



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: Zenon Smiechowski

Heard: December 16, 2010, Vancouver, British Columbia
Reasons for Decision: December 31, 2010

REASONS FOR DECISION

Hearing Panel of the Pacific Regional Council:

The Hon. Thomas R. Braidwood, Q.C.	Chair
Martha Kane	Industry Representative
Darlene Barker	Industry Representative

Appearances:

Francis Roy)	For the Mutual Fund Dealers Association of Canada
)	
)	
Zenon Smiechowski)	Did Not Appear
)	

1. A Notice of Settlement Hearing was duly given to determine whether pursuant to Section 24.4 of the MFDA By-Law No.1, this hearing panel should accept the Settlement Agreement entered into between Staff of the MFDA and Zenon Smiechowski (the “Respondent”).

2. Particulars of the allegations against the Respondent are as follows:
 - a) the Settlement Agreement concerns allegations that the Respondent:
 - (i) engaged in personal financial dealings with a client by borrowing monies from the client (the “Loan”) and then failing to promptly repay the Loan, contrary to MFDA Rules 2.1.4 and 2.1.1;
 - (ii) failed to comply with the policies and procedures of Members with which he was registered by not informing them of the Loan or a civil claim commenced against him by the client in respect of the Loan, contrary to MFDA Policy No. 6, MFDA Rules 1.1.2, 1.25(b) and 2.5.1, and MFDA Rule 2.1.1.

3. The Parties have agreed to the following facts:

Registration History

- a) From November 5, 2008 to January 7, 2010, the Respondent was registered in British Columbia as a mutual fund salesperson and branch manager with Hub Capital Inc. (“Hub”);
- b) The Respondent had previously been registered with Hub:
 - (i) from November 19, 2007 until March 24, 2008 as a mutual fund salesperson and branch manager; and
 - (ii) from November 9, 2006 until March 24, 2008 as a mutual fund salesperson.
- c) The Respondent was terminated by Hub on March 24, 2008 as a result of some of the events described herein.
- d) From February 2002 to October 27, 2006, the Respondent was registered as mutual fund salesperson with Clarica Investco Inc. (“Clarica”).

- e) On June 25, 2007, Clarica changed its name to Sun Life Financial Investment Services (Canada) Inc. (“Sun Life”). Sun Life/Clarica has been a Member of the MFDA since January 11, 2002.

The Respondent Engaged in Personal Financial Dealings With FP

- f) On February 24, 2003, FP became a client of Sun Life/Clarica when she opened an RRSP account. The Respondent was the Sun Life/Clarica salesperson responsible for servicing client FP’s mutual fund and insurance accounts.
- g) In July 2004, the Respondent asked client FP for a personal loan in the amount of \$25,000.
- h) On July 23, 2004, client FP lent \$25,000 (the “Loan”) to the Respondent. In order to do so, client FP carried out the following transactions:
- (i) On July 15, 2004, she surrendered \$20,520.40 from her Standard Life segregated funds (non-registered Income Balanced Fund), for which she incurred surrender fees in the amount of \$520.40; and
 - (ii) On July 16, 2004, she surrendered a further \$5,130.36 from her Standard Life segregated funds (non-registered Income Balanced Fund), for which she incurred surrender fees in the amount of \$130.36
- i) On July 23, 2004, immediately prior to client FP making the Loan, the Respondent sent an email to client FP requesting that she transfer the Loan funds to his personal bank account instead of writing him a cheque. The Respondent’s bank account number and information was included in his email. Client FP agreed and transferred \$25,000 from her bank account into the Respondent’s bank account.
- j) On the same date the Loan was made, the Respondent prepared and signed a document entitled “Memorandum of financial agreement” (the “Memorandum”) stipulating the terms of the Loan. The Memorandum permitted the Respondent to repay the Loan in full with a variable interest component in one of three ways: in one payment after six months; in two payments after 12 months; or in one payment after 12 months. The Memorandum described the terms in the following manner:
- A personal loan of \$25,000 (twenty five Thousand) from [client FP] to Zenon Smiechowski.
- Loan provisions – Return after 6 months = \$27,500 (02/05)
or \$15,000 (02/05) + \$13,750 (06/05) for a total of \$28,750
or [sic] return after 12 months - \$30,000 (06/05).
- k) Contrary to the terms of the Memorandum, the Respondent failed to repay the Loan to client FP, either in part or in full, when the Loan became payable after six months and after twelve months.

