

# Re Schayes

IN THE MATTER OF:

**The By-Laws of the Investment Dealers Association of Canada**

**and**

**The Dealer Member Rules of the Investment Industry Regulatory  
Organization of Canada**

**and**

**David Guy Schayes**

2014 IIROC 42

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Alberta District)

Heard: March 4, 5 and April 3 and 4, 2014

Decision: September 15, 2014

**Hearing Panel:**

The Hon. H. Benjamin Casson, Q.C., Char, Mr. Martin Davies and Mr. Peter McWilliam

**Appearances:**

Mr. Tayen Godfrey, Enforcement Counsel

Mr. David Guy Schayes, the Respondent

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## DECISION AND REASONS

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### OUTLINE

- A. List of Witnesses
- B. List of Exhibits
- C. Review of Proceedings and Alleged Contraventions
- D. Summary of Written Complaint of H.G.D.
- E. Summary of Written Complaints of L.M.
- F. The Evidence of H.G.D.
- G. The Evidence of L.M.
- H. The Evidence of Gil Gauthier
- I. The Evidence of D.V.C.
- J. The Evidence of David Guy Schayes
- K. The Position of Enforcement Counsel
- L. The Position of the Respondent
- M. Analysis

N. Conclusion

**A. LIST OF WITNESSES**

**For IIROC:**

Gil Gauthier

L.M.

H.G.D.

**For the Respondent:**

D.V.C.

David Guy Schayes

**B. LIST OF EXHIBITS**

1. Book of Documents, Book 4 of 5
2. Book of Documents, Book 1 of 5
3. Book of Documents, Book 5 of 5
4. David Schayes – L.M. – Margin Account
5. Letter dated October 14, 2011, from Sean Barber (IIROC):

Re: Registrant: David Schayes

Complainant: L.M.

Our File No. 0689/11

Letter dated October 27, 2011 from: Y.J.S., Senior Associate, Regulatory Complaints Team CIBC World Markets Inc.

6. Book of Documents, Book 3 of 5
7. Book of Documents, Book 2 of 5

**C. REVIEW OF PROCEEDINGS AND ALLEGED CONTRAVENTIONS**

¶ 1 The Enforcement Department (“Staff”) of the Investment Industry Regulatory Organization of Canada (“IIROC”) conducted an investigation of written complaints of H.G.D. (“H.G.D.”) (Exhibit #3, Tab 17), and L.M.. (Exhibit #1, Tabs 22 & 23) against their former Investment Advisor and Registered Representative of CIBC World Markets Inc., David Guy Schayes (“Respondent”).

¶ 2 A Notice of Hearing dated April 8, 2013, was duly served on the Respondent.

¶ 3 The Respondent failed to respond, in any manner, to the Notice of Hearing.

¶ 4 Consequently, a Disciplinary Hearing was scheduled for May 13, 2013, in Edmonton, Alberta.

¶ 5 The Respondent, unexpectedly, appeared in person.

¶ 6 The Panel heard, and granted, an Application by Mr. Tayen Godfrey (“Enforcement Counsel”), consented to by the Respondent, to adjourn the Disciplinary Hearing *sine die*.

¶ 7 On February 4, 2014, an Amended Notice of Hearing (Exhibit #2, Tab 1) was duly served on the Respondent (Exhibit #1, tab 11) which set out the following alleged contraventions of the Investment Dealers Associations By-Laws and/or Dealer Member Rules of IIROC.

**Re: Complaint of H.G.D.**

**Count 1**

In September of 2006 and February of 2007, the Respondent made unsuitable recommendations for the account of H.G.D., contrary to IDA by-law 1300.1(q) (Dealer Member Rule 1300.1(q) after June 1, 2008);

### **Count 2**

Between April 2007 and March of 2010, the Respondent made unauthorized trades in the account of H.G.D., contrary to Dealer Member Rule 29.1 (Investment Dealer Association by-law 29.1 prior to June 1, 2008);

### **Re: Complaint of L.M.**

### **Count 3**

Between June of 2006 and September of 2008, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to L.M., contrary to Dealer Member Rule 1300.1(a) (Investment Dealer Association by-law 1300.1(a) prior to June 1, 2008);

### **Count 4**

Between June of 2006 and September of 2008, the Respondent made unsuitable recommendations for the account of L.M., contrary to Dealer Member Rule 1300.1(q) (Investment Dealer Association by-law 1300.1(q) prior to June 1, 2008); and

### **Count 5**

Between June of 2006 and September of 2008, the Respondent engaged in discretionary trading in the account of L.M., without the account first having been approved as a discretionary account, contrary to Dealer Member Rule 1300.4 (Investment Dealer Association by-law 1300.4 prior to June 1, 2008).

¶ 8 A Disciplinary Hearing commenced on March 5, adjourned to April 3, 2014 and adjourned, on completion of the evidence, on April 4, 2014.

¶ 9 The Panel heard evidence from five witnesses, three for IIROC and two for the Respondent.

¶ 10 Written Submissions were received by June 30, 2014, and Replies to those Submissions were received by July 25, 2014.

### **D. SUMMARY OF WRITTEN COMPLAINT OF H.G.D.**

¶ 11 In June, 2006, H.G.D. opened a registered account with CIBC Wood Gundy when the Respondent, who had been her investment advisor for ten years, joined the firm.

¶ 12 Prior to this transfer of her portfolio, the Respondent had managed her investments which consisted, only, of an RRSP account.

¶ 13 In September, 2006, H.G.D. received a \$110,000 settlement in a personal matter.

¶ 14 H.G.D. contacted the Respondent, and opened a non-registered account and requested that these funds be deposited in a money market fund in order that she could have immediate access to most of that amount to purchase a home.

¶ 15 On September 5, 2006, H.G.D. deposited \$110,000 with CIBC Wood Gundy.

¶ 16 H.G.D. made two withdrawals, each of \$10,000.00, on October 3, 2006 and February 6, 2007, from the \$110,000 which she believed had been deposited in a money market fund. She learned, however, that the balance of her \$110,000.00 after deductions of the two \$10,000.00 withdrawals was \$84,764.02, not \$90,000.00 as she had calculated.

¶ 17 H.G.D. subsequently learned that the Respondent had not deposited her \$110,000.00 in a money market fund but had purchased a portfolio of equities.

¶ 18 H.G.D. further learned that the Respondent had sold some of the equities and had used the proceeds to

purchase two deferred sales charge mutual funds.

¶ 19 H.G.D. acknowledges that she reviewed fund transfers that met the \$90,000.00 balance, however, she learned that the Respondent had removed \$5,500.00 from her RRSP account to make up the \$90,000.00 by way of a first time Home Buyers withdrawal from her registered retirement savings plan.

¶ 20 H.G.D. denies authorizing the Respondent to make such a withdrawal.

#### **E. SUMMARY OF WRITTEN COMPLAINTS OF L.M.**

¶ 21 L.M. opened a non-registered account with the Respondent, when he was with TD Waterhouse, in March, 2004, with a deposit of \$128,169.43.

¶ 22 The Respondent told L.M. that he could achieve for her a monthly income of \$5,000.00 if she were to pool her TD investments, pension and the proceeds of sale of her house in Fort McMurray.

¶ 23 Based on the Respondent's assurances, L.M. transferred \$939,225.13 to TD Waterhouse by December, 2005.

¶ 24 In April, 2006, the Respondent informed L.M. that her account totaled \$941,598.10.

¶ 25 In the summer of 2006, the Respondent moved to CIBC Wood Gundy and L.M. transferred her TD Waterhouse account to CIBC Wood Gundy.

¶ 26 During 2007, L.M.'s account at CIBC Wood Gundy totaled \$680,196.53.

