

**IN THE MATTER OF THE SECURITIES ACT,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)**

– AND –

**IN THE MATTER OF JEAN-SMAILLE GERMEIL and FPE TRADING
(collectively, the Respondents)**

DECISION

Hearing In writing

Decision: March 27, 2019

Panel: Shirley P. Lee, QC
Valerie B. Seager
Kenneth Wheelans

Chair
Commissioner
Commissioner

Submissions: Heidi E. Schedler and
Stephanie Atkinson

Director of Enforcement
for the Commission

No submissions were made
by or on behalf of the
Respondents

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I. OVERVIEW

A. Nature of the Hearing

- [1] This was a hearing (the Hearing) before the Nova Scotia Securities Commission (the Commission) pursuant to sections 134, 135 and 135A of the Act to determine whether it is in the public interest to issue certain orders against the Respondents.
- [2] The proceeding arose from a Notice of Hearing issued by the Commission on January 8, 2018 (the Notice of Hearing), to which was attached a Statement of Allegations of the Director of Enforcement for the Commission (Staff) dated January 3, 2018 (the Statement of Allegations).
- [3] In the Statement of Allegations, Staff alleged that the Respondents, between approximately June 2013 and January 2015 (the Material Time), solicited investments from three residents of Ontario and one resident of Nova Scotia (the Investors). For privacy reasons, the Investors are referred to in this Decision as AA, BB, CC and DD. Staff alleged that Jean-Smaïlle Germeil (Germeil) promoted FPE Trading (FPE) to the Investors as a foreign exchange investment opportunity and thereby solicited investments contrary to several provisions of the Act.
- [4] Subsequent to a pre-hearing conference held on February 8, 2018, and a consideration of written submissions from Staff dated March 1, 2018, the Commission agreed to Staff's request that the Hearing proceed as a hearing in writing under an order of the Commission in the Memorandum of Pre-hearing Conference dated April 11, 2018 (the Memorandum). The Memorandum sets out the process for the hearing in writing, including the provision of documents from Staff to the Respondents and opportunities for the Respondents to reply and provide submissions.
- [5] Throughout the process for this matter, the Respondents have not appeared, participated, made submissions, responded or objected to the Hearing being held in writing.
- [6] Under Part 7 of Rule 15-501 General Rules of Practice and Procedure, the Commission has jurisdiction to proceed with the Hearing in the absence of the Respondents when they have been given notice of the Hearing but have not appeared, provided that the Commission is satisfied that a copy of the Notice of Hearing had been served upon the Respondents. The panel is satisfied that the Respondents have been given the requisite notice.

B. Staff Allegations

- [7] Staff made the following allegations against the Respondents:
- (a) the Respondents acted as a dealer, adviser and/or investment fund manager without being registered contrary to section 31 of the Act;
 - (b) the Respondents distributed securities in FPE to the Investors without having filed a prospectus or preliminary prospectus with the Commission contrary to subsection 58(1) of the Act;
 - (c) the Respondents engaged in unfair practice contrary to subsection 44A(2) of the Act;
 - (d) the Respondents made untrue statements to the Investors that a reasonable investor would consider material in deciding whether to enter into or maintain a trading relationship with the Respondents contrary to subsection 50(2) of the Act; and
 - (e) the Respondents' conduct was contrary to the public interest and undermined investor confidence in the fairness and efficiency of the public markets.

II. SUMMARY OF THE EVIDENCE

- [8] This section contains a summary of the factual background relevant to our decision, derived from the following documentary evidence submitted by Staff:
- (a) Affidavit of William McDonald, Investigator for the Commission, dated July 6, 2018;
 - (b) Affidavit of Abel Lazarus, Director, Corporate Finance, for the Commission, dated June 15, 2018;
 - (c) Affidavit of Brian Murphy, Manager, Registration and Compliance, for the Commission, dated June 28, 2018;
 - (d) Affidavit of AA dated June 27, 2018;
 - (e) Affidavit of BB dated June 29, 2018; and
 - (f) Affidavit of CC dated June 27, 2018.
- [9] All investments made by, and any payments made to, the Investors were in Canadian dollars.

