



**Mutual Fund Dealers Association of Canada**

Association canadienne des courtiers de fonds mutuels  
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File No.200711

IN THE MATTER OF A SETTLEMENT HEARING  
PURSUANT TO SECTIONS 24.4 OF BY-LAW NO. 1  
OF THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

**RE: ALTIMUM MUTUALS INC.**

SETTLEMENT HEARING

Hearing: June 15, 2007

Decision: June 15, 2007

DECISION AND REASONS

Hearing Panel of the Ontario Regional Council:

The Hon. Fred Kaufman, C.M., Q.C.  
Robert Hovianseian  
Jeanne Beverly

Chair  
Industry Representative  
Industry Representative

Appearances:

Shelly Feld	)	For the Mutual Fund Dealers Association
	)	of Canada
Donald Reid	)	For the Respondent

By Notice of Settlement Hearing, the Mutual Fund Dealers Association of Canada (“MFDA” or “the Association”), announced that it proposed to hold a hearing to consider whether, pursuant to section 24.4 of MFDA By-law No. 1, a Hearing Panel of the Ontario Regional Council should accept the Agreement entered into by MFDA staff and Altimum Mutuals Inc. (“the Respondent”). This hearing was held in Toronto, Ontario, on June 15, 2007, at the conclusion of which the Panel accepted the Agreement. What follows are the Panel’s reasons.

The facts, as agreed by the parties, are as follows:

### **Registration History**

5. The Respondent is registered as a mutual fund dealer and limited market dealer in Ontario. The Respondent’s head office is located in St. Catharines, Ontario. Between July 18, 2003 and February 14, 2005 (the “Material Time”), the number of mutual fund salespersons that were registered with the Respondent ranged between 2 and 7. The Respondent has been a Member of the MFDA since May 29, 2003.
  
6. The Respondent has no previous disciplinary history.

### **Background**

7. This Settlement Agreement concerns misleading sales communications prepared and used by the Respondent to promote a referral arrangement between the Respondent and Portus Alternative Asset Management Inc., formerly Paradigm Alternative Asset Management Inc. (“Portus”).
  
8. On March 14, 2003, Portus was registered as an Investment Counsel and Portfolio Manager (“IC/PM”) in all Canadian jurisdictions except Quebec. Portus developed investment products distributed directly and indirectly to

both accredited and retail investors. Portus accepted client referrals from various sources, including Members of the MFDA and IDA.

9. On or about July 18, 2003, the Respondent entered into a referral arrangement with Portus (the "Agreement"). The Agreement provided that Portus would pay the Respondent referral fees based on the amount of assets invested by the Respondent's clients in Portus securities.
10. Between December 2003 and January 22, 2005, the Respondent received approximately \$117,000 in referral fees from Portus under the terms of the Agreement.
11. Portus purported to rely on exemptions from the prospectus requirements available in the jurisdictions in which its securities were offered for sale to retail investors. Portus presented its securities to the Respondent and others as principal protected note products, structured such that: (i) a large proportion of the funds invested would be used to purchase a guaranteed instrument from a Canadian chartered bank at a discount which would mature at a value equivalent to the principal invested by clients; (ii) a second portion of the monies invested would be used to pay fees and expenses of the manager, including commissions for sales and referrals; and (iii) the remaining funds would be invested aggressively and actively managed in investments acquired for the purpose of supplementing the return for investors. Marketing materials prepared by Portus to promote its securities stated that Portus was targeting monthly returns of 0.5%-1% and annual returns of 8%-12% but noted that "[t]here is no guarantee of performance and past or projected performance is not necessarily indicative of future results".

12. Staff of the Ontario Securities Commission (“OSC”) subsequently came to the view that: (i) Portus securities did not qualify for the prospectus exemptions that Portus relied upon; (ii) Portus securities were not structured in a manner that would provide principal protection directly to the investors who acquired Portus securities; and (iii) the funds invested in Portus securities were not administered or invested appropriately.
13. As a result, in February 2005, the 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, bankruptcy proceedings were commenced against Portus and the OSC commenced enforcement proceedings against Portus, its affiliates and certain officers and directors of Portus.

#### **OSC Terms & Conditions On Dealers That Referred Clients To Portus**

14. Securities dealers that referred clients to Portus in Ontario, including the Respondent, (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 the OSC Terms & Conditions, the OSC, the IDA and the MFDA agreed not to pursue enforcement proceedings against the Ontario Dealers for the failure of such dealers to: (i) exercise appropriate due diligence before entering into referral arrangements with Portus; or (ii) adequately supervise Approved Persons and Registered Representatives with respect to the appropriateness of specific referrals of their clients to Portus.

15. On January 23, 2006, the Respondent accepted the OSC Terms & Conditions and thereafter repaid approximately \$117,000 in referral fees to its clients.