¶ 27 L.M. noted from her monthly statements that the Respondent had made purchases of investments of up to \$80,000.00 without her knowledge or approval. L.M. requested of the Respondent that he call her before he made such investments.

¶ 28 L.M. learned from an assistant of the Respondent that the Respondent had used margin to buy securities and saw monthly interest payments of \$791.63 in June, 2007 and \$1,131.31 in September, 2007.

¶ 29 L.M. spoke to the Respondent about her concerns with the interest payments on November 17, 2007, and the Respondent spoke at length of how such borrowing led to earnings greater than the interest charged. The Respondent told her to trust him.

¶ 30 A March, 2008, summary of her account, received from the Respondent, showed a total of \$650,059.26.

¶ 31 L.M.'s final account balance received from CIBC Wood Gundy in September 2008, showed a total of \$537,382.09, however, by the time L.M. had obtained a new financial advisor, that total was reduced to \$409,235.71 which, according to L.M., amounted to a loss to her of \$300,000.00 from August, 2005.

#### **F. THE EVIDENCE OF H.G.D.**

##### **(a) Examination by Enforcement Counsel**

¶ 32 H.G.D. testified that she met with Respondent in the late 90's through a referral by a friend.

¶ 33 At that time, she had a direct deposit RRSP account.

¶ 34 When shown Exhibit "6", Tab 20, p.1, H.G.D. identified the deposit to her non-registered account of \$110,000.00 on June 9, 2006.

¶ 35 When shown Exhibit "6", Tab 17, H.G.D. identified a letter of complaint dated November 24, 2010, that she had sent to Mr. Fred Patton, Manager, CIBC Wood Gundy. H.G.D. testified that she wrote the letter after noting in her tax return that, apparently, she had made a first-time Home Buyer's withdrawal from her RRSP account which shocked her.

¶ 36 H.G.D. explained that she had severed a relationship with her partner in 2006 and had received a settlement from the sale of their house in the amount of \$110,000.00. H.G.D. met with the Respondent and asked him to invest the funds in a money market fund so she could have easy access to the money if needed.

¶ 37 H.G.D. did not know, until she met with a new financial advisor, that her funds were not invested in a money market fund but had been invested in a variety of equities and deferred sales charge mutual funds.

¶ 38 H.G.D. was shown Exhibit 6, Tab 21, p. 2 (Proposed Portfolio Additions H.G.D. Margin Account) which is reproduced as follows:

**PROPOSED PORTFOLIO ADDITIONS**  
**G. D.**  
**MARGIN ACCOUNT**

\$110,000 ✓

10,000 into monthly investing - 100,000 ✓  
 Invest

**Fixed Income**

Manulife Interest Savings Account (MIP510) 4.0%  
 50,000 into Real Return Bond

**Consumer Goods**

15% Liquor Barn Income Fund (LBN.UN - TSX) 15,000 ✓  
 Current Price - \$12.59, 12 Month Target - \$15.00  
 Yield - 6.3% per annum, paid monthly

10% Golf Town Income Fund (GLF.UN - TSX) 1200 ✓  
 Current Price - \$11.30, 12 Month Target - \$14.00  
 Yield - 10.5% per annum, paid monthly 859 ✓

**Utilities**

10% Epcor Power LP (EP.UN - TSX) 310 ✓  
 Current Price - \$31.59, 12 Month Target - \$36.50  
 Yield - 7.98% per annum, paid monthly

**Oil and Gas**

10% PennWest Energy Trust (PWT.UN - TSX) 225 ✓  
 Current Price - \$46.28, 12 Month Target - \$54.00  
 Yield - 8.82% per annum, paid monthly

**Mutual Funds**

10% 15 Guardian Monthly High Income Fund ✓ 66,260  
 10% 15 TD Dividend Fund 7,088.20  
 10% 15 Bissett Dividend Income Fund 7,443.03

Investment Property

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15.5

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¶ 39 The following exchange between Enforcement Counsel and H.G.D. appears at pp. 277 and 278 of the Transcript of Proceedings commencing at line 14:

- Q. I'm going to turn you to page 21. Or, sorry, Tab 21. And the second page. Do any of these investments look familiar to you that are listed there?
- A. Well, it's got my name on it as far as – but I don't recall exactly what this is for.
- Q. Do you recall any discussion with Mr. Schayes in regards to these?
- A. I don't recall offhand. I'm not saying I didn't have the conversation with him. But I don't recall. I don't have a copy of this document.
- Q. Do you recall – sort of I was asking you general conversations regarding these. Do you recall any questions about – from Mr. Schayes regarding investing in any of these or any directions – giving any direction to invest in these?
- A. Definitely not in a margin account. I've never held – as far as I knew. I don't even know what a margin account is. I knew I had an RRSP account with him and I knew that I had requested that money – specifically the \$110,000 that I had, I had specifically requested that that go in a money market fund. And that was my understanding of where that was going to be invested.

¶ 40 Enforcement Counsel referred H.G.D. to Exhibit 6, Tab 19, p. 21 and, specifically, a transaction involving the purchase and sale of Global Equity and a TD Real RTN Bond for \$5,944.77 and \$9,886.94, respectively. Asked if she recalled these transactions, H.G.D. replied “No. I know nothing about this.” (*Tr. p. 278, line. 25*)

¶ 41 H.G.D. testified that she did not recall any conversations with the Respondent about transactions involving her RRSP account. At p. 279, lines 8 to 10, H.G.D. stated:

“I never had any intention of withdrawing any money out of that account ever. It was a growth, a long-term growth, investment for me.”

¶ 42 Enforcement Counsel referred H.G.D. to Exhibit 6, Tab 19, p. 14, and, specifically, to an entry on April 23, 2007, i.e. “Transaction Type – Withdrawal – Home Buyers Withdrawal - \$5500.00”. When asked if she would have had any discussions with the Respondent regarding this, H.G.D. replied “No. Definitely not.” (*Tr. p. 200, line 19*)

**(b) Cross-Examination by Respondent**

¶ 43 Under cross-examination by the Respondent, H.G.D. re-affirmed what she had stated in her letter of complaint to Fred Patton, Manager, CIBC Wood Gundy and in her evidence-in-chief that:

- She just learned that the deposit of \$110,000.00, which was deposited with CIBC Wood Gundy on June 9, 2006, was not invested in a money market fund, as she had requested of the Respondent, when she met with a new financial advisor in 2010.
- She did not authorize, nor have any knowledge of, a First-Time Home Buyers Plans withdrawal from her RRSP account.
- She had no knowledge of, or a recollection of any discussions with the Respondent in respect of the sale of any Golf Town Shares or an investment in Liquor Barn.

**G. THE EVIDENCE OF L.M.**

**(a) Examination by Enforcement Counsel**

¶ 44 L.M. testified that she first met the Respondent in 2003 having heard positive things about him from other investors.

¶ 45 L.M. had previously received investment advice from I.H., in whom she had full confidence, however, I.H. ended her career as an investment advisor.

¶ 46 In March, 2004, L.M. was single, owned a house in Ft. McMurray and was employed as an Instructor at

Keyano College, Ft. McMurray, with an annual salary of \$70,000.00.

¶ 47 In March 2004, L.M. opened a non-registered account with the Respondent as a Registered Representative of TD Waterhouse with a deposit of \$128,169.43.

¶ 48 L.M. met with the Respondent in April, 2005, and discussed her plan to retire at age 55. The Respondent advised her that if she pooled her investments at TD Waterhouse, the proceeds of the sale of her house in Ft. McMurray and the proceeds of her pension, then the portfolio allows her to receive a monthly income of \$5,000.00.

¶ 49 L.M. stated that in April, 2005, she had \$941,000.00 to invest which included her savings of \$200,000.00, the proceeds of the sale of her house of \$510,000.00 and the value of her pension.