A. The Respondents

- [10] At the Material Time, Germeil was a resident of Nova Scotia.
- [11] On October 3, 2013, FPE was registered as a partnership/business name with the Registry of Joint Stock Companies in Nova Scotia (the Registry). Germeil was listed as a partner of FPE. Its business was noted as "online currency trading" and the registered office and mailing address was the same as Germeil's. Throughout the Material Time, Germeil was the directing mind of FPE.
- [12] On December 4, 2014, the status of FPE with the Registry was "revoked for non-payment".
- [13] The Respondents were not registered with the Commission to trade or distribute securities in any capacity.
- [14] FPE had not filed a preliminary prospectus or prospectus with the Commission.
- [15] FPE had not filed any reports of trade with the Commission relying on exemptions in Nova Scotia securities laws to distribute securities in Nova Scotia.

B. The Investors

- [16] Around June 2013, AA, a resident of Ontario, was introduced to Germeil through a friend.
- [17] Between August 2013 and July 2014, AA invested \$18,000 with the Respondents on behalf of himself and his charity.
- [18] AA did not receive a prospectus or any account opening documents from the Respondents.
- [19] AA received emails from the Respondents showing the increasing value of his investments.
- [20] Between September and October 2014, AA received \$9,500 from the Respondents after requesting a withdrawal of funds from his account.
- [21] AA was not an accredited investor and had no family or business relationship with the Respondents.
- [22] The funds received by the Respondents from AA were comingled into personal bank accounts controlled by Germeil and used for Germeil's day-to-day expenses.
- [23] BB, a resident of Ontario, was introduced to the Respondents through AA. BB and AA are siblings.

- [24] In October 2013, AA invested approximately \$7,000 with the Respondents on behalf of BB.
- [25] BB did not receive a prospectus or any account opening documents from the Respondents.
- [26] BB received emails from the Respondents showing the increasing value of his investments.
- [27] BB received no return of principal or interest from the Respondents.
- [28] BB did not know Germeil prior to investing with him and did not consider him a friend, business associate or family member.
- [29] Around September 2013, CC, a resident of Ontario, learned of FPE through his friend AA.
- [30] Between September and November 2013, CC invested \$12,000 with the Respondents.
- [31] CC did not receive a prospectus or any account opening documents from the Respondents.
- [32] CC received emails from the Respondents showing the increasing value of his investments.
- [33] On November 17, 2014, CC received approximately \$1,300 from the Respondents after requesting a withdrawal of funds from his account.
- [34] CC was not an accredited investor, did not know Germeil prior to contacting him and did not consider him a friend, business associate or family member.
- [35] The funds received by the Respondents from CC were comingled into personal bank accounts controlled by Germeil and used for Germeil's day-to-day expenses.
- [36] DD, a resident of Nova Scotia, was a neighbor of Germeil.
- [37] DD provided a cheque dated August 3, 2014, made out to Germeil for \$500 and signed a contract on August 3, 2014, with FPE for the investment (the FPE Contract).
- [38] DD did not receive a prospectus from the Respondents.

III. LAW AND ANALYSIS

A. Unregistered Activity

1. Nature of the Security

- [39] Staff has submitted that the arrangements between the Respondents and each of the Investors with respect to currency trading by the Respondents were investment contracts (the FPE Securities) and, therefore, securities as defined in subclause 2(1)(aq)(xiv) of the Act.
- [40] The term "investment contract" is not defined in the Act. The leading Canadian case relating to the interpretation of the term is *Pacific Coast Coin Exchange of Canada Limited v. Ontario Securities Commission*, [1978] 2 S.C.R. 112 (the Pacific Coast Decision), in which the Supreme Court of Canada (the SCC) held (at pages 128-129) that an investment contract consists of an investment of money in a common enterprise with an expectation of profit derived significantly from the efforts of others.
- [41] Each of the Investors gave money to the Respondents for investment purposes, with a total of \$37,500 being invested with the Respondents.
- [42] Each of the Investors had an expectation of profit when they provided their money to the Respondents for purposes of foreign currency trading. The Respondents provided communications to the Investors that would have given them an expectation of profit, including the following:
- (a) AA was informed by Germeil that he had a mathematical algorithm that was quicker than anyone else's, that he bought currencies low and sold them high hundreds of times per day and that FPE's growth at the end of 2013 for the year to date was 57.49%. He received regular email communications from the Respondents purporting to show high returns on his investments;
 - (b) AA invested \$7,000 on behalf of BB. Germeil advised BB that he had received his money and would do his absolute best for him. BB also received regular email communications from the Respondents purporting to show high returns on his investment;
 - (c) CC, after advising Germeil that he did not know much about making profits in currency trading, was informed by Germeil that he bought and sold US dollars and made a good profit doing so. He received regular email communications from the Respondents purporting to show high returns on his investments and received a T5 from FPE for the 2013 tax year showing income earned; and
 - (d) After a discussion between DD and Germeil, in which he indicated to DD that that he was trading in commodities and getting a 20% to 30% return, DD gave Germeil some money to see what he could do for him. DD and FPE entered

into the FPE Contract, under which DD agreed to invest \$500 to be used by FPE to buy and sell currencies profitably in the foreign exchange markets.

