Re Ewonus

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Matthew Ewonus

2023 CIRO 48

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: March 21, 2023 by electronic hearing at Vancouver, British Columbia
Decision: March 21, 2023
Reasons for Decision: December 29, 2023

Hearing Panel:
Joseph A. Bernardo, Chair
Barbara E. Fraser, Industry Representative
Tammi Walsh, Industry Representative

Appearances:
Jennifer Galarneau, Enforcement Counsel
Hunter Parsons, Counsel for the Respondent
Matthew Ewonus, the Respondent

REASONS FOR DECISION

¶ 1 On January 1, 2023, the Mutual Fund Dealer's Association (MFDA) and the Investment Industry Regulatory Organization of Canada merged to form a new self-regulatory organization, which subsequently adopted the name and is now known as the Canadian Investment Regulatory Organization (CIRO).

¶ 2 Under CIRO's transitional provisions, the conduct addressed by these reasons remains subject to the rules and bylaws of the MFDA that were in force at the time the conduct occurred.

Overview

¶ 3 On November 8, 2001, the Respondent became registered in British Columbia as a dealing representative with Sun Life Financial Investment Services (Canada) Inc. (Sun Life), then a Member of the MFDA and now a Dealer Member of CIRO.

¶ 4 On September 9, 2022, the MFDA issued a Notice of Hearing alleging the Respondent had contravened MFDA Rules by:

(a) Between March 23, 2020 and March 24, 2020,
  (i) offering compensation to a client in response to a complaint without the prior written consent of Sun Life; and
  (ii) guaranteeing a specific investment result to a client.

(b) Between March 30, 2020 and October 9, 2020, making false or misleading statements to

Sun Life and the MFDA in the course of their respective investigations into his conduct.

¶ 5 On March 21, 2023, the Hearing Panel was asked in a closed session to consider a settlement agreement (Settlement Agreement) made between the Respondent and CIRO staff (Staff) relating to the foregoing allegations. It is attached as Exhibit A.

¶ 6 The Panel accepted the Settlement Agreement for the following reasons.

Agreed facts

¶ 7 The parties agree that:

(a) The Respondent conducted business in Kelowna, British Columbia, and was responsible for servicing the accounts of client CM.

(b) Sun Life's policies and procedures required that:

(i) Approved Persons review and, if appropriate, update client Know-Your-Client (KYC) information at least every 24 months.

(ii) Approved Persons report client complaints to Sun Life no later than two days after being informed of them.

(iii) No direct or indirect compensation of any kind be provided to clients except through the auspices of Sun Life.

(iv) Unless previously approved by Sun Life, no forward looking financial information be provided to clients.

(c) On March 19, 2020:

(i) CM emailed the Respondent instructing him to immediately convert all of her account holdings into cash.

(ii) CM subsequently telephoned the Respondent to clarify that she wanted him to switch her holdings to a high interest savings fund.

(iii) The Respondent was unable to process CM's order immediately as she had asked. This was because he had not reviewed and updated CM's KYC information within the preceding 24 months, and Sun Life's order entry system did not permit trades to be processed from accounts with out of date KYC information.

(iv) During their telephone conversation, the Respondent obtained instructions from CM to update her KYC information.

(d) On Friday, March 20, 2020:

(i) The Respondent updated CM's KYC information, after which he submitted CM's order of the previous day for processing. The order was entered after the cut-off time for same-day transactions.

(ii) The Respondent then emailed CM to advise that the trades she had ordered would not be settled until the next business day, which was Monday, March 23, 2020.

(iii) CM responded by email to complain that the Respondent: had not processed her order on the day she had instructed him to do so; had failed to call her to obtain further instructions when he became aware the order could not be processed until a later date; had not advised her that the order could not be processed until her KYC information had been updated; and did not arrange for her to receive her KYC Update Form for signature until the morning of March 20, 2020.

(iv) The Respondent did not report CM's complaint to Sun Life. Instead, he emailed a reply to CM in which he said there had been a miscommunication and that he would get back to

her on March 23, 2020 after looking into the matter.

(e) On March 22, 2020:

(i) CM emailed the Respondent to amplify her complaint. She informed him that she expected the settlement of the trades she had ordered to result in a closing balance equal to what it would have been had her order been processed on March 19, 2020. This amount was approximately $128,000.

