



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: Professional Investments (Kingston) Inc.

Heard: January 20, 2017, in Toronto, Ontario
Reasons for Decision: February 2, 2017

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Guenther W. K. Kleberg	Industry Representative
Kenneth P. Mann	Industry Representative

Appearances:

Shelly M. Feld)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Mark Tavares)	Chief Compliance Officer of Respondent
)	
)	

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 Friday, January 20, 2017. The full Settlement Agreement, dated December 21, 2016, entered into between Staff of the MFDA and Professional Investments (Kingston) Inc. (“Professional Investments” or the “Respondent”) is available on the MFDA website and will not be set out in detail here. The Respondent was represented at the Settlement Hearing by Mark Tavares, the Chief Compliance Officer of the Respondent.

2. The Panel accepted the proposed Settlement Agreement at the conclusion of the January 20, 2017 hearing, with reasons to follow. These are our reasons for the decision.

3. The Respondent, whose head office is in Kingston, Ontario, has been registered in Ontario as a mutual fund dealer since April 8, 1986 and has been a Member of the MFDA since March 8, 2002.

Alleged Conduct

4. Staff of the MFDA conducted an investigation of the Respondent’s activities. The investigation disclosed that the Respondent had engaged in activity for which the Respondent could be penalized by a Hearing Panel pursuant to s. 24.1 of By-law No. 1.

5. Proceedings against the Respondent were commenced by a Notice of Settlement Hearing, dated December 16, 2016.

6. In the Settlement Agreement the Respondent admits contraventions of MFDA Rules. The Respondent admits in paragraph 41 that:

“between February 2009 and March 2010, the Respondent failed to adequately supervise the activities of former Approved Person, Patrick Caicco, to ensure that the Respondent

was aware of and had approved all outside business activities that Caicco was engaged in and to ensure that all securities related business that Caicco engaged in was being conducted for the account of the Respondent and through the facilities of the Respondent, contrary to MFDA Rules 1.1.5, 2.5, 2.1.1 and MFDA Policy No. 2.”

7. And in paragraph 42 the Respondent admits that:

“between May 2009 and April 2013, it failed to conduct a reasonable supervisory investigation after receiving information that ought to have raised concerns that Caicco was engaged in unapproved outside business activities and had engaged in securities related business that was not carried on for the account of the Respondent or processed through the facilities of the Respondent, contrary to MFDA Rules 1.1.5, 2.5 and 2.2.1.”

8. From May 12, 2009 to March 12, 2010, Patrick Caicco (“Caicco”) was registered in Ontario as a mutual fund salesperson/dealing representative with the Respondent. When he was registered with the Respondent, Caicco resided and carried on business in Ottawa, Ontario. Prior to becoming registered with the Respondent, Caicco was registered intermittently in the securities industry in various capacities since approximately 1992. In March 2010 Caicco sold his book of business to another Approved Person of the Respondent. He is not currently registered in the securities industry in any capacity.

Terms of Settlement

9. Staff of the MFDA and the Respondent agreed to the following terms of settlement in paragraph 43 of the Settlement Agreement:

- a) the Respondent shall pay a fine in the amount of \$60,000 on the date when this Settlement Agreement is accepted by the Hearing Panel;
- b) the Respondent shall pay costs in the amount of \$10,000 on the date when this Settlement is accepted by the Hearing Panel;
- c) the Respondent shall in the future comply with MFDA Rules 1.1.5, 2.5, and 2.1.1 and MFDA Policy No. 2; and

- d) a senior officer of the Respondent will attend in person, on the date set for the Settlement Hearing.

Caicco's Misconduct

10. Caicco's misconduct is set out in detail in paragraphs 10 and 11 of the Settlement Agreement. He engaged in a significant number of off-book transactions without the approval of Professional Investments. Between May 12, 2009 and March 12, 2010, Caicco engaged in securities related business that was not carried on for the account and through the facilities of Professional Investments by recommending, selling, facilitating the sale or making referrals in respect of the sale of approximately \$3.35 million of investment products to at least 33 clients and other individuals outside of Professional Investments, contrary to MFDA Rules 1.1.1 and 2.2.2 and sections 13.7 and 13.8 of National Instrument 31-103.