- l) The Loan was a violation of Clarica's Policies and Procedures, which specifically prohibited Approved Persons from lending to or borrowing from clients.
- m) At no time did the Respondent obtain permission from, or disclose to, Clarica that he had borrowed monies from client FP.
- n) On November 9, 2006, the Respondent became an Approved Person at Hub. FP was not, and never became, a client of Hub.
- o) Between January 15, 2007 and July 10, 2007, or approximately two years after the Loan had become payable, FP sent four emails to the Respondent wherein she requested repayment of the Loan. The Respondent replied to each of these emails confirming that he would make prompt payment in full, with interest. Notwithstanding his promises to FP, the Respondent did not repay the Loan at that time, either in part or in full.
- p) On July 29, 2007, FP informed the Respondent in writing that if she did not receive full payment by July 31, 2007, she would consider commencing a legal action against him.
- q) On August 31, 2007, still having received no payments from the Respondent, FP's lawyers sent a letter to the Respondent informing him that if payment of the Loan was not received by FP on or before September 10, 2007, a legal action would be commenced against him seeking reimbursement of the Loan, together with interest and costs.
- r) On October 13, 2007, the Respondent was served with a Writ of Summons and Statement of Claim issued by the British Columbia Supreme Court (the "Claim"). The Claim, which had been commenced by FP and named the Respondent as the sole defendant, alleged, among other things, that the Respondent "...had the benefit of the personal loan of \$25,000 without ever having made any payments..." to FP.
- s) The Respondent was required to report the Claim to Hub in accordance with Hub's Policies and Procedures as well as MFDA requirements. Notwithstanding his obligations, the Respondent did not do so.
- t) On November 8, 2007, the British Columbia Supreme Court issued a default judgment against the Respondent, ordering him to pay FP \$32,743.54 (the Loan amount, together with interest and costs) (the "Judgment").
- u) On November 28, 2007, the Respondent acknowledged to FP's lawyers that he had received the Judgment and advised them that he would send them full payment in satisfaction of same by December 14, 2007, once he had had an opportunity to re-negotiate the terms of his mortgage. Notwithstanding this assurance, the Respondent never sent payment to FP's lawyers. The Respondent also did not disclose the Judgment to Hub.

- v) On January 29, 2008, Hub advised the Respondent that it had received a “Wage Garnishment Order” issued by the British Columbia Supreme Court on December 20, 2007 in respect of the Claim and that, consequently, “[e]ffective next pay period a deduction of 30% will be applied to your earnings and will be payable to the New Westminster Court House.”
- w) At no time prior to Hub having been served with the Wage Garnishment Order did the Respondent inform Hub that he was the subject of a civil proceeding and judgment commenced and obtained by FP against him.
- x) On March 13, 2008, FP submitted a complaint to Hub with respect to the Respondent’s failure to repay the Loan, notwithstanding his promises and the Judgment against him.
- y) On March 24, 2008, on the basis of FP’s complaint and disclosure of her personal financial dealings with the Respondent, Hub terminated the Respondent.
- z) In October 2008, the Respondent and FP agreed to a schedule for the repayment of the outstanding Loan and the Respondent completed the payments in or about March 2009.
- aa) On November 5, 2008, on the basis of the Respondent agreeing to certain terms and conditions, including that he upgrade his qualifications, Hub re-instated the Respondent as a branch manager. Nevertheless, on January 7, 2010, having failed to satisfy one of Hub’s conditions in a timely manner, Hub again terminated him.

Prior Disciplinary History of the Respondent

- bb) The Respondent has not previously been the subject of MFDA disciplinary proceedings.

A. CONTRAVENTIONS

- 1. By engaging in the conduct described above, the Respondent admits the following:
 - a) between July 23, 2004 and October 27, 2006, he engaged in personal financial dealings with client FP by borrowing \$25,000 from client FP, thereby giving rise to an actual or potential conflict of interest between himself and client FP which he failed to address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to MFDA Rules 2.1.4 and 2.1.1;
 - b) between July 23, 2004 and at least October 27, 2006, he failed to disclose to the Sun Life/Clarica that he had engaged in personal financial dealings with client FP, thereby failing to comply with the Member’s policies and procedures and interfering with the

ability of the Member to supervise the Respondent and comply with its obligations under MFDA Rule 2.1.4, contrary to MFDA Rules 1.1.2 and 2.5.1, and MFDA Rule 2.1.1;

