



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF SETTLEMENT HEARINGS
PURSUANT TO SECTION 24.4 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Investia Financial Services Inc. & FundEX Investments Inc.

Heard: January 27, 2012 in Toronto, Ontario
Reasons for Decision: March 26, 2012

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Frederick H. Webber
Robert C. White
Paul M. Moore, Q.C

Chair
Industry Representative
Industry Representative

Appearances:

| | | |
|---------------|---|---|
| Charles Toth |) | Counsel, Mutual Fund Dealers Association of |
| |) | Canada (“MFDA”) |
| David DiPaolo |) | Counsel for the Respondents |
| |) | |

Preliminary Matters

1. Both counsel agreed that the Respondents, Investia Financial Services Inc. (“Investia”) and FundEX Investments Inc. (“FundEX”), are related companies and the facts and analysis in both cases are essentially the same. They also agreed that a full settlement hearing should occur regarding Investia and that all the considerations would be identical regarding FundEX so that a full hearing would not then be necessary regarding FundEX. The Panel agreed to proceed on that basis. All references in paragraphs 2 through 32 below are to the settlement agreement regarding Investia.

2. At the outset of the settlement hearing, the Panel considered a joint motion by the MFDA and Investia to hold the hearings *in camera* pursuant to Rule 15.2(2) of the MFDA Rules of Procedure which provides that:

“A Hearing Panel may... at the request of a party, order that all or part of the settlement hearing be held in the absence of the public, having regard to the principles set out in Rule 1.8.”

3. Rule 1.8 provides that:

“A Panel may order that all or a part of a hearing be heard in the absence of the public where the Panel is of the opinion that intimate financial or personal matters or other matters may be disclosed at the hearing which are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.”

4. The Hearing Panel granted the motion that all submissions and documents would be heard and accepted *in camera*. Both parties agreed that should the Panel accept the settlement agreements, the Panel would provide reasons for the decisions, which, along with the record of the settlement hearings and the settlement agreements, would be available to the public. This is consistent with Rule 15.3 of the Rules of Procedure.

Facts

5. The facts are set out in the settlement agreement between the MFDA and Investia dated

December 15, 2011 (the “Settlement Agreement”).

Admission of Contraventions

6. Investia admitted the following contraventions of the By-laws, Rules and Policies of the MFDA:

- a. Between August 2007 and April 2009, Investia failed to establish, implement and maintain policies and procedures to detect instances of excessive trading, contrary to MFDA Rules 2.2.1, 2.5, 2.9 and 2.10, and MFDA Policy No. 2;
- b. Between January 2009 and April 2009, Investia failed to ensure that its supervisory staff adhered to its policies and procedures with respect to the supervision of trading activity at the branch level, contrary to MFDA Rules 2.2.1, 2.5, 2.9 and 2.10, and MFDA Policy No. 2;
- c. Between January 2009 and April 2009, Investia failed to ensure that its supervisory staff adhered to its policies and procedures with respect to the supervision of new accounts, contrary to MFDA Rules 2.2.1, 2.2.2, 2.5, 2.9 and 2.10, and MFDA Policy No. 2;
- d. Between January 2009 and April 2009, Investia failed to establish and maintain adequate internal controls, and books and records, pertaining to leveraged accounts, contrary to MFDA Rules 2.9, 5.1 and 2.2.1;
- e. Between August 2003 and June 2007, Investia failed to employ adequate supervision to prevent Approved Persons, DB, KN and MH, from maintaining referral arrangements with a third party, contrary to MFDA Rules 2.4.2, 2.5 and 2.9;
- f. Between January 2010 and July 2010, Investia failed to adequately supervise the outside business activities of an Approved Person, ML, contrary to MFDA Rules 1.2.1(d) (now MFDA Rule 1.2.1(c)), 2.4.2, 2.5, and 2.9; and

- g. Between September 2009 and May 2010, Investia failed to adequately supervise the outside business activities of an Approved Person, CT, contrary to MFDA Rules 1.2.1(d)(now MFDA Rule 1.2.1(c)), 2.4.2, 2.5, and 2.9.

7. The said contraventions are based upon the following facts as set out in the Settlement Agreement:

(a) Inadequate Supervision of Excessive Trading

8. MFDA Rules 2.2.1 and 2.5 and Policy No. 2, require Members to supervise the trading activities of Approved Persons to ensure that each order accepted for a client is suitable for the client, in keeping with the client's investment objectives, and within the bounds of good business practices. An excessive trade (one made for the purpose of generating commissions or creating a benefit for the Approved Person, in circumstances where there is little or no economic rationale for the trade or benefit to the client) is neither in keeping with the client's investment objectives nor within the bounds of good business practice.

9. During the MFDA's compliance examination of the period August 1, 2007 to April 30, 2009 (the "2009 Examination"), the MFDA determined that Investia failed to establish, implement and maintain policies and procedures to detect instances of excessive trading (sometimes referred to as "churning"). This was a repeat deficiency originally identified by MFDA during a previous compliance examination covering the period December 1, 2005 to July 31, 2007.