11. Some of this misconduct was done through a company, Advantage Wealth Building Strategies, which he incorporated without the knowledge of Professional Investments and which sold a product known as the Skyline Apartment Real Estate Investment Trust. Off-book products were also sold – without the approval of Professional Investments – through the Assaly Group of Companies, which carried on business as a diversified real estate organization that was engaged in the development and management of residential and commercial properties in Canada and the United States. The Assaly Group was involved in two projects in Ontario, one called Nature's Walk Gated Community in North Grenville, Ontario, and the other, Villa Montague, in Smith Falls, Ontario.

12. Off-book transactions are clearly improper. MFDA Rule 1.1.1(a) provides:

“No Member or Approved Person (as defined in By-law 1.1) in respect of a Member shall, directly or indirectly, engage in any securities related business (as defined in By-law 1.1) except in accordance with the following:

- a) All such securities related business is carried on for the account of the Member, through the facilities of the Member (except as expressly provided in the Rules) and in accordance with the By-laws and Rules...[the exceptions in the Rule are not applicable to this case].

13. The losses incurred by investors in this case are significant. It remains unlikely that investors will recover the full amounts that they invested in Assaly Group products. According to media reports, a court approved settlement of litigation against Assaly Group companies was expected to result in the recovery by investors of approximately 22% of their principal investment.

Seriousness of Caicco's conduct

14. Caicco was the Respondent in a separate but related disciplinary proceeding in 2015 (*Re Caicco* 201503). In paragraphs 20 and 21 of the reasons for its decision in that case, the Panel stated:

“It is important that persons approved by the MFDA conduct their securities transactions through the Member and with the Member’s consent. The policy rationale underlying the prohibition on off-book business is that when transactions are carried out off a Member’s books, the Member loses its ability to supervise the transaction and to take responsibility for the suitability of the transaction for the investor. The Rule protects both investors and Members.”

“The Respondent prevented Professional Investments from conducting due diligence to determine whether the investments were sound, legitimate and prudent products which ought to be made available for sale to clients and potential clients. His actions also prevented Professional Investments from supervising his sales activities. The Respondent exposed clients and other individuals to risks of investment loss. These risks materialized when the investments in the Nature’s Walk development and Villa Montague development collapsed. The Respondent’s misconduct caused considerable harm to the 22 individuals who invested in the Assaly Group developments.”

15. The Panel in the *Caicco* case went on to say: “A Pacific Regional Council Panel put it well in a 2010 case, *Re Laverdière* (File No. 200936 at paragraph 5):

“MFDA Rule 1.1.1(a) is fundamental to the regulatory mandate of the MFDA. An Approved Person must not trade in securities other than through the firm employing him/her, and the firm must have knowledge and consent to those business dealings. The Rule enhances investor protection and strengthens public confidence in the Canadian Mutual Fund Industry, as it creates a regime whereby an approved person is only permitted to sell investment

products that have first been approved for sale by the Member, and which are sold through the facilities of the Member, thus ensuring the trading activity is subject to appropriate review and supervision.”

The Respondent’s Supervision of Caicco’s Outside Business Activities

16. The Settlement Agreement states in paragraph 12: “Except to the extent reflected in this Settlement Agreement, there is no evidence that the Respondent was aware of the facts admitted to by Caicco at the time that those events occurred.” The Respondent did not become aware of Caicco’s conduct until April 27, 2013 when the *Ottawa Citizen* newspaper published an article in which Caicco was named as the financial advisor who had, between 2009 and 2010 facilitated the investment of approximately \$3.3 million into two real estate development projects promoted by the Assaly Group.

17. “However,” counsel for the MFDA argues, and we agree, “MFDA Members are required to be vigilant in their supervision of the conduct of Approved Persons and to follow up on red flags that come to the Member’s attention that could indicate that the interests of clients were compromised or that registrants may have engaged in misconduct even if the responsible Approved Person is no longer registered with the Member....The obligation to conduct reasonable supervisory investigations when suspicious information comes to the attention of a Member is critical to the protection of investors.”

