

**IN THE MATTER OF THE
COMMODITY FUTURES ACT, R.S.O. 1990, c. C.20, AS AMENDED
AND THE SECURITIES ACT, R.S.O. 1990, c. S.5, AS AMENDED**

- and -

IN THE MATTER OF WAYNE S. UMETSU

**SETTLEMENT AGREEMENT BETWEEN STAFF OF THE ONTARIO SECURITIES
COMMISSION AND WAYNE S. UMETSU**

I. INTRODUCTION

1. By an Amended Notice of Hearing dated August 23, 2001 (the "Amended Notice of Hearing"), the Ontario Securities Commission (the "Commission") announced that it proposed to hold a hearing to consider the following issues:
 - (a) whether, pursuant to subsection 60(1) and section 60.1 of the *Commodity Futures Act*, R.S.O. 1990, c. C.20 (the "Act"), it is in the public interest for the Commission to make an order:
 - (i) that the exemptions contained in Ontario commodity futures law do not apply to Wayne S. Umetsu (the "Respondent") permanently or for such period as the Commission may direct;
 - (ii) prohibiting the Respondent from becoming or acting as a director or officer of any issuer permanently or for such period as the Commission may direct;
 - (iii) reprimanding the Respondent; and
 - (iv) requiring the Respondent to pay the costs of the Commission's investigation and the proceeding; and
 - (b) whether, pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Securities Act"), it is in the public interest for the Commission to make an order:
 - (i) that the Respondent cease trading in any securities permanently, or for such time as the Commission may direct;

- (ii) prohibiting the Respondent from becoming or acting as a director or officer of any issuer permanently or for such period as the Commission may direct; and
- (iii) reprimanding the Respondent.

II. JOINT SETTLEMENT RECOMMENDATION

- 2. Staff of the Commission ("Staff") agree to recommend settlement of the proceeding initiated by the Amended Notice of Hearing in accordance with the terms and conditions described below. The Respondent consents to the making of an order against him in the form attached as Schedule "1" (the "Order") based on the facts set out in Part III of this Settlement Agreement.

III. STATEMENT OF FACTS

Acknowledgment

- 3. The Respondent acknowledges that the facts set out in paragraphs 4 through 21 below are correct.

Facts

- 4. The Respondent was registered with the Commission as a salesperson pursuant to the Act for various periods since approximately August, 1981. From April 8, 1997 to May 2, 1997 and from December 16, 1997 to February 28, 1998, the Respondent was registered with the Commission as a salesperson with F.C. Canada Investments Inc. ("F.C. Canada"). During the material time, F.C. Canada was registered as an Introducing Broker pursuant to the Act.
- 5. The Respondent was not registered with the Commission in any capacity between May 2, 1997 and December 16, 1997.
- 6. The Respondent has not been registered with the Commission in any capacity since his employment with F.C. Canada was terminated on February 28, 1998.
- 7. W. E. is an individual who was a client of the Respondent.
- 8. In or around April, 1997, W.E. attended an information seminar hosted by F.C. Canada (the "Seminar"). The Seminar was advertised as an opportunity to learn about commodities, futures and options trading. W.E. met the Respondent (then a salesperson

employed by F.C. Canada) at the Seminar. The Respondent informed W.E. that he had 15 years' experience trading in futures contracts.

