

In the Matter of
The Securities Act, 1988

and

In the Matter of

Fluid FX
Paul Anderson
Alan P. Howard
and
John Andrews
(the Respondents)

**DECISION OF THE HEARING PANEL
CONCERNING THE HEARING ON THE MERITS**

Hearing on: October 13 and 14, 2020

Before: Howard Crofts, Panel Chairperson
The Honourable John Klebuc
Peter Carton
(collectively referred to as the “Panel”)

Appearances: Grace Hession David on behalf of the staff (“Staff”)
of the Financial and Consumer Affairs Authority of Saskatchewan (“FCAA”)

No one appearing by or on behalf of the Respondents

Date of Decision: December 18, 2020

I. BACKGROUND

1. This matter involves two Saskatchewan residents, referred to in this Decision as Investor 1 and Investor 2, each who made investments in options with a company named Fluid FX between September 2017 and January 2018. After executing investments and being informed that they had earned significant profits from the trades, each of them asked to withdraw funds from their trading accounts. In both cases, the requests were followed by requests from Fluid FX for additional funds to cover tax obligations, fund a new commercial account for Investor 1, and fund a margin account for Investor 2. When each refused to provide the additional funds, communication between the investors and Fluid FX ceased and Investors 1 and 2 claimed they lost \$43,150 USD and \$67,470 USD respectively.

2. Investor 1 is the name given to a Saskatchewan registered corporation, the proper name of which is set forth in Exhibit S-27 filed by Staff with the Panel during the hearing. Investor 2 is a person resident in Saskatchewan and his full proper name is set forth in Exhibit S-4 filed by Staff with the Panel.
3. Having regard for the ongoing COVID-19 pandemic, the Panel adopted a hybrid virtual hearing procedure pursuant to which witnesses and the Respondents were entitled to attend the hearing either in person before the Panel or virtually through WebEx. Investors 1 and 2 and Investigator Foster attended the hearing virtually. Staff counsel and the Panel attended the hearing in person. No one appeared on behalf of the Respondents.
4. After receiving complaints from Investor 1's accountant in September 2017 and Investor 2 in February 2018, FCAA Investigator Ken Foster ("Investigator Foster") initiated an investigation. Investigator Foster's investigation concluded in the fall of 2018 and included searching Fluid FX's website, interviewing the investors, obtaining documents supporting the investments transacted by the two investors, and making various attempts to contact the Respondents and members of Fluid FX's legal department to discuss the complaints and the company's interactions with the Saskatchewan investors. Fluid FX owned and operated a website (www.fluidfxint.com) where it promoted its activities and where investors could access information about the company, its commodities, and its derivatives trading platform.
5. In the Statement of Allegations dated May 1, 2020, Staff alleges that Fluid FX, Paul Anderson ("Anderson"), Allan P. Howard ("Howard"), and John Andrews ("Andrews") held themselves out to be dealers and advisors acting on behalf of Fluid FX. Further, it is alleged that while carrying out the acts detailed in the Statement of Allegations, the Respondents did not take reasonable steps to ensure that they had sufficient information about the Investors' investment needs and objectives, as well as financial circumstances and risk tolerance, thereby putting them in contravention of section 13.2 of *National Instrument 31-103 [NI 31-103]*. Additionally, it is alleged that the Respondents did not take reasonable steps to ensure that, before they made a recommendation to or accepted instruction from the Investors to buy or sell a security or derivative, the purchase of the security or derivative was suitable for the investors thereby putting them in contravention of section 13.3 of *NI 31-103*.
6. The Statement of Allegations sought the following relief:
 - (a) Pursuant to subsection 134(1)(a) of *The Securities Act, 1988*, SS 1988-89, c S-42.2 [Act], all of the exemptions in Saskatchewan Securities laws do not apply to the Respondents, permanently;
 - (b) Pursuant to subsection 134(1)(d) of the Act, the Respondents shall cease trading in any securities and derivatives in Saskatchewan, permanently;
 - (c) Pursuant to subsection 134(1) (d.1) of the Act, the Respondents shall cease acquiring securities and derivatives for and on behalf of residents of Saskatchewan, permanently;
 - (d) Pursuant to subsection 134(1)(e) of the Act, the Respondents shall cease giving advice respecting securities, derivatives, and trades thereof in Saskatchewan, permanently;