### **Misleading Sales Communications**

16. In March 2004, the Respondent produced two pamphlets for the purpose of soliciting investments by clients in Portus securities and similar exempt securities available from other issuers that offered some kind of principal guarantee at maturity. The features attributed to the investments described in the pamphlets were based primarily upon the Respondent's understanding of Portus securities.
17. One of the pamphlets (the "RSIP Pamphlet") purported to promote an investment product referred to as the Retirement Security Investment Plan ("R.S.I.P."). The Respondent had obtained a registered trademark for the term R.S.I.P. prior to publishing the pamphlet. The other pamphlet (the "Portfolio Navigator Pamphlet") described and promoted the merits of what appeared to be a unique investment tool, software or methodology called the Portfolio Navigator. Neither the RSIP investment product nor the Portfolio Navigator investment process existed. Both concepts were creations of the Respondent designed to induce clients to invest in what were, in fact, Portus securities. The Respondent did not acknowledge in the pamphlets that Portus was the issuer of the underlying investments promoted in the pamphlets.
18. The Respondent prepared both pamphlets without participation by or authorization from Portus or any other third party. Some of the content in the pamphlets was borrowed from or influenced by marketing materials

prepared by Portus but none of the content in the pamphlets was attributed to any party other than the Respondent.

19. The Respondent claims that it was under the misapprehension that MFDA Rules were not applicable to sales communications produced for the purpose of soliciting investor interest in non-mutual fund products.
20. Although the two different pamphlets were designed to solicit interest in the same Portus securities:
  - (a) The RSIP Pamphlet was designed to appeal to clients over the age of 55 with conservative investment objectives who were approaching retirement and were concerned primarily with the safety of their principal; and
  - (b) The Portfolio Navigator Pamphlet was designed to appeal to clients under the age of 55 who had more aggressive investment objectives and were attracted to sophisticated investment strategies.

### ***The RSIP Pamphlet***

21. The RSIP Pamphlet constituted a misleading sales communication issued to the public because:
  - (a) The pamphlet contained untrue or misleading statements, contrary to MFDA Rule 2.7.2(a), as it stated or implied that an RSIP:
    - (i) “is the perfect Retirement Security Investment Plan”;
    - (ii) “was created for those 55 years of age and older who want to stop taking so much risk with their retirement funds”;
    - (iii) “was designed to replace G.I.C.’s in a portfolio”;

- (iv) features benefits such as positive and consistent returns and broad diversification; and
- (v) operates such that an investor's "\$10,000 portfolio will be constructed in the same way as a \$20,000,000 portfolio of a pension fund in Toronto if both are invested on the same day. Both portfolios will hold exactly the same investments in exactly the same proportions and both investors will pay exactly the same fees."
- (vi) is recognized by the Canadian government as an alternative to a Registered Retirement Savings Plan ("R.R.S.P.") by:
  - (A) expressly contrasting an R.S.I.P. to an R.R.S.P. in a manner that suggested both were retirement investment savings vehicles sanctioned by the government
  - (B) making use of a similar acronym, accompanied in places by a red maple leaf;
  - (C) stating that the RSIP was designed for individuals investing for their retirement years and seeking a tax advantaged return; and
  - (D) including a maple leaf on the cover of the pamphlet in a manner which suggested that the R.S.I.P. was an investment product sanctioned by the government.
- (vii) is a unique investment product and the Respondent is one of a select group of investment dealers authorized to offer it to investors, and stated that "[a]n R.S.I.P. is not available from your local bank ... credit union ... trust company ...[or] insurance agent" and "[m]any investment dealers are not yet authorized to offer an R.S.I.P." because they have "to meet certain minimum standards" and "stringent requirements in

terms of education, experience and amount of money under management” when in fact the pamphlet was a marketing tool to promote sales of Portus securities which were widely available for purchase from any one of the other sources referred to in the pamphlet and the Respondent had not satisfied any unique or stringent standards to become eligible to offer Portus securities to its clients.

- (b) The pamphlet contained unjustified promises of specific results, contrary to Rule 2.7.2(b), including “a nice, steady return of about 9% per year without a lot of volatility” and “steady growth higher than the rate of interest on G.I.C.’s”.
- (c) The RSIP Pamphlet failed to present the potential risks of investing in Portus securities, contrary to Rule 2.7.2 (e).