9. At the Seminar, W.E. asked the Respondent about investing and opening an account with F.C. Canada. The Respondent informed W.E. that he would be leaving F.C. Canada in the near future and joining a better investment company. The Respondent requested that W.E. wait to make his investment until the Respondent had joined the new company.
10. The Respondent left the employ of F.C. Canada on May 2, 1997, at which time the Respondent's registration as a salesperson was suspended pursuant to the Act.
11. In early May, 1997, the Respondent joined Prime Canadian Futures Company, an Investment Dealers Association of Canada member ("Prime"). Prime was registered as a Futures Commission Merchant under the Act. Prime did not, however, provide the Commission with notice in writing of the Respondent's employment. Thus, the Respondent's registration as a salesperson was not reinstated when he became employed by Prime.
12. On or about May 7, 1997, W.E. met with the Respondent at Prime's offices to open an account. The Respondent did not inform W.E. that he was no longer registered under the Act to trade in future contracts.
13. Between May 27, 1997 and September 16, 1997, W.E. deposited \$23,000 into his account at Prime. During this period, from time to time, W.E. instructed the Respondent to effect certain transactions in commodity futures contracts on his behalf. As a result, three commodity futures contracts were purchased and sold in W.E.'s account by the Respondent. The Respondent was not registered under the Act to make such trades.
14. Late in the summer of 1997, the Respondent informed W.E. that he was moving to a new company. Although the Respondent was not registered to trade future contracts, he held himself out to W.E. as being able to so trade. W.E. agreed to keep his business with the Respondent rather than transfer it to another Prime representative. Accordingly, W.E. withdrew all his funds from his Prime account. W.E. received from Prime two cheques dated September 22, 1997 (one in the amount of Cdn\$11,000 and one in the amount of US\$5,342). Although there were no open contracts in his Prime account, W.E. believed that the Respondent had between 10 and 20 commodity futures contracts for him in an account under the Respondent's name.
15. On September 23, 1997, the Respondent instructed W.E. to make a cheque in the amount of \$19,000 payable to "LFG, care of Wayne Umetsu" so that the Respondent could transfer W.E.'s account to the Respondent's new firm. Later the same day, the Respondent contacted W.E. and requested that he reissue the cheque to the Respondent personally. The Respondent picked up the \$19,000 cheque (made payable to him) at W.E.'s home. He deposited it into his personal account at Canada Trust. The Respondent made no investment on behalf of W.E. with the \$19,000. Rather, the Respondent used the monies solely for his own benefit.

16. At the Respondent's request, on October 31, 1997, W.E. made an emergency wire transfer to the Respondent's personal account at Canada Trust in the amount of \$15,000. W.E. was informed by the Respondent that these funds were required to protect his investments. The Respondent made no investment on behalf of W.E. with the \$15,000. Rather, the Respondent used the monies solely for his own benefit.
17. In the fall of 1997, the Respondent returned to the employ of F.C. Canada. He was registered with the Commission as a salesperson pursuant to the Act between December 16, 1997 and February 28, 1998 (when he was terminated by F.C. Canada). After February 28, 1998, the Respondent continued to hold himself out to W.E. as being registered under the Act to trade futures contracts.
18. On or about December 23, 1997, W.E. provided the Respondent with a cheque payable to the Respondent in the amount of \$1,000 to be invested on W.E.'s behalf. This cheque was deposited into the Respondent's personal account at Canada Trust. The Respondent made no investment on behalf of W.E. with the \$1,000. Rather, the Respondent used the monies solely for his own benefit.
19. Between March 17, 1998 and July 23, 1998, W.E. provided \$44,500 to the Respondent (\$3,500 cash and six cheques totaling \$41,000 made payable to the Respondent) for the purpose of being invested on his behalf. The Respondent deposited the cash and cheques into his personal account at Canada Trust. The Respondent made no investment on behalf of W.E. with the \$44,500. Rather, the Respondent used the monies solely for his own benefit.
20. By a handwritten agreement dated December 7, 1999, the Respondent agreed to pay back to W.E. the sum of \$150,000. Further to this agreement, the Respondent provided W.E. with 6 postdated cheques totaling \$100,000 (the repayment terms of the remaining \$50,000 was to be negotiated by the Respondent and W.E. later). W.E. attempted to cash the first cheque, but it was returned NSF. Shortly thereafter, the Respondent informed W.E. that he did not intend to honour their agreement. No restitution has been paid to date by the Respondent to W.E.
21. By trading futures contracts without being registered to do so contrary to section 22 of the Act, holding himself out as being registered to trade futures contracts contrary to section 52 of the Act and by diverting monies provided to him by W.E. for investment purposes for his own personal use, the Respondent contravened the Act and engaged in conduct contrary to the public interest.