- (e) Pursuant to subsection 134(1)(h)(i) of the *Act*, the Respondents shall resign any position that they hold as a director or officer of an issuer, a registrant, or an investment fund manager;
- (f) Pursuant to subsection 134(1)(h)(ii) of the *Act*, the Respondents are prohibited from becoming or acting as a director or officer of any issuer, registrant, or investment fund manager, permanently;
- (g) Pursuant to subsection 134(1)(h)(iii) of the *Act*, the Respondents shall not be employed by any issuer, registrant, or investment fund manager in any capacity that would entitle them to trade or advise in securities or derivatives, permanently;
- (h) Pursuant to subsection 134(1) (h.1) of the *Act*, the Respondents are prohibited from becoming or acting as a registrant, an investment fund manager, or a promoter, permanently;
- (i) Pursuant to section 135.1 of the *Act*, the Respondents shall, jointly and severally, pay an administrative penalty to the FCAA in the amount of \$40,000.00, or any other amount allowed by the Panel;
- (j) Pursuant to section 135.6 of the *Act*, the Respondents shall, jointly and severally, pay financial compensation to each person or company found to have sustained financial loss caused in whole or in part by contraventions of Saskatchewan securities laws committed by the Respondents, in amounts to be determined; and
- (k) Pursuant to section 161 of the *Act* the Respondents shall, jointly and severally, pay the costs of or relating to the hearing of this matter.

II. PRELIMINARY MATTER

a. Waiver of Sending / Non-Attendance by Respondent

7. During his investigation, Investigator Foster made several attempts via email, telephone, and mail correspondence to be in contact with and speak to Fluid FX officials to discuss the information that he obtained during his investigation; however, except for one letter in an email response from an individual who claimed to be the Respondent's legal counsel (as described in the second-last bullet in paragraph 17 below), he received no response to his inquiries. Staff also attempted to communicate with the Respondents to inform them of conference calls held by the Panel to set hearing dates; however, Staff also received no response. In having received no response to these attempts, and in being unable to effect service or sending to anyone at Fluid FX, on July 24, 2020 Staff filed an Application to Waive Service. After hearing the Application to Waive Service on August 5, 2020, and after being satisfied that waiving service or sending was the proper and necessary remedy in all the circumstances, the Panel issued an Order granting Staff's request to waive service on the Respondents pursuant to *Saskatchewan Policy Statement 12-602 Procedure for Hearings and Reviews [Local Policy]*, s. 1.4.2 – Inability to Effect Service.

III. TESTIMONY OF THE WITNESSES AND EVIDENCE PRESENTED

8. The Panel was provided with evidence about the actions of the Respondents and the impact of those actions from Investor 1, Investor 2, and Investigator Foster. The findings of fact in this decision are based on the testimony of the witnesses and the documents introduced as exhibits by Staff through Investigator Foster. Investigator Foster gathered documents through the course of his investigation from the complainants and from his search of Fluid FX's website. As no one appeared or has ever appeared on behalf of the Respondents in this matter, none of the evidence was challenged or refuted.