¶ 50 Before leaving for Manitoba, L.M. recalled the Respondent telling her not to worry about the principal. (*Tr. p.136, ll. 11 & 12*)

¶ 51 L.M. transferred \$939,225.13 to TD Waterhouse in December, 2005.

¶ 52 L.M. married in August, 2005, and she and her husband left Ft. McMurray for Manitoba in September, 2005.

¶ 53 Enforcement Counsel asked L.M. how often she communicated with the Respondent, the following exchange appears:

A. Occasionally he would call about something. Like, I think it was annually or periodically. I don't know how often. He would send a printout of kind of what the total was with a little comment written on it and I know when I took the first payment before I got – I asked: Is \$5,000 okay? Is that too much? No, no, it's fine. And then as I kind of watched the balances. I would phone periodically. Sometimes I would get to talk to him, but more likely it was someone that worked under him.

Q. Okay. Do you know who it was you spoke with when you were talking with someone who was under him?

A. Was it D.V.C.? Ben Someone, I think. Younger fellow. I can't think of his name. I can see him. I'm sorry. I can't think of his name. Towards the end. It was this young person I'm trying to think of. He was the one that –I just phoned and asked for him because I rarely got David.

Q. Would that be Ben?

A. No. It's someone that left. Sorry. That left the – that left the company at one point.

Q. And so who would – so if you did contact or if you had communications with him, who would be initiating that contract generally?

A. After a while it got to be me, because I would get the statements and generally I would look at the total, and if the total was fluctuating a lot, I would phone and I would ask, but it was usually me just asking – asking questions, because lots of times there was no one to answer. By the end, there wasn't one.

Q. You mentioned you looked at the total. Was there anything else you looked at when you reviewed your statements?

A. I really didn't understand it.

Q. When you did have communications or whether it was you contacting or Mr. Schayes' office contacting you, what were those discussions like? What kind of things did you talk about?

A. I would ask what fluctuations – why some of the changes, and I would get answers, like, well, the market is fluctuating, there has been a little bit of a down, and in a couple of months it will probably be okay. So when I look back now, they were kind of placating statements, and I heard them, and I – this is an investor. This is someone that I chose that’s supposed to be a professional and – and so I – I trusted.

Q. Did you ever contact with your own trades?

A. With my own --

Q. With your own trades? Did you ever have your own trades? Like, where you --

A. No.

Q. --instructed someone to --

A. No.

Q. -- make purchases?

A. No.

Q. No?

A. No.

*(Tr. p. 136, ll. 13 – 27; p. 137, ll. 1 – 27, p. 138, ll. 1 – 18)*

¶ 54 Enforcement Counsel asked L.M. if she had any discussions with the Respondent about specific trades. The following exchange appears:

A. I know sometimes if something had been mailed, I would have that in front of me, and I would ask questions, and I would write down notes, but I don’t have any --

Q. Sorry, Could you be a little more – something that was mailed. Can you describe what that was?

A. Oh, like – I say – I can’t remember how many times. A couple of times a year, once a year, I would get a kind of a printout saying: Oh, things are looking good. And so it would be on there that I would see something to question. I would receive papers that I would look at and stash away in my file box, if there had been trades, and there seemed to be a lot sometimes, and sometimes I would ask: Why so many trades? Well, it made sense economically to move something. Something wasn’t doing well. We moved it into something else. And it wasn’t often David. It would be other people who were telling me this.

Q. Okay. So you’re saying that there would be trades. You had these conversations that things would be moved and stuff like that. Did those conversations take – just to be clear – did those conversations take place before or after – after the trades?

A. Sometimes before. Sometimes – often I would be phoning because I would see a \$50,000 trade, a \$30,000 trade. Something that was a big amount. And I didn’t know why or what, and I would sometimes see a fee – a transaction fee, and I’d think there’s a lot of money going to that and wondered – I requested – I asked why, and at one point I said I would like to be called, because my former investor called me for 3,000 to 6,000 and I remember one time David saying: You want me to call? I said: Yes. So I got a few calls and then no calls again.

*(Tr. p. 138, ll. 21 – 27; p. 139, ll. 11 – 26)*

¶ 55 In the summer of 2006, the Respondent moved to CIBC Wood Gundy and L.M. opened a margin

account with him.

¶ 56 Enforcement Counsel asked L.M. if she was aware that she had opened a Margin Account. The following exchange appears:

- A. I guess so, yeah, because I would see something on a statement.
- Q. Okay. Did you have any discussions sort of as time went on in regards to margin in your account?
- A. Again, I don't know what it is. I remember one time seeing – two or three months in a row seeing a negative mark, and so I don't know if this is related to that or not, but by the time I figured it out, I found out that David had borrowed money that I didn't realize, and at one point it was – I think it was \$186,000, and by the time I figured it out, I was paying for a few months, over a \$1,000 in interest.
- Q. Roughly when do you think you figured that out or how did you – how did you figure that out?
- A. I don't know. 2007? It's in there somewhere. For a few months I just saw the negative – a negative sign, and I didn't know what it meant. So at one point I phoned, and that's when I found out there had been some borrowing.
- Q. And who did you talk to when you phoned?
- A. I don't remember. Somebody else.
- Q. Do you recall any of the details of that discussion?
- A. That's when I found out that there had been a borrowing on my behalf that I wasn't aware of. (*Tr. p. 141, ll. 4 -27*)
- A. I don't know if this was the time – there was one time—like, I initially signed with him before – this is when he was making a move, and one of the times in the office – and I think this was it, because my husband was there. I was – had all these forms. There were people coming in and out of the office. David was on the computer. My husband is a chatty person. All this conversation was going on, and I was trying to read, and at one point, David said: This page says this, sign here. This page says this, sign here. And that's what I did. But I had never done that in my life before. I had always read right through, but I was finding it so hard to concentrate.
- Q. So you're not sure. This may be that form but --
- A. I think this is, because I think that's one of the few times that my husband was there. I only met David four or five times, I think. So my husband was there.
- Q. We'll keep that in mind as we go through that. I was asking you, though, in regards to the investment. (*Tr. p. 145, ll. 9 – 27*)

¶ 57 Enforcement Counsel referred L.M. to Exhibit 1, Tab 25, Documents “A”, “B”, “C” and “D” (Know Your Client Forms of Wood Gundy). L.M. testified that apart from her signature, the Know Your Client Forms were completed by the Respondent, in her presence, in June, 2006.

¶ 58 At p. 2 of Document “A” of Exhibit 1, a box is captioned as “Investment Experience” and a tick appears on the rating as “good”. Enforcement Counsel asked L.M. if she agreed with that assessment and the following exchange appears:

- A. Whether good – I think something was said to the effect of: You've invested before. You have an idea how things work. So that was it.

Q. Okay. And it goes—next to that, under “Past Experience”, there is some boxes that are also ticked off that talks about past experience, and there is, I believe, GICs, stocks, bonds, mutual funds.

A. So I guess that’s what would have been in the portfolio.

*(Tr. P. 146, ll. 1 – 11)*

Q. Mr. Godfrey: And just to be – I guess perhaps I’ll just clarify this point. I think you did – you – and I guess I only touched upon it. This isn’t your handwriting?

A. No.

Q. Is that correct?

A. No.

Q. Okay. So you didn’t fill this form in?

A. No.

*(Tr. p. 146, ll. 19 – 27)*

¶ 59 Enforcement Counsel referred L.M. to Exhibit 1, Tab 23, p. 3 and notes recorded by L.M. under the heading: “Communications with David and his staff” and, specifically, to a note of November 15, 2007, as follows:

Nov. 15, 2007 David: Talk about volatile market. Medium long term investment fine for me. Cash flow is about \$4500 per month---a challenge. I asked about negative numbers. He explained he had borrowed to make money. He will pay down the loan with RRSP profits. He will be careful to ensure no penalties and taxes are efficient. He will shave down the line of credit so less interest is paid. Will shift more to foreign content which is making money.