- [43] The third criterion for an investment contract is a common enterprise. The SCC stated in the Pacific Coast Decision that the commonality necessary for an investment contract is between the investor and the promoter who solicits the capital. The commonality arises when the investor advances money and the promoter has managerial control over the success of the enterprise. In this case, there is a common enterprise. The Investors advanced their money to the Respondents and relied on them as the promoters to invest the money successfully to make a profit.
- [44] The last criterion for an investment contract is that the expectation of profit is derived significantly from the efforts of others. The Investors were passive investors who provided their money to the Respondents and were solely dependent on the efforts, expertise and success of the Respondents to buy and sell currencies for a profit. This is clearly reflected in the email statements and newsletters sent by the Respondents to the Investors and in the FPE Contract.
- [45] We find that the FPE Securities meet the criteria for an investment contract and were securities within the meaning in the Act.

2. Dealer Registration

- [46] Subsection 31(1) of the Act prohibits a person or company from acting as a dealer unless it is registered as a dealer.
- [47] A dealer is defined in clause 2(1)(i) of the Act to mean a person or company engaging in or holding itself out as engaging in the business of trading in securities.
- [48] "Trade" or "trading" is defined in clause 2(1)(as) of the Act to include any sale of a security for valuable consideration and any act, solicitation, conduct or negotiation directly or indirectly in furtherance of the sale.
- [49] There was a sale of FPE Securities by the Respondents to the Investors for money, the valuable consideration.
- [50] The Respondents also engaged in acts in furtherance of the sale of FPE Securities to the Investors, including the following:
- (a) entering into the FPE Contract with DD;
 - (b) accepting money from the Investors for investment purposes;
 - (c) depositing the Investors' funds into bank accounts controlled by Germeil; and

(d) sending regular emails and newsletters to the Investors regarding their investments.

[51] We find that the Respondents were trading FPE Securities.

[52] To determine whether the Respondents were in the business of trading, we consider the factors set out in section 1.3 of Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (CP 31-103). We find that the Respondents were in the business of trading as evidenced by the following activities:

(a) FPE was registered with the Registry showing a business of online currency trading;

(b) through communications with the Investors, the Respondents promoted the sale of the FPE Securities;

(c) there were sales of FPE Securities to the Investors over the Material Time;

(d) the Respondents sent regular emails and newsletters with account information to several of the Investors;

(e) the Respondents spent a large amount of time on the business as evidenced by the numerous emails between the Respondents and several of the Investors; and

(f) the Respondents expected to be compensated for carrying out the activity. BB received emails in January 2015 showing an account balance less a 15% fee and AA was told by Germeil that 20% interest earned would be the commission taken off the weekly statements.

[53] During the Material Time, neither of the Respondents were registered with the Commission in any capacity. The Respondents, resident in Nova Scotia at that time, engaged in activities that constituted "trading" in Nova Scotia and held themselves out as engaging in the business of trading securities when they were not registered to do so.

[54] There was no evidence that the trades of FPE Securities were made pursuant to an exemption from the dealer registration requirement.

[55] We find that the Respondents acted as a dealer when it was not registered as a dealer contrary to subsection 31(1) of the Act.

3. Adviser Registration

- [56] Subsection 31(2) of the Act prohibits a person or company from acting as an adviser unless it is registered as an adviser.
- [57] An adviser is defined in clause 2(1)(a) of the Act to mean a person or company engaging in the business of advising others as to the investing in or the buying or selling of securities.
- [58] Section 7.2 of CP 31-103 states that the adviser registration requirement applies to advisers who give “specific advice” that is tailored to the needs and circumstances of a client.
- [59] The Investors gave money to the Respondents for online currency trading in the hopes of making a profit through the FPE Securities. The nature of these securities entailed the Respondents using the money and their discretion and efforts to buy and sell currencies online. The Respondents were not providing specific advice to the Investors regarding the buying and selling of FPE Securities.
- [60] The Respondents may have discussed with some of the Investors TFSA's, silver, currency and timing of investments but this does not constitute providing specific advice regarding securities.
- [61] We find that there was no breach of the adviser registration requirement in subsection 31(2) of the Act by the Respondents.