Investor 1

9. Through his virtual attendance at the hearing, Investor 1 testified that he:
- was cold called by Anderson in 2017 and solicited to make investments using the Fluid FX website platform;
 - opened a trading account with Fluid FX in the name of his Saskatchewan registered company;
 - acting on/with the advice and assistance of Anderson as broker, made an investment in 10 Silver options in September 2017 costing \$10,000 USD. After receiving instructions from Anderson, he wired \$10,000 USD to a bank in Panama to fund the investment;
 - acting on/with the advice and assistance of Anderson, sold the 10 Silver options in September 2017 and was informed that the sale produced a profit of \$6,850 USD;
 - received a call from Howard in September 2017 who he described as being aggressive and applied significant pressure to convince him to make a second investment in 50 Palladium options costing \$50,000 USD;
 - told Howard that he was not comfortable wiring funds to a bank in Panama and was given instructions to wire \$33,150 USD to fund this second investment to a bank in Hungary, which he did;
 - acting on/with the advice and assistance of Howard as broker, in October 2017 he authorized the sale of the 50 Palladium options and was informed that he realized a profit of \$39,950 USD;
 - received further representations from Fluid FX representatives after the two trades that his trading account balance was in excess of \$147,000 and since it was more than \$100,000 USD, in order to avoid tax issues and an audit by the US Internal Revenue Service, he needed to open a commercial account and fund it with \$10,000 USD. He did not wire these additional funds to Fluid FX;
 - in October 2017, told Anderson that he was through with investing and requested the transfer of the entire balance in his trading account to his company; and
 - was informed in November 2017 by Anderson that he could withdraw all of the funds in his trading account, but needed to send \$3,000 USD to Fluid FX to meet tax obligations. He did not transfer these additional funds and thereafter heard nothing more from anyone at Fluid FX. At this point, his investment of \$43,150 USD was lost.
10. Each of the transactions that Investor 1 made were supported by documents confirming the trades, wire transfers, and requests for withdrawal of funds. Documents confirming purchases and sales of the investments were signed by either Anderson or Howard, acting as brokers, and Andrews acting as

Head of Compliance. These documents were marked as exhibits and entered as evidence in the proceedings.

11. Documents entered as evidence indicate that Fluid FX earned commission income of 15% on each trade transaction involving Investor 1.
12. Investor 1 also testified that of the three people he spoke with from Fluid FX - being Anderson, Howard and Andrews – not one of them asked him about his investing needs and goals. Investor 1 testified that he was never asked about his financial circumstances or his risk tolerance and no one from Fluid FX ever discussed his investment objectives to help determine the suitability of his investments.

Investor 2

13. Also, through his virtual attendance at the hearing, Investor 2 testified that he:
 - was cold called by Anderson in November 2017 and solicited to make investments using the Fluid FX website platform;
 - opened a trading account with Fluid FX in his personal name;
 - between early December 2017 and late January 2018, acting on/with the advice and assistance of Anderson and Howard as Fluid FX brokers, made six investments in various options:
 - 5 Silver options at a cost of \$5,000 USD;
 - 10 Crude Oil options at a cost of \$10,000 USD;
 - 10 Palladium options at cost of \$10,000 USD;
 - 10 Platinum options at a cost of \$10,000 USD;
 - 175 Crude Oil options at a cost of \$175,000 USD; and
 - 450 Palladium options at a cost of \$450,000 USD.
 - between early December 2017 and late January 2018, acting on/with the advice and assistance of Anderson and Howard as Fluid FX brokers, sold the aforementioned investments and was informed that the sales produced profits as follows:
 - 5 Silver options, a profit of \$1,250 USD;
 - 10 Crude Oil options, a profit of \$37,100 USD;
 - 10 Palladium options, a profit of \$57,730 USD;
 - 10 Platinum options, a profit of \$17,700 USD;
 - 175 Crude Oil options, a profit of \$257,250 USD; and
 - 450 Palladium options, a profit of \$1,100,250 USD.
 - used the reported profits from each of the above noted sales to fund the next purchase, and when requested and on instruction from Anderson, wired additional funds to a bank in Hungary to top up the balance in his trading account to fund the next investment.
 - in total, wired \$61,470 USD to Fluid FX to fund the initial and subsequent investments;
 - was informed that after the above noted six trades, his trading account balance was \$1,532,530;
 - in late January 2018, needing funds to make payroll for his business, requested the withdrawal of \$350,000 USD from his Fluid FX trading account and was told he needed to send \$98,000 USD for a tax deposit and needed to enter into a Margin Agreement which required an additional \$24,500 USD to be wired to Fluid FX. At this point, he did not send any additional funds to Fluid FX and

the communications between them ceased, leaving him with losses of \$61,470 USD.