Later look back I see figures as follows:

May 2007 Statement:- 150,015.32

June 2007 Statement: - 127,119.06, interest - \$797.63

July 2007 Statement: -\$157,779.78; interest - \$735.72

August 2007 Statement: -\$183,727.94; interest - \$1023.16

September 2007 Statement: -\$184,784.25, interest - \$1131.31

October 2007 Statement: -\$189,915.41 interest - \$1101.86

November 2007 Statement: -\$125,567.70, interest -\$1170.16

Figures for 2008 varied from a high of \$-116,562.91 to a low of \$38,473.81

¶ 60 Enforcement Counsel asked L.M. to elaborate and explain the note of November 15 and the following exchange appears:

A. That would be the first time that he would have said to me that – with that \$4,500 cash flow, it was a challenge to be sending the money to me. I – I think back to maybe without touching the principal or whatever. I’m not sure. And then I just looked back after that to see the statements, and this is the – the dollar amount at the beginning is – when I knew what I was looking for, this is what was – what was borrowed, and beside the interest is what I was paying out each month on what he’s borrowed. So the highest it got was \$189,915 at one point, and I wasn’t aware at that time that that was happening ‘til afterwards.

- Q. And when you saw those numbers or that number, particularly the \$183,000 and what not, did you have a conversation with Mr. Schayes?
- A. There is a gap there. I would expect I tried to contact – this – many times I would phone though and I couldn't get anyone. That just made me sick to look at the interest paid out. So I would have had a conversation at some point with someone.
- And I don't know when, but I talked at two different times to someone else from outside. It's in my – somewhere in – my letters. One was an investor in Edmonton. He said: You're taking far too much. This isn't right for you.

¶ 61 When asked by Enforcement Counsel what her overall impression was of the list of borrowed monies, L.M. replied:

- A. Yeah, I felt sick. I didn't remember any authorization, any discussion on this, and it – and to see the interest going off like that...I worked really hard and did a lot of without over the years, and to see money going to interest...I never had loans that – very rarely. Got a mortgage paid off in 11 years. You know? I didn't carry anything that gave me interest any more than I had to. So to be giving that away, I was really annoyed, you know. Upset, disappointed.

**(b) Cross-Examination by Respondent**

¶ 62 Under cross-examination by the Respondent, L.M. testified as follows:

- a) She had never purchased a GIC. (*Tr.*, p. 172, ll. 9 – 11)
- b) She had never herself purchased a stock. (*Tr.*, p. 172, ll. 12 – 15)
- c) She had no recollection of what sort of investments her former investment advisor, I.H., had purchased on her behalf. L.M. trusted her judgment. (*Tr.p.* 173, ll. 22 -26, p. 174, l. 18)
- d) She agreed with the Respondent her portfolio was worth approximately \$939,000.00 when she met with him to discuss her retirement and their objective was to provide her with a monthly income of \$5,000.00 and keep the capital safe. *Tr. P.* 175, ll. 18 -23)
- e) She guessed that she withdrew about \$140,000.00 from her account between July 26, 2006 and September 2008, and that was for a court case (\$36,000.00) and to purchase a house (\$120,000.00) (*Tr.p.* 176, ll. 18 – 27, *Tr. p.* 177, ll. 1 – 3)
- f) She stated that the calculation by IIROC of withdrawals of \$266,900.00 didn't seem right. *Tr.p.* 177. Ll. 4 – 7)
- g) She was a math teacher at Keyano College for many years. She taught math to Grade 9 and in the last five years she wrote two textbooks because the math curriculum had changed in Alberta. She was just focused on how they do multiplication, division and timetables and a little bit of trig.
- h) She was not able to calculate basic interest calculations. (*Tr. p.* 178, ll. 2 – 23)
- i) When she needed to withdraw money from her account, she would try to contact the Respondent but if he was not available, she would request the funds and explain the reasons for the request. (*Tr. p.* 180, ll. 6 – 19)
- j) She could, if she wished, check her investments online. (*Tr. p.* 196, ll. 20 -22)
- k) She didn't pay a lot of attention to changing global economic conditions between 2006 and 2008 and did not call CIBC Wood Gundy to express her concerns regarding global economic conditions between 2006 and 2008. (*Tr. p.* 198, ll. 8 –

20).

- l) She agreed that she would have discussed with the Respondent the section or areas of the economy in which her funds were invested but did not recall any discussions about oil and gas. (*Tr. p. 199, ll. 22 – 27, Tr. p. 200, ll. 1 – 3*)
- m) She left CIBC Wood Gundy on October 29, 2008, and moved to Canaccord with an account balance of \$531,382.00. (*Tr.p. 200, ll. 26 – 2727; Tr. p. 201, ll. 1-2*)
- n) She rarely watched the news in 2008; didn't recognize the name Lehman Brothers and didn't understand what was taking place in the global economy. (*Tr. P. 204, ll. 12 – 27; Tr. P. 205, ll. 1 – 4*)

¶ 63 Referred by the Respondent to her note at page. 5, Exhibit 1, Tab. 23, i.e.

“April 18, 2007 David: Telling me about good yields. Mining, uranium, gas. Positives: oil and gas up. Summer drives things up.”

L.M. stated that she recalled the conversation and stated:

- A. I don't know if it was or not because sometimes when I would talk to you, if I had a question, I would feel like I was being placated with. Look at this, this is happening, don't worry. Like that one other down in December 21. It felt like it was a – it felt, when I go, trust me. It sounds good, and I don't know what further to question. And these will just be a line or two to show some of the transactions. It's not detailed. Some of them I had pages written or I've had a document that I had written on and it would come in the mail, like a statement. (*Tr.p. 208, ll. 12 – 23*)

¶ 64 Referred by the Respondent to Exhibit 1, Tab 23, p. 6 and L.M.'s note as follows:

Sept. 26, 2008 D.V.C. (30 minutes on phone!) He says he has talked with David. Options: I should withdraw \$4500 per month in October and November. We discussed:

- 1. Move to more tax friendly environment;
- 2. Lira. He suggests higher yielding funds.
- 3. Reduce income to \$3000 – hopefully to keep even.

Says much of what is lost equals market fluctuation. Therefore more of principal lost.

An exchange appears as follows:

Q. MR. SCHAYES: Then if you flip to the next page, September 26<sup>th</sup> – September 12 and September 26<sup>th</sup>. Do you recall having discussions with D.V.C. on either of those days?

A. If I put down 30 minutes, that's probably one of the longest conversations that I had. So September 12<sup>th</sup>?

Q. And what recollections of those conversations do you have?

A. Well, the first one would have been I would have called for you obviously and Don would have come on and said that you were away until that date, and I didn't—like I said, I didn't want this to go down any further. And, again, just – that would be the total at that time.

And his comments: “It's a Wall Street creation/aggressive markets gone wild”.

So that's the gist of what we talked about

And the 26<sup>th</sup>, 30 minutes. He said he would talk with you. And then the answer, I

guess, to everything dropping is that I should drop what I'm taking per month. So that's where the 4,500 came from. And then his discussions, just as options or whatever.

Q. So you gave us, or D.V.C., instructions that you didn't want to plummet more?

A. No. Yes. I gave him instructions.

Q. And how did you believe that was going to be achieved?

A. I don't know. That's why I was phoning to ask. I was watching the totals go down and I'm wondering why.

Q. Do you think a transaction would need to transpire in order to facilitate that?

A. Maybe I was just looking for some truth. Because when I phoned, I felt like I wasn't being listened to, and I'd get these things like, oh. The markets up 22 points today, there's all these various things that we can do in the future, and if we wait a couple of months, it's going to be better. I guess I was feeling I was in that kind of situation where I wasn't getting any answers, and I didn't feel like anyone was listening to me.

