had sent a new complaint letter to the Member.

50. The complainant did not send a new complaint letter to the Member or sign the assignment agreement and instead submitted a complaint to the MFDA dated February 14, 2013 in which he alleged that the Respondents had tried to get him to withdraw his complaint against them.

51. On February 26, 2013, the MFDA informed Sterling about the content of JN's February 14, 2013 complaint to the MFDA.

52. By e-mail dated February 28, 2013, the CCO directed the Respondents to refrain from having any further contact with JN (verbal or written).

Action Taken Since The Conduct Was Reported

53. As a consequence of the conduct described in this settlement agreement, the Respondents were placed under strict supervision by the Member's compliance department commencing in March 2013 and have been charged an override on their commission for the heightened supervision since that time. Up to September 26, 2016, the override charges paid by the Respondents have amounted to approximately $95,000.

54. Sterling was a respondent to a separate but related proceeding (MFDA File No. 201619) that culminated with the approval of a settlement agreement between Staff and Sterling dated May 26, 2016. Among other things, Sterling admitted in that agreement that the Member knew or ought to have known that the participation of the subjects of a client complaint (in this case Mazzotta and Ireland) in the complaint handling process gives rise to a conflict of interest that could not be resolved in the best interests of the clients. The Member also admitted that it failed to ensure that the complaint was handled by qualified supervisory or compliance staff and instead permitted the subjects of the complaint to participate in the handling of the complaint, contrary to its regulatory obligations including MFDA Policy No. 3.

Additional Facts

55. The Respondents did not attempt to impose any confidentiality conditions or restrictions on the complainant during the complaint handling process.

56. The Respondents state that they intended to disclose the full extent of their communications with the complainant to the Member prior to finalizing the draft assignment agreement.

57. The Respondents cooperated with Sterling's and the MFDA's investigations into their conduct.

58. By entering into this Settlement Agreement, the Respondents have saved the MFDA the time, resources and expenses associated with conducting a full contested hearing of the allegations.