14. Documents marked as exhibits and entered as evidence indicate that Fluid FX earned commission income of 15% on each trade transaction involving Investor 2.
15. Each of the above noted transactions that Investor 2 made were supported by documents confirming the trades, including wire transfers and the request for withdrawal of funds. Documents confirming purchases and sales of the investments were signed by either Anderson or Howard acting as brokers, and by Andrews acting as Head of Compliance. These documents were also marked as exhibits and entered as evidence in the proceedings.
16. Investor 2 testified that of the three people he spoke with from Fluid FX – being Anderson, Howard, and Andrews – not one of them asked him about his investing needs and goals. Investor 2 was never asked about his financial circumstances or his risk tolerance and no one from Fluid FX ever discussed his investment objectives to help determine the suitability of his investments.

Investigator Foster

17. Investigator Foster attended the hearing virtually to provide testimony, and further provided an affidavit relating to the July 24, 2020 Application to Waive Service. Beginning with the affidavit, Investigator Foster deposed that:
 - he commenced an investigation on September 25, 2017 after receiving calls from two Saskatchewan residents involving an online commodity and forex trading company by the name of Fluid FX International. The two individuals each expressed concern about investments they had made and sent a link to the company's website;
 - the two Saskatchewan residents, known herein as Investor 1 and Investor 2, were interviewed under oath on October 19, 2017 and March 16, 2018 respectively;
 - Investor 1 and Investor 2 indicated to Investigator Foster that they were independently solicited by Anderson over the telephone, and that he represented he was a broker with Fluid FX International;
 - Investor 1 and Investor 2 indicated that they had limited investment knowledge;
 - Investigator Foster's investigation included visiting the Fluid FX website. The website indicated that the company had its headquarters in Japan and listed several phone numbers. The following address and phone numbers were included on the website page:

Office in Tokyo Japan:

Fluid FX International
3-6 - 1 - 2F Hatchobori, Chuo-ku Tokyo,
1375, Japan
Ph: 1-855-861-4969
Ph: +81-34580 1677
New York: 646-852-9943
Fax 1-8554774250
Email: service@fluidfxint.com

- on October 4, 2017, Investigator Foster conducted a search of the FCAA SMS database and the National Registration Database for Fluid FX International and the three named respondents. The searches produced no results. Similarly, a corporate search for Fluid FX International produced no results. There was no information on the internet website as to the place of incorporation for the company;
- on January 11, 2018, a Temporary Cease Trade Order was issued and successfully delivered to the Respondents via the email address at service@fluidfxint.com;
- on January 15, 2018, Investigator Foster telephoned Fluid FX at 1-855-861-4969 and on January 16, 2018 he called the New York phone number at 1-646-852-9943. Both calls defaulted to a pre-recorded message that either went to voicemail or the message indicated that he had reached a number in New Zealand that had changed or was no longer in service;
- on January 16, 2018 he sent a letter to the above-noted email address and via registered mail to the Japan address requesting information from Fluid FX;
- the only response Investigator Foster ever received from Fluid FX was on February 21, 2018 when he received an email with a letter attached from Ms. Carol Schwartz, Legal Counsel to Fluid FX responding to Foster's emailed letter of January 16, 2018 stating that Fluid FX is "an advisory firm which acts as an intermediary for the client", is not a trading or advisory entity and expressed an opinion that Fluid FX did not need to be registered in Saskatchewan and owed no fiduciary duty to its clients; and
- on February 26, 27 and 28, 2018, Investigator Foster attempted to contact Fluid FX officials via phone calls, emails, and mail; however, except for the letter received via email noted above, no contact was ever made, and mail correspondence was returned as "unclaimed" or "refused".

18. Investigator Foster's testimony revealed the following:

- Fluid FX claimed to have been in business since 2005;
- screenshots of the Fluid FX website included what Investigator Foster described, in his words, as characteristic "red flags" typically found on fictitious websites, including generic stock photos, lack of management biographies, and simplistic website construction – this type of minimal content is not what one would expect for a legitimate commodities trading firm;
- the "About Fluid FX" and "Trading Services" sections of the website offered fully managed accounts, non-discretionary accounts, and trading accounts for farmers; and
- the website also included a list of clickable links which linked to a webpage where Fluid FX clients could open an account, login to the trading platform, and learn about trading services, account security, privacy, and terms of use.

19. Investigator Foster also testified that on October 4, 2017, he viewed a LinkedIn page that contained information similar to the information on the Fluid FX website, but then later found that this page was no longer live.