(ii) The Respondent did not report CM's second complaint and request for compensation to Sun Life.

(f) On March 23, 2020:

(i) After the trades settled, the cash balance in CM's account was approximately $123,000 or about $5,000 less than it would have been if they had settled on March 19, 2020.

(ii) The Respondent emailed CM to say he would "make sure" that she would receive "exactly what [she] need[ed]".

(iii) He then followed up by leaving CM a voicemail in which he assured her that he would find a way to bring the account balance "back to that 128 number for you" and "I will personally guarantee that to be the case."

(g) On March 24, 2020, the Respondent left CM another two voicemails. He promised CM that if she returned to investing again he would restore the value of her account to $128,000 by personally putting $5,000 into her account, stating that "How I do that is going to have to be a little sneaky because there's a rule about me basically comping you back." The Respondent further guaranteed that he would put an additional $5,000 into CM's account, if after 12 months, the value of her portfolio had not exceeded the average market return by that amount.

(h) On March 25, 2020:

(i) CM emailed the Respondent to express her disappointment over his voicemail messages and demand compensation for her loss.

(ii) She also sent an email to both the Respondent and Sun Life, reiterating her complaint and forwarding to Sun Life copies of the emails she had previously sent to the Respondent.

(i) Sun Life commenced an investigation.

(j) On March 30, 2020, Sun Life asked the Respondent to respond to the substance of CM's complaint. The Respondent denied having offered to pay her $5,000 in compensation.

(k) On June 12, 2020, Sun Life interviewed the Respondent. He again denied having offered to pay CM $5,000.

(l) Sun Life informed the Staff of CM's complaints, following which the Staff asked the Member to obtain certain information from the Respondent.

(m) On October 9, 2020, the Respondent provided Sun Life with a written statement responding to Staff's queries in which he yet again denied having offered to compensate CM.

(n) Sun Life compensated CM for her loss by reversing the trades processed on March 23, 2020 and reprocessing them at the prices CM would have been able to obtain had her holdings been sold on March 19, 2020.

(o) Although the Respondent did not contribute to the cost of compensating CM, he has paid a fine of $20,000 to Sun Life in respect of his overall conduct as described in the Settlement Agreement.

(p) The Respondent has not previously been the subject of MFDA disciplinary proceedings.

Liability

¶ 8 In the Settlement Agreement, the Respondent acknowledges that:

(a) Between March 23, 2020 and March 24, 2020, he

(i) offered compensation to CM in response to a complaint without the prior written consent of Sun Life, contrary to its policies and procedures and Rules 2.1.1, 2.1.4 (as it was prior to its amendment on June 30, 2021), 1.1.2 and 2.5.1, and MFDA Policy No. 3; and

(ii) guaranteed a specific investment result to CM, contrary to Sun Life's policies and procedures and Rules 2.1.1, 2.1.4, 1.1.2, and 2.5.1.

(b) Between March 30, 2020 and October 9, 2020, he made false or misleading statements to Sun Life and the MFDA during the course of their respective investigations into his conduct, contrary to Sun Life's policies and procedures and MFDA Rule 2.1.1.

¶ 9 Rule 2.1.1 requires an Approved Person to observe high ethical standards, which includes refraining from business conduct that is unbecoming or detrimental to the public interest. This general ethical obligation overlaps with, and is informed by, the more specific requirements imposed by the Rules.

¶ 10 Rule 2.1.4 obligates an Approved Person who becomes aware of any conflict or potential conflict of interest to immediately disclose it to their employing Member, whereupon they are jointly required to inform the client in writing and address the issue by exercising responsible business judgment influenced only by the best interests of the client.

¶ 11 Rule 1.1.2 obligates an Approved Person to follow the supervisory policies and procedures their employing Member has established in compliance with Rule 2.5.1 to ensure its business is conducted in accordance with regulatory requirements.

¶ 12 MFDA Policy No. 3 addresses the handling of client complaints and the conduct of supervisory investigations. It broadly defines a complaint to include any kind of grievance expressed by a client, irrespective of how it is communicated. The Policy explicitly requires all client complaints to be handled by the employing Member's supervisory or compliance staff, and forbids an Approved Person from settling a complaint or compensating a client without the employing Member's prior consent.

MFDA Policy No. 3, Part I, sections 2, 9, and 10.

