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: Samuel Li

Heard: January 28, 2019 in Toronto, Ontario
Decision: January 28, 2019
Reasons for Decision: March 8, 2019

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, CC, QC	Chair
Paige A. Wadden	Industry Representative
Joseph A. Yassi	Industry Representative

Appearances:

Lyla Simon	)	Enforcement Counsel for the Mutual Fund Dealers Association of Canada
Bruce O'Toole	)	Counsel for Respondent
Samuel Li	)	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 Monday, January 28, 2019. The full Settlement Agreement, dated December 10, 2018, entered into between Staff of the MFDA and Samuel Li ("Li" or the "Respondent") is available on the MFDA website. The Respondent, who appeared in person, was represented by counsel at the Hearing.

2. The Panel accepted the proposed Settlement Agreement at the conclusion of the hearing, with reasons to follow. These are our reasons for our decision to accept the Settlement Agreement.

3. From September 16, 2011 to the present, the Respondent has been registered and continues to be registered in Ontario as a dealing representative with Investia Financial Services Inc. ("Investia" or the "Member"), a Member of the MFDA.

4. The Respondent started in the industry in 2005. From February 2005 to September 2005 he was registered as an Approved Person with WFG Securities of Canada Inc. and from September 2005 to September 2011 he was with Excel Financial Growth Inc. ("Excel"). Effective December 20, 2011, Excel resigned from Membership in the MFDA and Excel's assets were transferred to Investia.

5. At all material times, the Respondent carried on business from branches located in Markham, Ontario, both while he was registered with Excel and while he was registered with Investia.

6. A Notice of Settlement Hearing was issued on December 18, 2018. The Notice states:

> "The proposed Settlement Agreement concerns allegations that from in or about January 2007 to December 2009, and in or about September 2016 and February 2017, the Respondent drafted and required 13 of his clients to sign documents purporting to waive his and the Member's suitability obligations, thereby failing to ensure that the acceptance of the clients' trades were within the bounds of good business practice, contrary to MFDA Rules 2.2.1(b) and 2.1.1."

The Settlement Agreement

7. In Paragraph 23 of the Settlement Agreement, the Respondent admits the conduct set out in the previous paragraph.

8. The Settlement Agreement sets out the following terms of settlement in paragraph 24:

> "The Respondent agrees to the following terms of settlement:
>
> i. the Respondent shall pay a fine in the amount of $5,000, pursuant to s.24.1.1(b) of MFDA By-law No. 1;
> ii. the Respondent shall pay costs in the amount of $2,500, pursuant to s.24.2 of MFDA By-law No. 1;
> iii. the Respondent shall in the future comply with MFDA Rules 2.2.1(b) and 2.1.1; and
> iv. the Respondent will attend in person on the date set for the Settlement Hearing.

Undisclosed Waiver Documents

9. Paragraphs 11 to 13 of the Settlement Agreement set out that from about January 2007 to December 2009, while the Respondent was registered with Excel, he recommended to 11 clients that they obtain investment loans in order to implement a leveraged investment strategy in their mutual fund accounts.

10. At the time these clients were signing the various required documents in order to obtain the investment loans, the Respondent also required the clients to sign a waiver document that the Respondent had drafted ("Waiver").

11. Among other things, the Waivers generally contained the following or substantially similar language (errors are in the original text):

> 'My financial advisor, Samuel Li, has fully explained all the potential risk to me. I am fully aware of the risk and consequence associated with leverage investment. Although my financial situation might not be fully suitable for this loan and I will still continue in leverage loan investments. No parties, including Excel Financial Growth or my advisor, Samuel Li will be responsible/liable for assisting me in getting the investment loan."

12. Paragraphs 15 to 17 of the Settlement Agreement also set out that on or about September 2, 2016 and February 13, 2017, while the Respondent was registered with Investia, he assisted two clients in making redemptions in their leveraged mutual fund accounts.

13. At the time the two clients signed the various required documents in order to redeem funds from their accounts, the Respondent also required the two clients to sign a waiver document that the Respondent had drafted ("Redemption Waiver").

14. Among other things, the Redemption Waivers generally contained the following or substantially similar language (errors are in the original text):

> "My financial advisor, Samuel Li, has fully discussed the taxation implication, redemption charges of the funds and other alternative strategies, but I decide to go ahead with these redemptions. I understand that there could be impact to any income tested government benefits, while I will have to pay off any shortfall toward the investment loans with my own savings. I understand after these redemptions, all gains or losses from these accounts are finalized and no parties including Samuel Li, and Investia Financial Services Inc., will be liable for any losses arise from this leveraged plan."