Q. M-mm. So would it be fair to say that you were frustrated --

A. Yes.

Q. --over this situation?

A. Yes, of course. This is my life earnings we're dealing with.

Q. Yes. So then you had another conversation on the 26<sup>th</sup> that was much longer?

A. Yes.

Q. Okay. And D.V.C. mentions to you that he has talked with me and we, from what I gather from your notes, were obviously trying to look for a strategy?

A. M-mm.

Q. Would that be fair --

A. Yes, but I don't -- I didn't come away feeling anything had been decided. He was just saying these are things to look at.

*(Tr. p. 210, ll. 1 – 27; Tr. p. 211, ll. 1 – 27; Tr. p. 212, ll. 1 – 2)*

¶ 65 Referred by the Respondent to Exhibit 1, Tab 25, Documents "A", "B", "C" and "D", and, specifically, to the box captioned "Investment Knowledge indicated "good" and the box captioned Past Experience indicating "stocks, bonds, mutual funds and GIC's", the following exchange appears:

Q. MR. SCHAYES: And this is the page that deals with estimated total of liquid assets: total assets, million dollars; income; investment knowledge, which on the form indicates good; past experience. Do you recall filling this form out with me, Ms. L.M.?

A. Like I said before, I recall being in your office and a lot of activity and you talking with my husband and I was trying to read it.

Q. Do you recall me asking questions such as your social insurance number, date of birth, address, those kinds of things?

A. You may have. You had that from before, I don't recall.

Q. Okay. Do you recall me asking if you've ever invested in GIC's, stocks, bonds, or

mutual funds?

A. I think – I’m guessing that was filled in from what I had brought in to – this is when you were changing. This is 2006, right? So this is when you had changed?

Q. Yes, this is the form we filled out while you were in my office.

A. So all of this you would have known from what was being carried over from the other firm. So I don’t remember specifically discussing this. I remember coming to “investment knowledge” and saying I don’t know what to put, and you said something to the effect, You have invested before, you have an idea, or something; and I said okay, and you checked off “good”. I remember that.

Q. I said, Well, you’ve invested in bonds, yes? And you said yes. GIC’s? Mutual funds? And You said yes. Does that sound familiar?

A. Maybe. I don’t remember. (*Tr. p. 213, ll. 5 – 27; Tr. p. 214, ll. 1 – 9*)

## **H. THE EVIDENCE OF GIL GAUTHIER**

### **(a) Examination by Enforcement Counsel**

¶ 66 Mr. Gauthier testified that he was the Manager of Investigations for IIROC, held a Bachelor of Commerce Degree, and a designation of “Chartered Accountant”. His experience included twelve years with IIROC, seven years with the Vancouver Stock Exchange and the Canadian Venture Exchange and seven years with the Alberta Securities Commission.

¶ 67 He became aware of complaints by L.M. and H.G.D. involving the Respondent, and, in his capacity as Manager of Investigations, conducted interviews as follows:

- August 19, 2013, by telephone, with H.G.D. (Exhibit 7, Tab 16)
- July 26, 2012, by telephone, with L.M. (Exhibit 3, Tab 36)
- May 28, 2013, in person, with the Respondent

¶ 68 He requested all documents relative to L.M.’s accounts including any notes, account statements and account – opening forms.

¶ 69 He explained the “Know Your Client” Rule as follows:

“Those are the information about the client’s personal circumstances, including such things as the client’s investment knowledge, their income, their age, their stage of life, whether they are working or retired, their network, and that sort of thing.” (p. 21, ll. 14 – 18)

¶ 70 He testified that L.M. had received no financial courses, had little understanding of the financial world or how the markets work. (p. 24, ll. 25 – 27); (p. 25, ll. 1 – 3)

¶ 71 He was asked by Enforcement Counsel if anything struck him as significant after reviewing the essential facts in the “Know Your Client” forms. He replied:

“The forms indicated that Mr. L.M. was retired. She was approximately 55, 56 years of age at the time that she completed those forms, and that she—the net worth—she had net worth of—I think it was 800,000 liquid net worth, and income of \$45,000. (p. 26, ll. 12 -16)

¶ 72 He testified that the opening balance of L.M.’s account with CIBC Wood Gundy, on September 30, 2006, was \$890,635.00.

¶ 73 He testified that in order to achieve a monthly income of \$5,000.00 without affecting principal, a 6.7% return on investments would be required. This, he stated, would need a medium level of risk and some exposure to equity markets. (p. 29, ll. 25 – 26)

¶ 74 Asked to comment on L.M.’s risk tolerance, he stated:

“Yes, I concluded, given her age, the fact that she was retired, and relying on her funds at CIBC Wood Gundy for income, and she had no other source of income, that she was essentially a conservative, low-risk investor.” (p. 30, ll. 2 – 5)

¶ 75 Asked by Enforcement Counsel if he had conducted a suitability analysis of L.M.’s account, the following exchange appears:

A. Yes. I took three points in time over the approximately 26 months that the account was held at CIBC and reviewed the securities of that account – those accounts.

Q. Okay. I’m going to ask you to look at those briefly, but before you do that, can you discuss the methodology you used regarding classifying holdings?

A. Yes. As far as classifying holdings as between low, medium, and high risk, I typically took bonds, government bonds, and most corporate bonds and classified those as low risk investments. Investments such as income trusts and equities, especially blue chip equities, I typically classify those as medium risk investments. These are securities that trade on the TSX.

Q. Okay. Can I take you to tab—this is to—back to Book 5, Exhibit 3, to Tabs 34 and 35, and can you briefly tell us what those are and take us through them.

THE CHAIRPERSON: Go Ahead.

Q. Sorry, Mr. Gauthier. Could you explain these?

A. Yes. This is an analysis – the results of my analysis. I took three months – three month-ends, the first one, December 31, 2006. And the margin account, for instance, had a market value of – the securities in the account were valued at \$488,040. I determined that low risk securities in that particular account totaled \$89,741, medium risk securities totaled \$398,299, and that income generating securities totaled – were valued at \$340,095. Growth securities were valued at \$147,945.

So I did that analysis for each of the accounts, and I came up with a total at the bottom. The low risk securities comprised 30 percent of the accounts. The medium risk securities comprise 70 percent and then, over to the right, the total of the income securities comprise 72 percent of the account, and the growth securities were 28 percent of the account.

I did the same analysis as of December 31, 2007. The numbers changed slightly. The low risk securities I calculated at 21 percent of the accounts. The medium risk securities were now 78 percent, and there was one security, was a high risk security, 2 percent. And then the income-generating securities totaled 63 percent of the accounts. The growth securities were 37 percent.

And then I did a calculation at September 30<sup>th</sup>, 2008, shortly before the account was closed, and again, the numbers are fairly close to the previous two analyses. The low risk securities, I determined, were 19 percent, the medium risk securities were 75 percent of the accounts, high risk 6 percent. Income-generating securities comprise 62 percent of the accounts, and growth securities comprise 38 percent.

Q. Did you comprise a profit/loss analysis as well?

A. Yes, I did. On Tab 35, bottom half of the page, I show that when the accounts were transferred in, the value of the accounts – the accounts were valued at \$890,635. The value of the – Ms. L.M. withdrew \$266,900 over the time that she

had the accounts with CIBC. And the value of the securities in the accounts at September 30<sup>th</sup>, 2008 was \$537,382. So I have calculated a loss of \$86,353 over the 26 months that she had the account.