¶ 13 In the event, the Respondent did not succeed in putting his plan to compensate CM into effect.

¶ 14 Previous hearing panel decisions have held that sections 9 and 10 of MFDA Policy No.3 should be interpreted liberally, such that a failed attempt to settle a client complaint without prior Member approval nonetheless constitutes a contravention. To this, one may add the observation that any overt attempt to be "a little sneaky" in order to evade a Rule is conduct obviously detrimental to the public interest and contrary to Rule 2.1.1.

Rempel (Re), MFDA File No. 201348, September 3, 2015.

Mazzotta and Ireland (Re), MFDA File No. 201511, November 15, 2016.

¶ 15 An attempt to settle a client complaint without Member consent also constitutes an unreported conflict or potential conflict of interest contrary to Rule 2.1.4. Concealing a complaint from supervisory scrutiny to avoid potential disciplinary action is necessarily in conflict with the client's best interests. This is because the concealment denies the client access to the full range of potential remedies otherwise available to them when the employing Member is able to fulfill its responsibility to ensure complaints are addressed in an objective, transparent, and impartial manner.

¶ 16 Likewise, a conflict or potential conflict with the client's best interests necessarily arises when an Approved Person purports to guarantee a rate of return. Guaranteeing an above market performance makes an

Approved Person's own financial interest a hostage to fortune. It creates a situation where a portfolio's weak performance risks incentivizing the Approved Person into engaging in some form of further misconduct, such as making unauthorized trades, in order to avoid paying on the guarantee.

¶ 17 The facts unambiguously agreed upon in the Settlement Agreement provide a proper and sufficient basis for the Respondent's admissions of liability.

Applicable standard

¶ 18 Under MFDA By-Law No. 1, section 24.4, a settlement hearing panel's jurisdiction is limited to either accepting or rejecting a settlement agreement. It has no authority to impose its own preferred outcome on the parties.

¶ 19 MFDA settlement hearing panels have repeatedly drawn the obvious corollary: a panel ought not to assess a settlement against the outcome the panel might itself have ordered exercising its own discretion. Instead, a panel's task is to take the agreed upon facts at their face value and weigh the proposed sanctions against the objectives of protecting the investing public and the integrity of the mutual fund industry. An outcome that clearly falls "outside a reasonable range of appropriateness" may properly be rejected. Otherwise, it is incumbent on the hearing panel to accept it.

> *Sterling Mutuals Inc. (Re)*, MFDA File No. 20080, September 3, 2008, at paragraph 37, citing the reasoning in *Milewski (Re)*, [1999] I.D.A.C.D. No. 17 at p.11, Ontario District Council Decision dated July 28, 1999.

¶ 20 The rationale for this deferential approach is both clear and well-established. The MFDA's core regulatory purpose is protecting the investing public. It follows that settlements are to be encouraged and supported, because they facilitate timely regulatory responses to misconduct while simultaneously enabling the efficient allocation of limited enforcement resources. Moreover, as compromises negotiated by litigants, settlements by their very nature are pragmatic and nuanced resolutions of the facts and issues determined by the persons best situated to assess them.

¶ 21 This essential character of settlements, and their value in the securities context, was affirmed in *B.C. Securities Commission v. Seifert.* In that case, the British Columbia Securities Commission's settlement process was challenged for want of jurisdiction. In dismissing that proposition, the British Columbia Court of Appeal cited the trial judge's observation 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 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. Enforcement is rarely a concern because the settlement is voluntary. A person who is the subject of an investigation retains the option of refusing to settle and proceeding to a hearing. Settlements are also efficient. Both parties can forego the time and expense of a hearing.
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> *B.C. Securities Commission v. Seifert* 2007 BCCA 484 at paragraph 31.

Assessing appropriateness

¶ 22 The appropriateness of a settlement outcome depends on whether it can reasonably be said to satisfy the overarching principles that inform sanctioning generally.

¶ 23 Penalties in securities regulatory proceedings are required to be forward looking and preventative in orientation, not retrospective or punitive. Regardless of whether the context is a contested disciplinary hearing or a settlement, the appropriateness of proposed sanctions turns on whether their deterrent effect is both necessary to protect the investing public from future harm and proportional to the misconduct. As the Supreme Court of Canada stated in *Cartaway Resources Corp.*, the importance of deterrence when "imposing a sanction... will vary according to the breach... and the circumstances of the person charged".

> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at paras. 59 and 68.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paras. 14, 85.

Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672 at para. 61.

¶ 24 Following this approach requires a case specific assessment of the objective risk the misconduct presents to the investing public.

¶ 25 The Settlement Agreement contemplates that the Respondent:

(a) be suspended for six months;

(b) pay a fine of $30,000; and

(c) pay costs of $5,000.

¶ 26 In support of this common position, Enforcement Counsel cited a number of settlement precedents and sanction decisions involving somewhat similar misconduct:

Kim (Re), [2006] IDACD No. 26.

Chen (Re), MFDA File No. 201006, May 4, 2011.

Qi and Huang (Re), MFDA File No. 201253, November 20, 2013.

Rempel (Re), supra.

Mazzotta and Ireland (Re), *supra*.

¶ 27 On their facts, most of these cases are in significant respects distinguishable from the present case.

(a) *Kim*, *supra*, and *Chen*, *supra*, were settlement decisions where the attempted resolution of client complaints by way of private compensation arrangements, if successful, would have concealed other misconduct from their employing Members, namely, that the respondents had effected discretionary trades without their respective clients' prior written authorization. In both instances, fines in the range of $20,000 and costs of $5,000 were ordered. The respondent in *Kim*, *supra*, was also suspended for 6 months and required to be placed under strict supervision for 12 months upon re-registration.

(b) In *Rempel*, *supra*, the respondent proposed a secret compensation arrangement to induce a client to withdraw a complaint already filed with the employing Member and then lied to the MFDA about it. Following a contested hearing, the respondent was suspended for 36 months, ordered to pay a fine of $100,000 and costs of $25,000, and required to be placed under strict supervision for 12 months upon re-registration. In another contested hearing case, *Qi and Huang*, *supra*, the respondents were each suspended for 6 months, fined $20,000, and ordered to pay costs of $5,000 after failing to inform their employing Member about settling a lawsuit and compensating a client for losses arising from having facilitated an investment in an outside securities related business that turned out to be a Ponzi scheme.

(c) *Mazzotta and Ireland*, *supra*, was a settlement where the simplicity of the facts most closely resembles those of the present case. The respondents attempted to resolve a client complaint about a decline in account value by making a settlement proposal without first obtaining their employing Member's written approval. One respondent was fined $10,000, the other was fined $5,000, and each was ordered to pay costs of $5,000.

¶ 28 The principal guidance to be derived from these precedents is that, as always, the specific facts of misconduct are determinative when assessing the appropriateness of proposed sanctions.

Decision

¶ 29 As with all settlements, the Respondent choosing to make an unqualified admission of fault in the Settlement Agreement is a factor that deserves to be given considerable weight. By doing so he not only saved CIRO the time, trouble, and resources required to conduct a contested hearing, but objectively confirmed that

he recognizes the gravity of his misconduct and is prepared to accept serious consequences as a result.

¶ 30 With the exception of *Rempel, supra*, the outcomes in the sanction precedents provided to the Panel were all less onerous than those proposed in the Settlement Agreement. That observation even applies to the *Kim, Chen,* and *Qi and Huang* cases where, unlike in this case, the private offers of compensation served to conceal other misconduct from the respondents' employing Members. In *Rempel, supra*, where the sanctions were significantly more onerous than those proposed in the Settlement Agreement, the misconduct included having lied to the MFDA.

¶ 31 This same aggravating factor is also present in the present case. The Respondent was an experienced Approved Person who knew that privately compensating CM would, to use his own term, require him to be "sneaky". In the event, when he was caught out the Respondent compounded his attempt at deception by lying first to Sun Life and then to the MFDA.

¶ 32 The six month suspension, $30,000 fine, and $5,000 in costs agreed upon by the parties represent a sanctioning outcome that cannot be said to fall outside the reasonable range of appropriateness. On the contrary, taking all the available facts into consideration they represent a reasonable and proportionate response to the need for specific and general deterrence in this case. Accordingly, the Hearing Panel accepted the Settlement Agreement.

Dated at Vancouver this 29 day of December 2023

"Joseph A. Bernardo"

Joseph A. Bernardo (Chair)

"Barbara E. Fraser"

Barbara E. Fraser, Industry Representative

"Tammi Walsh"

Tammi Walsh, Industry Representative

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