



**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**

Heard: January 22, 2010, Toronto, Ontario  
Reasons for Decision: March 14, 2011

**REASONS FOR DECISION**

Hearing Panel of the Central Regional Council:

The Hon. Peter Cory, Q.C.  
Cheryl Hamilton  
Sandy Grant<sup>1</sup>

Chair  
Industry Representative  
Industry Representative

Appearances:

Shelly Feld	)	For the Mutual Fund Dealers Association of Canada
	)	
	)	
Carmine Mazzotta	)	Appeared via Teleconference
	)	

<sup>1</sup> Appointed to the MFDA Board of Directors on March 4, 2010 and did not participate in writing the Reasons for Decision (ref. s. 19.9 of MFDA By-law No. 1).

1. The MFDA issued a Notice of Settlement Hearing on January 20, 2010 which gave notice that a settlement hearing would take place before a Hearing Panel of the Ontario Regional Council of the Mutual Fund Dealers Association of Canada (“MFDA”) on January 22, 2010 commencing at 10:00 a.m. in the hearing room located at 121 King Street West, Suite 1000, Toronto, Ontario.
2. The purpose of the hearing was to consider whether, pursuant to section 24.4 of MFDA By-law No. 1, the Hearing Panel should accept a Settlement Agreement entered into by Staff of the MFDA and the Respondent, Carmine Paul Mazzotta, dated January 18, 2010. The Settlement Agreement between Staff and the Respondent involved matters for which the Respondent could have been disciplined as an Approved Person pursuant to sections 20 and 24.1.1 of MFDA By-law No. 1.
3. The Respondent participated in the settlement hearing via teleconference without counsel. The Respondent advised the Panel that he did not require counsel and that he was prepared to proceed on the date of the hearing and, accordingly, the matter proceeded.
4. At the outset of the proceedings, we considered a joint motion by Staff and the Respondent to move the proceedings *in camera*. We granted that motion. We then considered, in detail, the provisions of the Settlement Agreement itself. We heard submissions as to the facts set out in section IV of the Settlement Agreement and the applicable law which should guide this panel in determining whether to accept or reject the Settlement Agreement. We next heard submissions as to why this particular Settlement Agreement met the appropriate criteria.
5. We then retired to consider both the factors particular to this case and the applicable legal principles. After deliberation, we unanimously concluded that it was appropriate to accept the Settlement Agreement. As a Panel, we are obviously concerned with the type of conduct which is reflected in the Settlement Agreement, however we believe that the Settlement Agreement fairly addresses those concerns.
6. The salient portions of the Settlement Agreement are as follows:

## **“Registration History**

1. The Respondent has been registered as a mutual fund salesperson in the province of Ontario with Sterling Mutuals Inc. (“Sterling”) since June 2002.
2. Prior to working at Sterling, the Respondent was registered as a mutual fund salesperson with Fund Equity Plus Inc. from April 2001 to June 2002 and at Odyssey Capital from February 2000 to April 2001.
3. Sterling became a Member of the MFDA on March 8, 2002.

## **Portus Alternative Asset Management Inc.**

9. On March 14, 2003, Paradigm Asset Management Inc. which subsequently changed its name to Portus Alternative Asset Management Inc. (“Portus”) was registered as an Investment Counsel and Portfolio Manager (“IC/PM”) in all Canadian jurisdictions except Quebec (and became registered in Quebec when it changed its name). Portus developed certain principal-protected investment products that were distributed to retail investors by means of referrals from various sources, including Members of the MFDA. In total, approximately \$792 million was invested in Portus principal-protected investment products.

10. On February 2, 2005, the Ontario Securities Commission (“OSC”) issued orders requiring Portus and its affiliates to cease trading in securities because of apparent breaches of the *Securities Act*, R.S.O. 1990, c. S.5 as amended (the “OSA”). Subsequently, the OSC commenced enforcement proceedings against Portus, its affiliates and certain officers and directors of Portus. Upon application of the OSC, KPMG Inc. (“KPMG”) was appointed as the Receiver of all of the assets of Portus and related entities. The Receiver later applied for, and obtained, a bankruptcy order, among other things, adjudging Portus bankrupt. In its most recently disclosed assessment, KPMG estimated that realizations would exceed 95% of Portus Customer Claims when final distributions are made. Prior to the issuance of the cease trade orders, the Respondent was not aware of the improper conduct that gave rise to the OSC enforcement proceedings and the cease trade orders against Portus.

11. Sterling never authorized the sale of Portus investment products by its Approved Persons and did not enter into a referral arrangement with Portus. In fact, as described below, Sterling expressly directed its Approved Persons, including the Respondent that they were not permitted to sell or refer clients to Portus investment products.