(p. 30, ll. 18 – 27); p. 31, ll. 1 – 27); (p. 32, ll- 1 – 27); (p. 33. ll. 1)

¶ 76 On April 4, 2014, Mr. Gauthier was recalled by Enforcement Counsel to correct his loss calculation of \$86,353.00 to \$81,974.00.

¶ 77 Referred by Enforcement Counsel to Exhibit 1, Tab 28, p. 3, (Account Activity of July 1, 2001), he testified that L.M. had a margin account which carried a margin debt. On December 1, 2006, the negative balance of the account was \$33,094.73. (p. 34, ll. 19 – 21)

¶ 78 Referred to Exhibit 1, Tab 28, p. 4, (Account Activity to December, 2006), he testified that on December 29, 2006, the Respondent purchase three securities:

- Excel India Fund DSC (\$10,000.00)
- Finning International (\$23,322.00)
- Toronto Dominion Bank (\$34,410.00)

Those three purchases, he testified, increased the negative cash balance in the margin account by \$67,733.00 to a total of \$111,015.75 by December 29, 2006. (Exhibit 1, Tab 28, (Account Activity December 2006))

(p. 34, ll. 24 – 27); (p. 35, ll. 1 - 4)

¶ 79 He testified that, with reference to Exhibit 1, Tab 28, that L.M.'s statement showed a negative cash balance of \$127,119.06 as of June 29, 2007, and an increase to \$157,779.78 as of July 31, 2007 – an increase of \$30,000.00. (Exhibit 1, Tab 28, p. 4 (Account Activity July, 2007))

¶ 80 He further testified that at August 31, 2007, the negative balance reached \$183,727.94 with the purchase of UTS Accuity Small Cap Corp. for \$20,000.00.

¶ 81 Asked by Enforcement Counsel to comment on the use of margin and its suitability he testified:

“I concluded that the use of margin for a person that -- in her mid to late 50's, retired, relying on accounts—solely relying on her account for her income, with fair investment knowledge, that use of leverage in this situation was unsuitable for her.” (p. 36, ll. 15 – 19)

¶ 82 He testified that the use of margin in an account increases the risk level of that account as a result of the leverage being used. (p. 36, ll. 6 – 8)

¶ 83 Asked by Enforcement Counsel to explain the purpose of Dealer Member Rule 1300.4 (re: Discretionary Trading), the following exchange appears:

A. This rule is in place in order to—that registered representatives obtain firm instructions from their client of any trade before the trade, before the order is put through.

Q. Are there any special features of an account like that?

A. Yes, there are – a firm can have a discretionary account whereby the registrant is not – is not required to talk to the client in advance of each trade, or there are managed accounts that essentially are the same thing.

Q. Is there any difference in supervision for those accounts?

A. There are – there is additional supervision required on the accounts that are marked as discretionary or managed accounts, but this – the account for Ms. L.M. was not a discretionary account or was not a managed account.

Q. Were any of the accounts?

A. No.

Q. Okay. So I'll just take you back again to ---

MR. DAVIES: Sorry, Mr. Godfrey. Did I understand that to say that you asked Mr. Gauthier: were any of the accounts discretionary? Is this referring to two accounts that were in the accounts that are listed in the Notice of Hearing or are you asking about all the accounts that were registered under Mr. Schayes?

MR. GODFREY: I'm asking about all the --sorry, I'm asking about the accounts in regards to Ms. L.M. that he reviewed.

MR. DAVIES: Oh, any -- all the four accountants that she has.

MR. GODFREY: Four, yes.

MR. DAVIES: I understand, yeah.

Q. MR. GODFREY: I'll just take you back briefly to second-last paragraph. That's the third sort of sentence in. Could you read the rest of that paragraph?

A. "I asked him to speak with me before he made some of the big purchases I was being notified of--some \$30,000, some as high as \$80,000. He said, "You want me to call you?" and I said yes. But transactions continued although not in numbers as high as the \$80,000 transaction. When my statements came, I noted the changes in the principal and filed the statement away. The reason I had an investor was to take care of my money."

Q. And what, if anything, did you take away from that?

A. I concluded from that that Ms. L.M. is indicating that Mr. Schayes was not talking to her before making trades in her account.

Q. And do you know how many trades were conducted in her accounts, like CIBC?

A. Yes. I calculated 89 trades were made while she had the account with CIBC. (p. 37, ll. 7 – 27; p. 38, ll. 1 – 27; p. 39, ll. 1 – 8)

**(b) Cross-Examination by the Respondent**

¶ 84 In answer to a question concerning Gauthier's determination that L.M.'s investment knowledge was "fair" as opposed to "good", Gauthier replied:

A. I spoke to Ms. L.M. two or three times. The last time I spoke to her about this issue, I -- I asked her about her education and her investment experience, investment knowledge, whether she had taken any investment courses of any sort, and she said that she had not.

Q. And when you asked her about her previous investment experience, what did she tell you?

A. I don't recall.

Q. Did she tell you she had invested in stocks, bonds, mutual bonds for a period of 10 to 15 years prior to meeting me?

A. I had noted in her account statement at TD that there were equity securities in the account, yes.

Q. And did you note on the client information file that when it said "previous investment experience", it indicated that she had previously invested -- from

previous to TD – in stocks, bonds, and mutual bonds? Did you note that on the --

- A. Yes, I believe it did say that, yes.
- Q. Okay. Were you aware that she was a math teacher teaching at a college level for many, many years?
- A. I was aware that she taught at Keyano College in Fort McMurray, yes.
- Q. And it would be your opinion that if someone is teaching math at a college level, they should have a basic understanding of interest, dividends, and how interest and dividends, basic returns are calculated?
- A. They may understand how interest is calculated, but doesn't mean that they have any understanding of the financial markets and the risk levels of different securities.
- Q. Approximately how long did the discussion take before you came to your conclusion?
- A. I think the last discussion, one – I guess the fullest discussion I had with her might have taken 30 to 45 minutes. (p. 41, ll. 15 – 27); (p. 42, ll 1 – 24)

¶ 85 He was referred to an analysis, which he had done, on L.M.'s margin account and was asked how many buys and sells were processed during the period. He replied: thirteen buys and thirty sells. (p. 43, ll. 22 - 27)

¶ 86 When asked if he questioned L.M. as to why she didn't question anybody or write when she claimed she was having transactions that she knew nothing about, he replied:

- A. Yes, we did discuss that, and Ms. L.M. was unaware that the registrant is required to call her in advance of any trade being made. She thought that – that you, as her advisor, was perfectly – it was perfectly legal for you to make trades without calling her. She wasn't aware of those rules, and so that's why she wouldn't have complained on receipt of the statement. She didn't – didn't realize until much later that you were required to speak with her before every trade.
- Q. Thank you. She – this statement was sent to her 24 times in 24 months. She never read it, even though she thought something was going wrong in her mind, and she did nothing about it. Is that correct?
- A. No, I don't think she – she told me that – I'm just referring to my notes here. She was aware of – she received trade confirmation in the mail. She confirmed that to me. But again, she had no understanding that you were required to speak to her and obtain her confirmation of every trade before the trade went through. So yes, she acknowledged receiving information from the firm showing that trades had taken place, but did not understand the rule with respect to how trades were required to be authorized by her in advance. (p. 63, ll. 2 – 25)

¶ 87 When asked by the Respondent if, at any time throughout her notes or any conversations she had with him, L.M. ever gave any indication that she sold a security or bought a security with her instructions, he replied “No, she did not. She said she did not give any instructions or confirmation to purchase or sell any security.” (p. 85, l. 27) (p. 96, ll. 1 – 2)

¶ 88 When asked if, in any conversations he had with L.M., she ever referred to any transaction, specifically, that was a discretionary transaction, the following exchange appears:

- A. She advised me that she was aware that trades were going through her account because she received trade confirmations but she never talked to you or any assistant about the specifics of the trades.