4. Investment Fund Manager Registration

- [62] Subsection 31(3) of the Act prohibits a person or company from acting as an investment fund manager unless it is registered as an investment fund manager.
- [63] An “investment fund manager” is defined in clause 2(1)(rc) of the Act as a person or company that directs the business, operations or affairs of an investment fund.
- [64] A “investment fund” is defined in clause 2(1)(rb) of the Act as a mutual fund or a non-redeemable investment fund.
- [65] There is nothing to indicate that the FPE Securities are securities of an investment fund.
- [66] We find that there was no breach of the investment fund manager registration requirement in subsection 31(3) of the Act by the Respondents.

B. Distribution of Securities Without a Prospectus

- [67] Subsection 58(1) of the Act prohibits the distribution of securities unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.
- [68] A distribution is defined in subclause 2(1)(l)(i) of the Act to mean a trade in securities of an issuer that have not been previously issued.
- [69] The FPE Securities do not appear to have been previously issued by FPE. The communications between the Respondents and the Investors indicate that the Respondents were seeking investments to carry out their business of online currency trading.
- [70] The wording in the FPE Contract supports that the FPE Securities were securities of FPE that had not been previously issued. The contract states that FPE is seeking an investment, the investor is providing the investment and the money will be used by FPE to buy and sell currencies. This arrangement with the Respondents results in an investment contract being issued by FPE.
- [71] Although only DD entered into a written agreement with FPE, the nature of the investments entered into by all four of the Investors is the same.
- [72] Neither a preliminary prospectus nor a prospectus for the FPE Securities was filed with the Commission and there were no reports of trade filed to indicate reliance on a prospectus exemption.
- [73] We find that the Respondents distributed the FPE Securities to the Investors contrary to subsection 58(1) of the Act.

C. Unfair Practice

- [74] Section 44A of the Act reads as follows:

44A (1) In this Section, "unfair practice" includes

(a) putting unreasonable pressure on a person to purchase, hold or sell a security or trade or hold a derivative;

(b) taking advantage of a person's inability or incapacity to reasonably protect the person's own interest because of physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of any matter relating to a decision to purchase, hold or sell a security or trade or hold a derivative; or

(c) imposing terms or conditions that make a transaction in securities or derivatives manifestly inequitable.

(2) No person or company shall engage in an unfair practice.

- [75] The Commission considered section 44A of the Act in its Reasons for Decision *In the Matter of Quintin Earl Sponagle and Trevor Wayne Hill* dated August 4, 2011 (the Sponagle Decision). At paragraph 77 of the Sponagle Decision, the Commission stated that the definition of “unfair practice” in subsection 44A(1) of the Act is “... inclusive and therefore an unfair practice may arise from actions other than those enumerated in subsections (a), (b) and (c). ...” The Commission found that the whole investment scheme in that decision “... was fundamentally dishonest and an unfair practice within any understanding of the words.”
- [76] In the Sponagle Decision, the Commission specifically noted that untrue statements made by the respondents in that case relating to the return on investment, the success of investments and the licensing, insurance and regulation of the respondents were meant to mislead and coerce investors.
- [77] Both AA and CC advised the Respondents that they did not know much about currency trading but were interested in trying the Respondents’ currency trading techniques. There is no evidence that the Respondents discussed with the Investors the risks associated with currency trading (including doing a risk assessment), investment objectives or other general account opening procedures.
- [78] One Investor was told that the Respondents were regulated by the Investment Industry Regulatory Organization of Canada (IIROC) and the Canadian Investor Protection Fund (CIPF) when there is no evidence of this.
- [79] The regular emails and newsletters sent by the Respondents to several of the Investors lacked any details of the transactions and investments that were supposedly made on behalf of those Investors and contained representations of unrealistic returns. The only evidence of currency trading activity were transactions in the name of Germeil.
- [80] The Respondents comingled some of the Investors’ funds into personal bank accounts in Germeil’s name and the funds were used to pay Germeil’s day-to-day expenses, without the Investors’ consent or knowledge.
- [81] We find that the Respondents (i) took advantage of the Investors’ lack of knowledge of currency trading and (ii) comingled Investors’ funds with funds used to pay Germeil’s day-to-day expenses and, therefore, engaged in unfair practices contrary to subsection 44A(2) of the Act.