IV. TERMS OF SETTLEMENT

22. The Respondent agrees to the following terms of settlement:

- (a) pursuant to subsection 60(1), paragraph 3 of the Act, the exemptions contained in Ontario commodity futures law permanently will not apply to the Respondent;
- (b) pursuant to subsection 127(1), paragraph 2 of the *Securities Act*, the Respondent will be prohibited permanently from trading in any securities with the exception that after one year from the date of the approval of this settlement the Respondent is permitted to trade securities for the account of his registered retirement savings plan (as defined in the *Income Tax Act (Canada)*);
- (c) pursuant to paragraph 8 of subsection 60(1) of the Act and paragraph 8 of subsection 127(1) of the *Securities Act*, the Respondent will be prohibited permanently from acting as an officer or director of any issuer;
- (d) pursuant to subsection 60(1), paragraph 6 of the Act and subsection 127(1), paragraph 6 of the *Securities Act*, the Respondent will be reprimanded by the Commission; and
- (e) pursuant to section 60.1 of the Act, the Respondent will pay the Commission's investigation and hearing costs of \$10,000.

V. STAFF COMMITMENT

- 23. If the settlement is approved by the Commission, Staff will not initiate any other proceeding against the Respondent in relation to the facts set out in Part III of this Settlement Agreement.

VI. APPROVAL OF SETTLEMENT

- 24. Approval of the settlement set out in this Settlement Agreement shall be sought at the public hearing of the Commission scheduled for March 6, 2002, or such other date as may be agreed to by Staff and the Respondent (the "Settlement Hearing").
- 25. Counsel for Staff or the Respondent may refer to any part, or all, of this Settlement Agreement at the Settlement Hearing. Staff and the Respondent agree that this Settlement Agreement will constitute the entirety of the evidence to be submitted at the Settlement Hearing.
- 26. If this settlement is approved by the Commission, the Respondent agrees to waive his rights to a full hearing, judicial review or appeal of the matter under the Act and the *Securities Act*.
- 27. Staff and the Respondent agree that if this settlement is approved by the Commission, they will not make any public statement inconsistent with this Settlement Agreement.

28. If, at the conclusion of the settlement hearing, and for any reason whatsoever, this settlement is not approved by the Commission or an order in the form attached as Schedule "1" is not made by the Commission:
- (a) this Settlement Agreement and its terms, including all discussions and negotiations between Staff and the Respondent leading up to its presentation at the Settlement Hearing shall be without prejudice to Staff and the Respondent;
 - (b) Staff and the Respondent shall be entitled to all available proceedings, remedies and challenges, including proceeding to a hearing of the allegations in the Amended Notice of Hearing and Amended Statement of Allegations, unaffected by this Settlement Agreement or the settlement discussions/negotiations;
 - (c) the terms of this Settlement Agreement will not be referred to in any subsequent proceeding, or disclosed to any person, except with the written consent of Staff and the Respondent or as may be required by law; and
 - (d) the Respondent agrees that he will not, in any proceeding, refer to or rely upon this Settlement Agreement or the discussions/negotiations or the process of approval of this Settlement Agreement as the basis for any attack on the Commission's jurisdiction, alleged bias or appearance of bias, alleged unfairness or any other remedies or challenges that may otherwise be available.

VII. DISCLOSURE OF SETTLEMENT AGREEMENT

29. Subject to paragraph 25 above, this Settlement Agreement and its terms will be treated as confidential by Staff and the Respondent until approved by the Commission, and forever if, for any reason whatsoever, this settlement is not approved by the Commission, except with the written consent of Staff and the Respondent, or as may be required by law.
30. Any obligations of confidentiality shall terminate upon approval of this settlement by the Commission.

VIII. EXECUTION OF SETTLEMENT AGREEMENT

31. This Settlement Agreement may be signed in one or more counterparts which together shall constitute a binding agreement.
32. A facsimile copy of any signature shall be as effective as an original signature.

DATED this 4th day of March , 2002

WAYNE S. UMETSU

DATED this 5th day of March , 2002

STAFF OF THE ONTARIO SECURITIES COMMISSION

(Per) _____
MICHAEL WATSON
DIRECTOR, ENFORCEMENT BRANCH