- Q. If we go back to page 5 of her notes, the second paragraph, she's going:  
Transactions: Statements arriving in 2007 varied amounts.  
Isn't she talk about – don't those numbers refer to specific transactions?  
MR. GODFREY: So you're referring to the second paragraph?
- Q. MR. SCHAYES: Second paragraph on page 5 of her record of communication.  
She's referring to:  
Transactions: Statements arriving in 2007.  
My question is, does that not indicate that she has some input and understanding of what's---  
A. She's listing a series of numbers here, dollar amounts.
- Q. Well, \$47,699.78, to be exact, is the amount of the switch from the TD Global Dividend Fund to the TD Monthly Income Fund, as an example.
- A. Yes, she indicated that she was aware that trades were being made – but, again, she claimed that she never confirmed the details of those trades ahead of time.
- Q. You say she claims she never had those details ahead of time, yet she refers to the conversation on September 5<sup>th</sup>, 2007, with D.V.C., that he will get U.S. content out. Well, in your opinion, what did she think that meant?  
A. That, I can't answer what she was thinking of at that time.
- Q. Well, I'm asking what you think. Does that not lead to we were going to do something?  
MR. GODFREY: I think, again –  
THE CHAIRPERSON: I'll allow the question, Mr. Godfrey.  
MR. SCHAYES: I mean, I'm just looking for common sense.  
THE CHAIRPERSON: No, No. Aren't we all?  
MR. SCHAYES: Yeah.  
THE CHAIRPERSON: You don't have to answer the question if you feel you can't answer it.
- A. I can answer it this way. She indicates a discussion with D.V.C. about U.S. content, and there's no indication that there is any discussion about a sale of Global Dividend – or, sorry, a sale of Monthly Income Fund and purchase of the TD Global Dividend Fund. Those specifics are not in this note. (p. 99, ll. 5 – 57) (p. 100, ll. 1 – 26)

¶ 89 On the issue of suitability, and referring Gauthier to Exhibit 1, Tab #28, p. 3 of Statement of December, 2006, the following exchange appears:

- Q. MR. SCHAYES: So on the statement on page 3 of 6, it indicates there's \$429,285.72 of mutual funds.  
A. Yes.  
Q. On your account analysis sheet, you show \$89,741 as low risk and \$398,299 as medium risk. Could you explain to me how you came about that breakdown, please?  
A. Yes. If you turn to page 2 of 6 --

- Q. On the statement?
- A. Yes. I took each security, and I allocated them as to the low, medium, and high risk. The two low risk securities were the TD Real Return Bond Fund \$50,497.
- Q. Okay.
- A. And the TD Monthly Income Fund, I took 50 percent of that amount, 25,559. I allocated 50 percent to low risk, 50 percent to medium risk since that particular fund typically held 50 percent in bonds and 50 percent in equities and income trust.
- Q. I'm sorry, which one – was it the Guardian one you were referring to?
- A. TD Monthly Income Fund.
- Q. Oh, TD Monthly Income Fund. Okay.
- A. 25,559.
- Q. So 25 low and 50 medium?
- A. And --
- Q. Where did the other 25 percent go?
- A. And then the National Bank – well, there was actually three securities. The National Bank Mortgage Fund, \$26,464, I also allocated that to low risk.
- Q. Okay.
- A. Those three allowances total \$89,741.
- Q. So just to recap, all of the National Bank Mortgage Fund--
- A. Yes.
- Q. --allocated as low risk. So then – yea, so then we get no allocation for the TD Dividend Income Fund, the Guardian Monthly High Income Fund, TD Global Dividend Fund, correct?
- A. No allocation to low risk for those funds?
- Q. Yes, no percentage.
- A. That's correct.
- Q. When you were doing your analysis, sir, did you look at the prospectus and the holdings of those particular funds?
- A. Yes, I did. On many of these I did, yes.
- Q. Looking at the breakdown of mutual funds, would it be fair to say that the bulk of the funds in this account at this time were income mutual funds?
- A. Yes, I would agree.
- Q. Okay. Thank you. And so in terms of suitability for Ms. L.M.'s investment objectives, would you say that this portfolio was suitable for her investment objectives for her requirement for income?
- A. You're referring just to the margin account?
- Q. Just to this particular account with the holdings we have right now.
- A. I didn't look at it in isolation. I looked at all three of her accounts combined and

made my assessment on suitability.

Q. When I look at your calculations, there is a little to no change in the value of the LIRA account and RRSP account over that period of time, and there appears to be little to no change in the risk category for the LIRA and the RRSP account. So I guess my question to you is, where do you find that there is a suitability issue with respect to Ms. L.M.'s account at this point in time? Is it in the margin account: Is it in the RRSP accounts?

A. I've taken all three accounts combined and make my assessment on the suitability.

Q. So there is a suitability issue with each of the accounts?

A. In total.

Q. Well --

A. I didn't look at each account specifically and make an assessment as to whether the security was suitable. I combined all three accounts and made my assessment based on the totals.

Q. When you look at your suitability when you did your analysis, Mr. Gauthier, did you compare the suitability with the Know Your Client Form?

A. Yes, I'm aware of the objectives and risk tolerances on the Know Your Client Forms, and yes, I compared those to the risks that I've come up with here in my analysis.

Q. And when you did that, did you find that we were within the parameters established when the accounts were opened, or did we exceed those parameters at any time during the time we managed Ms. L.M.'s accounts?

A. Well, the Know Your Client Forms, most of the accounts – the risk tolerances, I believe, were 40 percent high risk and 60 percent medium risk and zero low risk. So yes, the months that I looked at, the amounts were within the risk parameters. There were very few high risk securities in the months I looked at, yet the Know Your Client Form show a 40 percent allocation to high risk.

Q. So in your opinion, the investments that were held in the portfolio were much more conservative than what the Know Your Client Form reflected?

A. Yes, I agree.

Q. Is that correct?

A. Yes

(Tr. p. 102, ll. 19 – 27); (Tr. p 103, ll. 1 – 27); (Tr. p. 104, ll. 1 – 27); Tr. p. 105, ll. 1 – 27); (Tr. p. 106, ll. 1 – 27);

(Tr. p. 107. Ll. 1 – 27)

## **I. EVIDENCE OF D.V.C.**

### **(a) Examination by the Respondent**

¶ 90 D.V.C. testified that he was with Richardson Greenshields from September, 1979 to November, 1986; with Wood Gundy from November 1986 to April, 200; with National Bank Financial from April 200 to 2002 (in the capacity of Registered Representative, Compliance Officer and Senior Branch Administrator); absent from the investment business due to illness from 2002 to 2007; and again with Wood Gundy as of May 31, 2007.

¶ 91 He met the Respondent at National Bank Financial around 1996.

¶ 92 He had a long, after-hours meeting with L.M. in September, 2008. The meeting lasted several hours. He had done extensive research into L.M.'s account and answered her questions as completely and fully as possible.

¶ 93 He had several telephone conversations with L.M. in September, 2008.

¶ 94 D.V.C.'s dealings with L.M. are covered in the following exchange with the Respondent:

Q. MR. SCHAYES: And did you and I share any particular specific frustrations with the respect – with respect to that particular account?

A. Yes. That – you know, that Ms. L.M. had a great deal of difficulty making a decision. And that we would make suggestions of recommendations. We would talk about, you know, that she was withdrawing too much money from her account, you know. And that – and also that Ms. L.M. on several occasions telephoned to express her concerns.

She would – in my opinion, was aware of the value of her account. And that she asked good questions, solid questions. You know, she was knowledgeable to it, to the account, in terms that it – you know. And that she, along with a great many other people, were having a lot of issues because of September of 2008 was a terrible time.