D. Misleading and Untrue Statements

[82] Subsection 50(2) of the Act reads as follows:

50(2) A person or company shall not make a statement about something that a reasonable investor would consider important in deciding whether to enter into or maintain a trading or advising relationship with the person or company if the statement is untrue or omits information necessary to prevent the statement from being false or misleading in the circumstances in which it is made.

[83] In paragraph 69 of the Sponagle Decision, the Commission determined that, if subsection 50(2) of the Act had been in force at the time of the respondents' activities, blatantly untrue statements had been made by them about money being invested when it was not, money earning fantastic rates of return when it was never invested and investments being fully insured when there was no insurance.

[84] The Respondents made a number of statements that were untrue or omitted information necessary to prevent the statements from being false or misleading, including the following:

- (a) the Respondents' trade was regulated by IIROC and insured through CIPF and its activities were legal and ethical;
- (b) FPE was a proprietary trading desk specializing in currencies, commodities and precious metals;
- (c) assets under management were \$83,194.72 and owners' equity was \$123,194.72;
- (d) Germeil was a registered mutual fund dealer and had an Investment Funds Institute of Canada (IFIC) designation;
- (e) several of the Investors were advised that audits of the investor accounts were to be released on March 11 and April 8, 2014, but no audits were performed; and
- (f) several of the Investors were told that their investments were profitable and generating substantial returns when a review of Germeil's trading accounts showed substantial losses.

[85] We find that these statements made by the Respondents are contrary to subsection 50(2) of the Act as a reasonable investor would consider returns on investment, regulatory oversight, registration, insurance and audits as important considerations in determining whether to enter into or maintain a trading relationship with a person or company.

E. Conduct Contrary to the Public Interest

- [86] The Commission's mandate is to uphold the purpose of the Act set out in section 1A of the Act. The purpose is to provide investors with protection from practices and activities that undermine investor confidence in the fairness and efficiency of capital markets and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation.
- [87] The purpose of the Commission's public interest jurisdiction in carrying out its mandate is protective and preventative, to be exercised to prevent possible future harm to Nova Scotia's capital markets.
- [88] The Respondents' actions are clearly not in the public interest and undermine investor confidence in the fairness and efficiency of Nova Scotia's capital markets.

IV. CONCLUSION

- [89] We find that, during the Material Time:
- (a) the Respondents acted as a dealer without being registered to do so and without an available exemption from the dealer registration requirement, contrary to subsection 31(1) of the Act;
 - (b) the Respondents distributed securities when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for them by the Director and without an available exemption from the prospectus requirements, contrary to subsection 58(1) of the Act;
 - (c) the Respondents engaged in unfair practices contrary to subsection 44A(2) of the Act;
 - (d) the Respondents made untrue and misleading statements contrary to subsection 50(2) of the Act; and
 - (e) the Respondents' conduct was contrary to the public interest and harmful to the integrity of the Nova Scotia capital markets.
- [90] An order will be issued as of the date of this Decision as follows:
- (a) the Respondents have until April 5, 2019, to notify the Secretary of the Commission that they require an oral sanctions hearing, which, if required, will be scheduled by the Secretary;
 - (b) failing notification by the Respondents, Staff shall serve and file their written submissions on sanctions and costs by April 17, 2019;

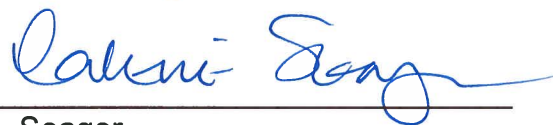
- (c) the Respondents shall serve and file their written submissions on sanctions and costs by April 26, 2019; and
- (d) Staff shall serve and file reply submissions on sanctions and costs, if any, by May 3, 2019.

DATED at Halifax, Nova Scotia, this 27th day of March, 2019.


NOVA SCOTIA SECURITIES COMMISSION



Shirley P. Lee, QC
Chair



Valerie B. Seager
Commission Member



Kenneth Wheelans
Commission Member