(b) Inadequate Tier 1 Trade Supervision

10. MFDA Rules 2.2.1, 2.5, 2.9 and 2.10, and MFDA Policy No. 2 require Members to establish, implement and maintain policies and procedures, and supervisory practices, to ensure that adequate supervision of trading activity is conducted at the Tier 1 (Branch Manager) level.

11. MFDA Rule 2.5.4 (now MFDA Rule 2.5.7) and Policy No. 2 further require Members to ensure that proper records of the supervision conducted by compliance staff are prepared and maintained, an essential element of trade supervision. At a minimum, records of trade

supervision should include records of trades reviewed, inquiries made, responses received and resolutions achieved. Proper record keeping is a key element in the overall supervision structure at the Member as it provides a basis for, among other things, compliance handling, reasonable supervisory investigations, and regulatory oversight by the MFDA.

12. In January 2009, Investia implemented policies and procedures requiring Branch Managers and Regional Branch Managers to supervise trading activity by reviewing trade blotters daily. The 2009 Examination revealed that Investia's supervision of trading activity was deficient in that the Branch Managers and Regional Branch Managers failed to sign the daily trade blotters in some instances to evidence trade supervision and suitability review and failed to review daily trade blotters in some instances in a timely manner.

13. Investia, thereby, failed to ensure that its Branch Managers and Regional Branch Managers adhered to its policies and procedures with respect to the supervision of trading activity at the branch level. As a result, Investia processed trades in some instances without adequate evidence of trade supervision and suitability review.

(c) Inadequate New Account Supervision

14. MFDA Rules 2.2.1, 2.2.2, 2.2.3, and 2.5 and Policy No. 2 require Members to supervise the opening of new accounts to ensure that the accounts and trading within these accounts are suitable for the client, in keeping with the client's investment objectives and within the bounds of good business practice.

15. In January 2009, Investia implemented policies and procedures requiring Branch Managers and Regional Branch Managers to review and approve new accounts, in particular that (1) Branch Managers review a "New Account Report" daily; and (2) Regional Branch Managers review and approve New Account Application Forms ("NAAFs") daily.

16. The 2009 Examination revealed that Investia's supervision of new account openings was deficient in that Branch Managers failed in some instances to review New Account Reports daily and Regional Branch Managers failed to review and approve NAAF's daily. Investia thereby failed to ensure that its Branch Managers and Regional Branch Managers adhered to its policies

and procedures with respect to the supervision of new accounts, thereby allowing new accounts to be opened without adequate supervision to ensure that the accounts were suitable for clients.

(d) Inadequate Supervision of Leveraging

17. Members are required, in accordance with MFDA Rule 2.2.1, to establish, implement and maintain supervisory structures and controls to ensure that all leveraging recommendations are suitable for the client, in keeping with the client's investment objectives, and within the bounds of good business practice. Further details are provided in MR-0069. The 2009 Examination revealed that Investia failed to establish and maintain adequate internal controls to track leveraged accounts by failing to properly identify leveraged accounts in its back office system. This deficiency prevented Investia from conducting adequate supervision of leveraged accounts and prevented MFDA Compliance Staff from completing a review of Investia's leveraged accounts.

18. During the 2009 Examination, MFDA Compliance Staff also determined that Investia's supervision of the suitability of leveraging recommendations was deficient in that Investia's Head Office compliance staff failed to maintain evidence of their review of leveraging recommendations in some instances. As a result of this deficiency, leveraging recommendations which may have been unsuitable were processed by Investia without proper supervision.

(e) Referral Arrangements and Outside Business Activities

19. MFDA Rules 1.2.1(d)(now MFDA Rule 1.2.1(c)), 2.4.2, 2.5 and 2.9 require Members to establish, implement and maintain policies and procedures, and supervisory practices, to monitor the activities of Approved Persons to ensure that they comply with regulatory requirements regarding referral arrangements and outside business activities. In addition to deficiencies identified in the 2009 Examination, MFDA investigations identified deficiencies regarding the supervision of referral arrangements and outside business activities between August 2003 and July 2010. The MFDA investigation did not reveal any client losses.

Acceptance of Settlement Agreements

20. Pursuant to s. 24.4.3 of MFDA By-law No. 1, a Hearing Panel may accept or reject a settlement agreement. As established in cases such as Sterling Mutual Funds (Re), [2008] MFDA Central Regional Council, File No. 200820 and Milewski (Re) [1999] I.D.A.C.D. No. 17,

“...in a settlement hearing the Panel 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.”

21. This Panel agrees with this principle. The MFDA Submissions cited a number of considerations which Hearing Panels have taken into account in determining whether a settlement should be accepted, including whether it:

- i. is in the public interest and whether the penalty will protect investors;
- ii. is reasonable and proportionate having regard to the Respondent's conduct;
- iii. addresses both specific and general deterrence;
- iv. will prevent a reoccurrence of the type of conduct described in the agreement; and
- v. will foster confidence in the integrity of Canadian capital markets, the MFDA and the regulatory process.