20. Investigator Foster also noted press releases he found on a website - www.prlog.org – that provided testimonials to the credibility of Fluid FX and that postings to this website are not fact-checked or verified as to their credibility. His evidence was that such misinformation is the kind of thing that can cause innocent investors to trust the company and invest with them.

IV. ANALYSIS AND DECISION

21. Based on the uncontroverted evidence given by Investor 1, Investor 2, and Investigator Foster, which the Panel finds credible, and based on exhibits S-4 to S-35 entered in evidence by FCAA Staff, the Panel is satisfied that the events and actions hereinafter described occurred in the manner stated by the witnesses.

22. With this in mind, the Panel is unanimous in the following views:

(a) Subsection 2(1)(a.1) of the *Act* defines an "adviser" as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising another as to the investing in or the buying or selling of securities or derivatives". The evidence presented indicates and the Panel finds that the Respondents acted as advisers in relation to Investor 1 and Investor 2.

(b) Subsection 2(1)(n) of the *Act* defines a "dealer" as "a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities or derivatives as principal or agent". The evidence presented indicates and the Panel finds that the Respondents acted as dealers in relation to Investor 1 and Investor 2.

(c) Subsections 27(2)(a) and 27(2)(b) of the *Act* require any person or company who acts as a dealer or adviser to register with the FCAA. The evidence presented indicates and the Panel finds that at all relevant times the Respondents were not registered in Saskatchewan, yet they acted as dealers and/or advisers in relation to Investor 1 and Investor 2. As such, the Respondents contravened subsections 27(2)(a) and 27(2)(b) of the *Act*.

(d) Section 13.2 of *NI 31-103* states, in part, that:

[A] registrant must take reasonable steps to...

(c) ensure that it has sufficient information regarding all of the following to enable it to meet its obligations under section 13.3 or, if applicable, the suitability requirement imposed by an SRO:

(i) the client's investment needs and objectives;

(ii) the client's financial circumstances;

(iii) the client's risk tolerance. Subsection 2(pp) of the *Act* defines "registrant" as including those persons that are required to be registered.

The evidence demonstrates and the Panel finds that the Respondents did not take reasonable steps to ensure that they had sufficient information of the Investors' investment needs and objectives, financial circumstances, and risk tolerance. Therefore, the Respondents contravened section 13.2 of *NI 31-103*.

(e) Section 13.3 of *NI 31-103* states, in part, that:

(1) A registrant must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a client to buy or sell a security, or makes a purchase or sale of a security for a client's managed account, the purchase or sale is suitable for the client.

(2) If a client instructs a registrant to buy, sell or hold a security and in the registrant's reasonable opinion following the instruction would not be suitable for the client, the registrant must inform the client of the registrant's opinion and must not buy or sell the security unless the client instructs the registrant to proceed nonetheless.

The evidence demonstrates and the Panel finds that the Respondents did not take reasonable steps to ensure that, before they made a recommendation to or accepted instruction from the Investors to buy or sell a security or derivative, the purchase of the security or derivative was suitable for the Investors. The Respondents therefore contravened section 13.3 of *NI 31-103*.

23. In light of the Panel's views above and in consideration of all the evidence presented, the Panel finds that Staff has met its burden in proving its case on the merits. The next step in these proceedings is for the Panel to receive submissions from the parties in respect to sanctions and costs, consider these submissions, and then render a decision on these issues. In this regard, the Panel directs that Staff and the Respondent provide the Panel with written submissions in respect to the issues of sanctions, including in respect to an appropriate administrative penalty, as well as costs within sixty (60) days of the date of this decision.

24. In respect to Staff's request that the Respondents, jointly and severally, pay financial compensation to each person or company found to have sustained financial loss caused in whole or in part by contraventions of Saskatchewan securities laws committed by the Respondents, the Panel directs that this issue be the subject of a future hearing in accordance with the procedures set out in Part 13 of the *Local Policy*.

25. This is a unanimous decision of the Panel.

Dated at Regina, Saskatchewan this 18th day of December, 2020.

"Howard Crofts"

Howard Crofts, Hearing Panel Chairperson

"John Klebuc"

Honourable John Klebuc

"Peter Carton"

Peter Carton