## **OSC Terms and Conditions**

12. In approximately January 2006, mutual fund dealers and investment dealers that were registered in Ontario and referred clients to Portus (the “Ontario Dealers”), voluntarily agreed to terms and conditions on their registration stipulating that the Ontario Dealers would repay clients all referral fees received from Portus (the “OSC Terms & Conditions”). As part of that process, many of the Ontario Dealers, in turn, subsequently clawed back from Approved Persons any compensation that had been paid to them in respect of such referrals. Taking into account the OSC Terms & Conditions,

the OSC, the Investment Dealers Association of Canada and the MFDA agreed not to pursue enforcement proceedings against the Ontario Dealers for shortcomings in the due diligence and supervision of their Portus referral programs.

13. In light of the fact that Sterling never had a referral arrangement with Portus and did not receive referral fees from Portus, Sterling was not subject to the OSC Terms & Conditions and was not expected to repay any referral fees to its clients. Consequently, unlike the clients of the Ontario Dealers, prior to the commencement of this proceeding, individuals who had purchased Portus investment products through the Respondent or the companies that he controlled were not repaid the referral fees that had been paid by Portus to the Respondent or his companies (approximately \$136,100 as described below).

### **Securities Related Business Outside the Member**

14. Between January 2004 and January 2005, the Respondent or companies that he controlled sold, referred or facilitated the sale of approximately \$3.46 million of Portus investment products to approximately 31 clients. None of the transactions were carried on for the account of Sterling or processed through the facilities of Sterling.

15. Sterling had not approved Portus investment products for sale by its Approved Persons and as described below, in June 2004, Sterling expressly directed its Approved Persons, including the Respondent, that they were not permitted to sell or refer them.

16. Companies that the Respondent controlled were paid sales commissions or referral fees in the amount of approximately 4% of the amounts invested as compensation for the involvement of the Respondent and his companies in the sale of Portus investment products to clients. Portus Referral Fee Statements indicate that the compensation paid by Portus to the Respondent or the companies that he controlled as compensation for involvement in the sale of Portus investment products to be approximately \$136,100. The Respondent's records indicate that he paid more than \$70,000 of the compensation that was received from Portus to clients or to other individuals that processed their Portus transactions through companies that the Respondent controlled.

17. The Respondent acknowledges that since Sterling became a Member of the MFDA in March 2002, MFDA Rules have prohibited him from making sales or referrals of securities that were not processed through the facilities of Sterling. The Respondent states that representatives of Portus told him that he could process sales of Portus products through the managing general agency ("MGA") that he operated and through which he was authorized to process insurance business. That advice was in fact incorrect and the Respondent elected not to discuss the proposal from Portus with Sterling. The Respondent now acknowledges that he cannot rely on advice from an issuer concerning his obligations as an Approved Person. All sales and referrals of securities must be approved by and processed through the facilities of his Member Sterling.

### **Failure to Comply with Member's Direction**

18. On June 3, 2004, Sterling's Vice-President and Chief Compliance Officer sent an e-mail entitled "Non Approved Product" to all Approved Persons, including the Respondent, which stated:

*Please note that you are not allowed to sell products which has (sic) not been approved by the dealer. Paradigm funds have changed their name to Portus Funds. They are not approved. The firm has been trying to by-pass dealer compliance by offering their product on a referral basis through MGA channels. This is not allowed under the MFDA. Any advisor attempting to do so will be suspended and reported to regulators.*

19. Between June 3, 2004 and January 2005, contrary to the express terms of the written direction of Sterling, the Respondent continued selling, referring or facilitating the sale of Portus investment products to clients of Sterling. The Respondent did not disclose his involvement in the sale of Portus investment products to Sterling.

20. As noted above, Sterling did not enter into a referral arrangement with Portus at any time and did not approve the sale or referral of Portus investment products by its Approved Persons at any time.

21. The Respondent acknowledges that he is obliged to ensure that he reads and complies with all instructions, policies, procedures and directives that are communicated by his Member, Sterling. The June 3, 2004 e-mail was successfully transmitted to and received at the Respondent's "SterlingMutuals.com" e-mail address but the Respondent states that he does not recall receiving it at the time. The Respondent acknowledges that he was required to read and comply with the June 3, 2004 communication from Sterling and his failure to do so constituted a contravention of his Member's policy and MFDA Rules.