Appropriateness of the Penalty

22. The MFDA Submissions also set out a number of factors which a Hearing Panel should consider in determining whether a penalty is appropriate, including:

- i. the seriousness of the allegations proven against the Respondent;
- ii. the Respondent's history;
- iii. the Respondent's experience in the capital markets;
- iv. the Respondent's recognition of the seriousness of the improper conduct;
- v. harm caused to investors by the Respondent's activities;
- vi. benefits received by the Respondent from the misconduct;
- vii. the risk to investors and capital markets if the Respondent were to continue operating;

- viii. damage caused to the integrity of capital markets by the misconduct;
- ix. the need to deter those involved in the case as well as other market participants
- x. the need to alert other market participants regarding the consequences of the misconduct; and
- xi. previous decisions made in similar cases.

23. The MFDA Submissions also referred to the MFDA Penalty Guidelines which set out additional factors and suggest appropriate penalties.

Application of Principles and Factors to This Case

(a) Nature of the Misconduct

24. The MFDA Submissions characterize the misconduct as serious, reflecting a range of supervisory deficiencies, occurring over a lengthy time period, with the potential for significant client losses. This Panel agrees with the MFDA Submissions in this regard.

(b) Respondent's Recognition of Seriousness of Misconduct

25. The MFDA Submissions acknowledged that Investia cooperated extensively with the MFDA's investigations and in the development of the Leverage Review Action Plan that is part of the proposed settlement. Also, Investia admitted its misconduct, accepted responsibility for it, demonstrated contrition and avoided the need for a lengthy investigation and hearing which would have entailed additional cost and expense. This Panel accepts the foregoing as mitigating factors in determining the appropriate penalty.

(c) Steps Taken Since Discovery of the Problem

26. The MFDA Submissions acknowledge that Investia has revised and represents that it will continue to revise, its policies and procedures regarding supervision of excessive trading, branch level trading, new accounts and leveraging, to address the deficiencies at issue in this proceeding; and has implemented, and will continue to implement these revised policies and procedures.

(d) Respondent's Past conduct

27. Investia has received warning letters from MFDA regarding isolated occurrences of issues addressed in the Settlement Agreement, but has not previously been subject to MFDA disciplinary proceedings.

(e) Deterrence

28. The MFDA Submissions characterize the penalties proposed in the Settlement Agreement as substantial and will require time, costs and resources from Investia. This Panel views deterrence of Investia and of others as a very important factor in determining sentence and believes that the proposed penalties should have that effect.

(f) Penalty Guidelines

29. The proposed penalties are consistent with the MFDA Penalty Guidelines

(g) Previous Cases

30. The MFDA Submissions referred the Panel to a number of cases which are instructive as to the appropriate penalty in this case. The MFDA also advised the Panel that it is satisfied that an independent monitor is not necessary to ensure that Investia will continue to take the appropriate remedial actions, and this Panel has no reason to question the MFDA's conclusion in this regard. The fine proposed in this case falls within the range of fines imposed in the cases referred to. MFDA counsel advised the Panel that it is satisfied that the proposed penalty is appropriate given the nature and seriousness of the deficiencies and the additional resources Investia must expend to implement the Leverage Review Action Plan. The Panel agrees that the fine proposed is appropriate.

Penalties

31. Investia has agreed to the following terms of settlement:

- i. Investia shall pay a fine of \$100,000;
- ii. Investia shall implement the revised policies and procedures identified in the Settlement Agreement;
- iii. Investia shall implement the Leverage Review Action Plan;
- iv. Investia shall pay costs in the amount of \$15,000;
- v. Investia acknowledges that any issues pertaining to its obligation to handle client complaints pursuant to MFDA Rule 2.11 and MFDA Policy No. 3 is unaffected by the Settlement Agreement; and
- vi. Investia shall in the future comply with all MFDA By-laws, Rules and Policies, and all applicable securities legislation and regulations made thereunder, including MFDA Rules 1.2.1(d) (now MFDA Rule 1.2.1(c)), 2.2.1, 2.2.2, 2.2.3, 2.4.2, 2.5, 2.9, 2.10, and 5.1 and MFDA Policy No. 2.

Panel Decision

32. Having regard to:

- i. the principle stated in cases such as Milewski (*supra*) and the factors which Panels have taken into account in determining whether a settlement ought to be accepted, referred to in paragraphs 20 and 21 above;
- ii. the factors indicating the appropriateness of proposed penalties referred to in paragraphs 22 and 23 above; and
- iii. the application of the said principles and factors to this case set out in paragraphs 24-30 above;

the Hearing Panel accepts the Settlement Agreement.

FundEX

33. The terms of the settlement agreement between the MFDA and FundEX are almost identical to the terms of the Settlement Agreement and this Panel accepts the FundEX settlement agreement on the same basis as it accepts the Settlement Agreement.

DATED this 26th day of March, 2012.

“Frederick Webber”

Frederick H. Webber,
Chair

“Robert C. White”

Robert C. White,
Industry Representative

“Paul M. Moore”

Paul M. Moore, Q.C.,
Industry Representative