- c) between October 13, 2007 and January 29, 2008, he failed to disclose to Hub that he was the defendant in a civil claim that had been commenced against him by client FP in the British Columbia Supreme Court regarding activities that occurred while he was an approved person at another Member, contrary to:
 - (i) sections 4.1(c) and (e) of MFDA Policy No. 6 and MFDA Rules 1.25(b) and 2.1.1; and
 - (ii) the Member's policies and procedures.

thereby interfering with Hub's ability to supervise him and comply with its obligations under MFDA Rule 2.1.4, contrary to MFDA Rules 1.1.2 and 2.5.1; and

- d) between June 2005 and June 2009, he failed to repay \$25,000 in principal plus interest owing to former client FP under the terms of a promissory note, thereby engaging in conduct unbecoming an Approved Person and detrimental to the public interest, contrary to MFDA Rule 2.1.1.

B. TERMS OF SETTLEMENT

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

- a) the Respondent shall pay a fine in the amount of \$10,000, pursuant to section 24.1(b) of By-law No. 1, upon the acceptance of this Settlement Agreement;
- b) the Respondent shall be suspended from acting as a mutual fund salesperson for a period of 6 months, pursuant to section 24.1(c) of By-law No. 1, upon the acceptance of this Settlement Agreement;
- c) the Respondent shall pay the costs of this proceeding in the amount of \$5,000, pursuant to section 24.2 of By-law No. 1, upon the acceptance of this Settlement Agreement; and
- d) the Respondent shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations.

4. The Panel was referred to a detailed analysis of many of the decided cases on the subject, together with the guidelines provided and the principles to be adopted.

5. In the past cases, MFDA Hearing Panels have taken into account the following considerations when determining whether a proposed settlement should be accepted:

- a) Whether acceptance of the settlement agreement would be in the public interest and whether the penalties imposed would protect investors;
- b) Whether the settlement agreement is reasonable and proportionate, having regard to the conduct of the Respondent as set out in the settlement agreement;
- c) Whether the settlement agreement addresses the issue of both specific and general deterrence;
- d) Whether the proposed settlement will prevent the type of conduct described in the settlement agreement from occurring again in the future;
- e) Whether the settlement agreement will foster confidence in the integrity of the Canadian capital markets;
- f) Whether the settlement agreement will foster confidence in the integrity of the MFDA; and
- g) Whether the settlement agreement will foster confidence in the regulatory process itself.

***Professional Investments (Kingston) Inc. (Re)*, [2009] MFDA Ontario Regional Council, Hearing Panel Decision dated March 24, 2009, MFDA File 200836 at p.9. MFDA Book of Authorities at Tab 7. [“*Professional Investments*”].**

***Evangeline Securities Limited (Re)*, [2008] MFDA Atlantic Regional Council, MFDA File 200816, Hearing Panel Decision dated September 21, 2008 at para. 5 MFDA Book of Authorities at Tab 8. [“*Evangeline Securities*”].**

6. It should be stated also that the British Columbia Court of Appeal recently acknowledged the importance and usefulness of settlements in achieving outcomes which further the goals of the securities regulatory context, noting that:

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 doing so, they are effective in accomplishing the purposes of the statute. They provide a means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation.

British Columbia Securities Commission v. Seifert, 2007 BCCA 484 at p. 16, para. 31, MFDA Book of Authorities at Tab 9. (See Page 19 also)

7. In the case before us, in addition to the facts and circumstances above set out, we have noted the terms of mitigating circumstances the monies have been paid in full, although indeed with a considerable delay and after a lawsuit, that the Respondent had no prior history of wrong doing, that he was fully cooperative with the investigating officers, including paying into trust some \$15,000.00 as a result of the settlement contract, that his admissions reflect that he has assumed responsibility for his actions, an expensive hearing has been avoided and that there has been public condemnation by reason of the publication of these verdicts and processes.

8. In the results, the panel unanimously accepts and approves the settlement agreement, but we wish to add this caveat that we are of the view that on the facts presented to us if we were to have considered this matter de novo without the benefit of the settlement agreement, we would not have agreed to that 6 months was an appropriate suspension, but would have considered a longer suspension period.

9. In conclusion, the settlement agreement is approved and confirmed.

DATED this 31st day of December, 2010.

“Thomas Braidwood”
The Hon. Thomas R. Braidwood Q.C.,
Chair

“Martha Kane”
Martha Kane,
Industry Representative

“Darlene Barker”
Darlene Barker,
Industry Representative