18. A number of red flags are identified in the Settlement Agreement. Mr Caicco, for example, told the Member that he was engaged with an unnamed charitable foundation and earned “referral fees” associated with those activities. But the Respondent did not make any inquiries to Caicco or conduct any other due diligence to determine the nature and extent of Caicco’s activities with respect to the charitable foundation. In fact, according to Caicco, the “charitable foundation” that he worked with was actually an investment business promoted and operated by Mr. Assaly, the principal of the Assaly Group, which purported to offer participants the benefits of a tax shelter.

19. Another red flag that was not followed up by the Respondent was Caicco’s involvement with Advantage Wealth. In one e-mail that the Respondent received from Caicco, there was no

reference to Professional Investments or content that reflected Caicco's association and affiliation with Professional Investments. The Respondent failed to make any further inquiries to Caicco or take any other supervisory action to determine the nature and extent of the Respondent's activities with respect to Advantage Wealth.

20. Similarly the Respondent did not disclose that he was operating an independent website under the name Advantage Wealth and was offering investment products through Advantage Wealth that had not been disclosed to or approved for sale by the Respondent.

21. In February 2010, the Respondent discovered that trades had been processed on behalf of individuals for whom no client accounts had been opened with the Respondent. The trades appeared to be connected to Caicco. When confronted, Caicco stated that the trades had been processed by another financial advisor at another dealer who had given up his license and referred his clients to Caicco. The Respondent has no records of any steps taken to verify or seek corroboration of Caicco's account of these facts.

Acceptance of Settlement Agreement

22. Failure to provide adequate supervision by the Member is a serious matter. Supervision is at the heart of effective securities regulation. The Respondent should have done more. Had they done so, it is likely that they would have discovered a number of outside business activities that Caicco was engaged in and a number of unapproved investment products that he was offering to investors, including clients of the Respondent.

23. Since Caicco ceased to be an Approved Person of the Respondent in March 2010, the Respondent has amended and enhanced its supervisory procedures in several respects. These are set out in paragraph 41 of the Settlement Agreement. They include, for example, that the Respondent has developed a more robust questionnaire to obtain information about outside business activities engaged in by its Approved Persons; the Respondent ensures that trade names used by its Approved Persons are approved by the Respondent and used in a manner that is compliant with MFDA Rule 1.1.7; the Respondent conducts annual reviews and internet searches to review the content of websites operated by or referencing its Approved Persons and their trade

names to monitor the social media activity of its Approved Persons; and the Respondent schedules interviews with all of its approved Persons on a set schedule as part of its branch review process in order to learn about their activities and evaluate compliance with regulatory requirements.

24. In spite of the heavy losses suffered by clients, the Respondent received no client complaint.

25. The Respondent has fully cooperated with Staff's investigation of this matter.

26. On the other hand, the Respondent was subject to a previous disciplinary proceeding that resulted in a Settlement Agreement that was accepted by a Hearing Panel in 2009. That hearing dealt with matters unrelated to the present case and resulted in enhanced policies and procedures relating to that misconduct. See *Re Professional Investments (Kingston) Inc.* 2009 LNCMFDA 9.

27. As stated above, the Panel accepted the terms of the Settlement Agreement. We found that the proposed penalty was reasonable and proportionate in the circumstances of this case. It provides specific deterrence to the Respondent and general deterrence to others in the industry.

28. Further, by entering into a Settlement Agreement, the Respondent has accepted responsibility for his misconduct, recognizes its seriousness, and has exhibited remorse.

29. The penalty imposed is not out-of-line with recent cases cited by counsel. It is also consistent with the MFDA Penalty Guidelines.

30. 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.”

31. 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.

32. As a recent Panel stated (*Re Keshet*, File No. 201419 at paragraph 7): “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.”

33. The penalty agreed to in this case clearly falls within “a reasonable range of appropriateness.”

34. For the above reasons, we accepted the Settlement Agreement.

DATED this 2nd day of February, 2017.

“Martin L. Friedland”

Martin L. Friedland, C.C., Q.C.
Chair

“Guenther W. K. Kleberg”

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Industry Representative

“Kenneth P. Mann”

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