15. Neither Investia or Excel were aware of the waivers or the waiver documents. Paragraph 18 of the Settlement Agreement states:

- the Members (Excel and Investia) were unaware that the Respondent had drafted the waiver documents;
- the Members (Excel and Investia) were unaware the Respondent was requiring clients to sign waiver documents; and
- the Respondent failed to seek or obtain the Members' (Excel or Investia) approval prior to drafting any waiver documents or prior to requiring the clients to sign any waiver documents."

Policy Considerations

16. Paragraph 10 of the Settlement Agreement notes that 'Excel's policies and procedure prohibited its Approved Persons, including the Respondent, from engaging in client communications that were …detrimental to the interests of clients.'

17. Paragraph 14 of the Settlement Agreement states that "[o]nly Investia prescribed or approved forms may be used when processing your mutual fund business. All non-standard forms must be approved by compliance prior to their use. The use of non-approved Investia forms is prohibited."

18. It is important that Members know about Approved Persons' activities, whether it be outside business activity or the use of special forms. How can a Member properly supervise Approved Persons' Activities without knowing what they are doing and how they are doing it?

19. MFDA Rule 2.2.1(b) imposes a positive obligation on Members and Approved Persons to use due diligence to ensure that the acceptance of any order for any account is "within the bounds of good business practice." It is not "good business practice" to prepare forms without consulting with the Member, particularly forms which attempt to limit the financial liability of the Approved Person or the Member.

20. This conduct is also contrary to MFDA Rule 2.1.1 which requires each Member and each Approved Person of a Member to:

a) deal fairly, honestly and in good faith with its clients;

b) observe high standards of ethics and conduct in the transaction of business;

c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest.

21. The Respondent admits to having breached both MFDA Rule 2.1.1 and MFDA Rule 2.2.1(b).

22. Whether the conduct would have breached MFDA rules if the Member had approved the forms is less straight-forward. Can a Member or an Approved Person limit liability for losses incurred, as the Respondent purported to do?. This issue was not argued at the hearing, but we note that the Canadian Securities Administrators Staff Notice 31-336, issued January 9, 2014, specifically provides in its document "Guidance for Portfolio Managers, Exempt Market Dealers and Other Registrants on the Know-Your-Client, Know-Your-Product and Suitability Obligations," under the heading "Unacceptable practices:" "Registrants should not…Use a KYC

form or other document that contains disclaimer language which purports to limit liability for all losses, including losses resulting from a breach of the registrant's obligations under securities law."

23. We also note the MFDA case of *Re Sterling Mutuals Inc.* 2016 LNCMFDA 77, which involved a contractual "release" from suitability obligations. In that case the Respondent (see paragraph 58 of the Settlement Agreement) "required clients to sign a document that purported to release the Respondent and the Approved Persons from liability for contraventions of their suitability obligations contrary to MFDA Rules…." The Panel concluded at paragraph 22 of its reasons: "It is incompatible with the standard of conduct and contrary to the public interest to contract out of regulatory obligations. Members and Approved Persons have a duty to ensure the suitability of the investments that their clients hold and cannot simply agree to disregard this fundamental obligation.'

Acceptance of the Settlement Agreement

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

25. Attempting to limit financial liability, as done in this case, without the knowledge of the Member is serious, and it was done for 13 clients during two separate periods of time.

26. The present case is, however, at the lower end of the spectrum. No client complained and there is no evidence of client loss. In December 2017, Investia canvassed all the Respondent's "potentially affected clients" and did not receive any responses. Neither the Member nor Staff received any client complaints related to this matter. Further, Staff is not aware of any client harm related to this matter.

27. The Respondent has not benefited financially from having the clients execute the forms.

28. The Respondent has been in the securities business since 2005 and has not been the subject of MFDA disciplinary action.

29. The Respondent cooperated fully with MFDA Staff and sought an early resolution in this matter. Counsel for the MFDA described the Respondent as "contrite" and Counsel for the Respondent used these actions to indicate his client's "remorse." Moreover, by entering into a

Settlement Agreement the Respondent has accepted responsibility for his misconduct and saved the MFDA the time, resources and expenses associated with conducting a full hearing.

30. A fine of $5,000 is a significant penalty. It offers a substantial measure of specific and general deterrence.

31. Counsel were unable to find any case that was "on all fours" with the present case. Counsel for the MFDA described this case as "unique". The cases cited, involving know your client and know your product issues, were consistent with the penalty in the present case.

32. The award of costs of $2,500 appears reasonable.

33. 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."

34. 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. Respecting settlements is particularly desirable in cases, such as this one, where experienced counsel were involved and where, we were told, there were "substantial negotiations."

35. 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."

36. The penalty and the costs agreed to in this case clearly fall within "a reasonable range of appropriateness."

37. For the above reasons the Panel accepted the Settlement Agreement.

DATED this 8th day of March, 2019.

"Martin L. Friedland"
Martin L. Friedland, CC, QC
Chair

"Paige A. Wadden"
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Industry Representative

"Joseph A. Yassi"
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