### **The Portfolio Navigator Pamphlet**

- 22. The Portfolio Navigator Pamphlet constituted a misleading sales communication that was issued to the public contrary to MFDA Rule 2.7.2 because:
  - (a) The pamphlet contained untrue or misleading statements, contrary to Rule 2.7.2(a), as it stated or implied that:
    - (i) “[Our elite managers] can make money whether the market is going up or down....Your portfolio is managed to generate a smooth, reliable rate of return that is significantly higher than fixed income investments” when there was no reasonable basis for making such claims;

- (ii) “Portfolio Navigator” is a special tool, software or methodology that is used exclusively by the Respondent when, in fact, the term “Portfolio Navigator” was conceived of by the Respondent and incorporated into the Respondent’s marketing pamphlet to promote interest among the Respondent’s clients in securities issued by Portus which were widely available from other market participants;
- (iii) We use something called Portfolio Navigator to tell us when to buy and sell. It is a process in which tools are applied to your portfolio on a daily basis, to make sure that you are investing only when the risk is low and that you are selling when the risk in the market is high” when no such tool was being applied to the Respondent’s client portfolios and there was no basis for describing the administration of Portus securities in that manner;
- (iv) The Respondent is registered as an IC/PM and actively manages the underlying investments as the Respondent is the only corporate entity referred to in the pamphlet and the pamphlet states among other things that:
  - (B) “With Portfolio Navigator as a guide, *we* invest for you”;
  - (C) includes frequent references to “*Our* elite managers” who make use of “technical analysis”, “short selling, leverage, market timing and hedging” and “active, discretionary money management techniques, aiming to improve the performance of your portfolio while systematically reducing risk”; and
  - (D) *We* don’t bother you with the day-to-day decisions. *Our* elite managers take whatever initiative is necessary and make all of the trading decisions for you;”

[emphasis added].

- (b) The pamphlet makes no reference to any potential risks to a client who wishes to participate in the Portfolio Navigator investment strategy, contrary to Rule 2.7.2 (e)
- 23. The Respondent sent the RSIP Pamphlet and the Portfolio Navigator Pamphlet to approximately 150 clients and displayed the pamphlets in one of its offices and on its website, where clients or potential clients could obtain copies.
- 24. Of the total amount of \$3.3 million invested in Portus securities by clients of the Respondent, more than \$2,750,000 was invested by approximately 70 of the 150 clients to whom the Respondent mailed copies of the pamphlets.
- 25. The pamphlets remained on display and available on the Respondent's website until MFDA Staff raised concerns about the pamphlets during a sales compliance review of the Respondent in February 2005. After being advised of MFDA Staff concerns, the Respondent voluntarily discontinued further distribution of the pamphlets.

The parties agree, and so does the Panel, that, by its actions, the Respondent acted contrary to the public interest and thereby contravened MFDA Rules 2.7.2 and 2.1.1(c) by distributing misleading sales communications to clients.

The agreed-upon penalty is a fine of \$10,000, to be imposed pursuant to MFDA By-law No. 1, section 24.1.1(b).

As has been said before (see, for instance, *Re: Investors Group Financial Services Inc.*, MFDA Case # 200401, December 16, 2004), and *Re: Joseph Zollo*, MFDA Case # 200610, April 16, 2007), in determining whether the Settlement Agreement should be accepted, the Hearing Panel will consider a number of factors, including the following:

1. The public interest and whether the penalty imposed will protect investors.
2. Whether the Settlement Agreement is reasonable and proportionate, having regard to the conduct of the Respondent, as set out in the Agreement.
3. Whether the Settlement Agreement addresses the issues of both specific and general deterrence.
4. Whether the proposed settlement will prevent the type of conduct described in the Agreement from occurring again in the future.
5. Whether the Settlement Agreement will foster confidence in the integrity of the Canadian capital markets.
6. Whether the Settlement Agreement will foster confidence in the integrity of the MFDA.
7. Finally, whether the Settlement Agreement will foster confidence in the regulatory process itself.

Upon consideration, we find that all these factors have been dealt with in an appropriate fashion. The Respondent's business is operated from an office in its owner's home. It is not a large operation and the two pamphlets in question did not have a wide distribution (they were sent to approximately 150 clients and also displayed in the Respondent's office and on the company's website). About 70 clients invested a total of \$2,750,000 in Portus securities, resulting in referral fees paid by Portus to the Respondent of \$117,000. This amount has been disgorged by the Respondent, in accordance with the terms and conditions of the Ontario Securities Commission on the registration of Ontario dealers who referred clients to Portus.

The Respondent has no disciplinary record. Mr. Reid (who was present at the hearing) co-operated fully with MFDA investigators, avoiding thereby the necessity of a lengthy inquiry. His admissions reflect acceptance of responsibility for his conduct, and the fine, together with the disgorgement of profits, adequately underline the gravity of the matter and constitute sufficient deterrence for the future.

It is for these reasons that the Hearing Panel accepted the Settlement Agreement.

Given at Toronto, Ontario, this 22nd day of June, 2007.

“Fred Kaufman”

Hon. Fred Kaufman, C.M., Q.C., Chair

“Robert Hovianseian”

Robert Hovianseian, Industry Representative

“Jeanne Beverly”

Jeanne Beverly, Industry Representative