#### **Undisclosed Outside Business Activity**

22. The Respondent disclosed to Sterling and was granted approval by Sterling to carry on a dual occupation selling insurance through Innovative Financial Group Inc., a company that he incorporated and operated. The Respondent also disclosed his involvement with Innovative Financial Group Inc. on the Form 33-109F4 Registration Form filed with the Ontario Securities Commission ("OSC").

23. The Respondent did not disclose to or seek the approval of Sterling or the OSC to engage in sales and referrals of Portus investment products through Innovative Financial Group Inc., the entity through which he initially processed such sales and referrals.

24. Subsequently, on January 30, 2004, the Respondent incorporated a second company called Corporate Optimization Strategies Inc. ("COSI") primarily for the purpose of processing sales and referrals of Portus investment products. The Respondent was the President and sole director of COSI. Thereafter, until January 2005, the Respondent processed sales and referrals of Portus investment products through COSI.

25. The Respondent did not disclose to or obtain the approval of Sterling or the OSC with respect to establishing and operating COSI as a business for processing sales and referrals of Portus investment products, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

## **The Respondent's Agreement To Compensate Clients**

26. In January 2010, the Respondent agreed to pay compensation to individuals who purchased Portus investment products through him or companies that he controlled by repaying to such individuals the total amount of referral fees, commissions or other compensation that was retained by the Respondent or his companies as a result of such sales. The Respondent's agreement to rebate to purchasers of Portus investment products the compensation that the Respondent and his companies retained in respect of referrals or sales of Portus investment products will result in the disgorgement of the profit that he and his companies obtained as a result of the contraventions admitted to in this Settlement Agreement.

## **Mitigating Facts**

27. The Respondent has not been the subject of previous disciplinary proceedings as an Approved Person or as a licensed insurance agent. He has been a licensed insurance agent since 1978 and has been the owner and operator of an MGA since 1982.

28. The Respondent co-operated with the MFDA's investigation of his conduct.

29. The Respondent deeply regrets the contraventions of MFDA Rules and the policies and procedures of his Member that are described in this Settlement Agreement."

7. In determining whether the Settlement Agreement should be accepted, the Hearing Panel considered a number of factors. These factors included the following:

- a) We have considered the public interest and whether the penalty imposed will protect investors.
- b) We have considered whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the Settlement Agreement.
- c) We have considered whether the Settlement Agreement addresses the issues of both specific and general deterrence.
- d) We have considered whether the proposed settlement will help to prevent the type of conduct set out in the Settlement Agreement from occurring again.
- e) We have considered whether the Settlement Agreement will foster confidence in the integrity of the MFDA, the Canadian capital markets, and the regulatory process itself.

8. In our view, the Settlement Agreement adequately addresses all of the above factors. We believe that each and every one of these factors is dealt with in an appropriate fashion by the Settlement Agreement.

9. In addition, we carefully reviewed the MFDA Penalty Guidelines and the factors applicable in cases concerning unapproved outside business activities and referral arrangements when determining the appropriate penalties to impose.

10. We believe that, in a hearing of this nature, it is appropriate to consider any and all mitigating factors. A number of these factors are set out below, as presented by Staff of the MFDA during oral submissions and as set out in the Settlement Agreement itself:

- a) The Respondent's conduct occurred in the early days of the MFDA's regulatory mandate and prior to the issuance of many Member Regulation Notices, disciplinary decisions and other sources of guidance that have clarified the obligations of Approved Persons to conduct all securities related business for the account of and through the facilities of the Member;
- b) The Respondent has worked in the financial services industry as an insurance agent since 1978 and as a mutual fund salesperson since 2002 and has no previous disciplinary record either before or since the conduct that occurred in this case;
- c) The Respondent cooperated with Staff throughout its investigation of his conduct;
- d) The Respondent's admissions to the misconduct described in the Settlement Agreement reflect acceptance of responsibility for his misconduct and demonstrate remorse and regret for failing to comply with MFDA Rules and his Member's policies and procedures; and
- e) By entering into a Settlement Agreement, the Respondent has avoided the need for a potentially lengthy hearing that would have entailed additional effort, time and expense for the MFDA.

11. Finally, the Hearing Panel considered that this was a Settlement Agreement that was reached by the parties after significant discussion and negotiation. The Settlement Agreement represents what they feel, with their knowledge and their experience, is an appropriate resolution. In our view, the Settlement Agreement is reasonable and in the public interest and, for all of

these reasons, we accepted the Settlement Agreement and signed the appropriate order as presented at the hearing.

**DATED** this 14<sup>th</sup> day of March, 2011.

“Peter Cory”

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The Hon. Peter Cory, Q.C., Chair

“Cheryl Hamilton”

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Cheryl Hamilton,  
Industry Representative

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