People were seeing account balances drop daily. Stock market was in a deep – a steep decline. You know, that – it was this – we talked about – we used the term global downturn, yes. And that – you know, that – as I – her quote was regress of the markets gone wild in terms of that.

So it was an extremely difficult time. In that month and the month following. I probably worked many 14- hour days. And there was – you know, people were – you know, it was extremely uncomfortable.

Q. Had you/or, to the best of your knowledge, myself had discussions with her regarding reducing the extra withdrawals she had been taking out of the portfolio and/or reducing her monthly income?

A. We talked about both of those items. In my meeting with Ms. L.M., and I'm over-answering the question, she kept talking about this \$930,000 account. And in my notes – and unfortunately they're not here with us but it – but we never received \$930,000 when it transferred from TD. The transfer amount, according with the statements, was somewhere in the neighbourhood of \$860,000.

And I reinforced to Ms. L.M. on more than one occasion that she had withdrawn beyond what we had recommended and that if she was to take the – subtract the withdrawals from the dollar amount that we received, you know, it's more to the point of the value of account. The day of over \$900,000 was years ago. It wasn't in the now.

And the frustration of that was – you know like, I showed her statements. Here, you have withdrawn x number of dollars, you know, in terms of that. And – so – we – that –she was aware of the fact that she had taken the money as to the – it doesn't return to the statement.

A. Well, I think I answered that in the fact that she kept coming back to this number. And the reality was significantly less. And that—and the reality was she had withdrawn at that time in excess of \$200,000 from the amount of money that we

received in the – on the transfer in.

I don't have the exact numbers in front of me in terms of that. But, you know, it had been withdrawn. And she had made those requests, you know, that we would send out the monthly – electronic funds transfer and she would ask again or – you know, it – you know it.

Q. MR. SCHAYES: Did you have further discussions with Ms. L.M. over the period of time, D.V.C.?

A. I – the key discussions were in September of 2008. But I had talked to her on the telephone numerous times in the year in front of that. She would call the office in – as per her outline and want to have an explanation in regards to her account.

Q. And would you discuss specific investment recommendations with her at any point?

A. I would discuss specific holdings.

Q. And when you recommended a change, did she agree with the change?

A. She was always reluctant to give you an answer. It would be I'll call you back, or I'll have to think about it. It wasn't – I – she was slow to make decisions.

Like, I – when I had talked to her, I would – you know, I would tell her about a security, a holding, and, you know, then I would – said you could talk to David about it later or you can think about it and call us back.

But, you know, it was somebody that was aware of what she held and couldn't come to grips with the changes that were occurring. And it was a particularly difficult time. (Tr. p. 310, ll. 12 – 27); (Tr. p. 311, ll. 1 – 27); (Tr. p. 312, ll. 1 – 27); (Tr. p. 313, ll. 1 – 27); (Tr. p. 314, ll. 1 – 27);

¶ 95 Over the objection of Enforcement Counsel, i.e. that D.V.C. is not an expert, the Chair allowed this question:

Q. D.V.C., in your years of experience with analyzing portfolios, and I know you spent many hours analyzing Ms. L.M.'s portfolio, do you find in your professional opinion any investments in there that you find unsuitable for Ms. L.M.?

A. Well, the majority of the account was income focused. As to a small percentage of the account, I wasn't part of the conversation that, you know, recommended a particular holding. But for – the vast majority of the account was designed to earn income. You know, it was there to earn income, as far as those holdings were.

And in a large – very large percentages of holdings were in mutual funds. So, you know, it wasn't a question of an individual's deciding on this position or that position. You were buying professional advice. You were buying the advice of well-established mutual funds. (Tr. p. 314, ll. 25 – 27); (Tr. p. 315, ll. 1 – 19)

**(b) Cross-Examination by Enforcement Counsel**

¶ 96 D.V.C. had no notes of his conversations of meetings with L.M.. He stated that he took notes but the notes and his files, from the days when he was with the Respondent at Wood Gundy, were in the account files to those accounts which were distributed to other brokers.

¶ 97 D.V.C. stated that he spoke to L.M. quite a number of times in the office and the Respondent, who was often out of the office, was not present.

¶ 98 During this period, there was a team of four: the Respondent was the Investment Advisor. If a client

phoned about their account and the Respondent was away, he would speak to the client.

¶ 99 D.V.C. stated that at this time when he was in contact with L.M., the office had in excess of 1200 clients and in excess of 600 family accounts.

## **J. EVIDENCE OF DAVID GUY SCHAYES**

### **(a) Evidence in Chief**

¶ 100 With reference to Count #3 involving the complaint of L.M., i.e.

*between June of 2006 and September of 2008, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to L.M., contrary to Dealer Member Rule 1300.1(a) (Investment Dealer Association bylaw 1300.1(a) prior to June 1, 2008).*

¶ 101 The Respondent noted that L.M. stated that she kept 24 telephone records from June, 2006, to September 2008. 16 of those were to the Respondent, directly, and the remainder were to the other three members of the Respondent's investor team.

¶ 102 He stated that during this period there were two in person meetings with L.M. in his office: (Tr. p. 329, ll. 23 – 27) (Tr. p. 330, ll. 1 – 3)

¶ 103 The Respondent testified that:

- a) There was an investment proposal, agreed to by L.M. and himself, which (according to L.M.) was 21 pages in length. (Tr. p. 330, ll. 9 – 14)
- b) L.M. did not keep him informed about changes which she made that affected the terms of their agreement. (Tr. p. 330, ll. 4 – 9)
- c) The agreement provided for a payment to L.M. of \$5,000.00 per month from her accounts. L.M., he stated, withdrew \$271,900.00 from her accounts between June, 2006 and September 2008. Their agreement stipulated withdrawals of \$13000.00.

¶ 104 He stated that L.M.'s evidence that her investable assets totaled \$939,000.00 was not true because she withdrew \$271,900.00 from her accounts with Wood Gundy and made two withdrawals of \$10,000.00 and \$25,000.00 when her accounts were with TD Waterhouse. (Tr. p. 330, ll. 21 – 27); (Tr. p. 331, ll. 1 -4)

¶ 105 With reference to Count #4 involving L.M.'s complaint, i.e.

*between June of 2006 and September of 2008, the Respondent made unsuitable recommendations for the account of L.M., contrary to Dealer Member Rule 1300.1(q) (Investment Dealer Association by-law 1300.1(q) prior to June 1, 2008).*

¶ 106 The Respondent testified that as of December 9, 2006, L.M.'s Margin Account held securities that produced 80% income with a 20% growth component. Her RRSP Account held securities with a 74% income and 26% growth; and her LIRA Account held securities with 79% income and 21% growth. (Tr. p. 332, ll. 5 – 9)

¶ 107 The Respondent stated that L.M.'s portfolio mix was within the guidelines for L.M.'s investment objective as stipulated in L.M.'s new client application form. (Tr. p. 332, ll. 5 – 23).

¶ 108 With reference to Count #5 involving L.M.'s complaint, i.e.

*between June of 2006 and September 2008, the Respondent engaged in discretionary trading in the account of L.M., without the account first having been approved as a discretionary account, contrary to Dealer Member Rule 1300.4 (Investment Dealer Association by-law 1300.4 prior to June 1, 2008).*

¶ 109 The Respondent testified as follows:

“No discretionary trading of any kind occurred in Ms. L.M.'s account. In the 26-month period,

Ms. L.M.'s own records show 24 phone calls from her to my office. We made numerous phone calls from our office to her. She admits to having some discussion regarding investments, but can't remember any particulars. However, she does not deny that conversations like that could have occurred. In particular, she recalls part of the conversation that she and I had on April 18, 2007, when we discussed adding mining and uranium to her portfolio. And there are corresponding transactions that were generated subsequent to that conversation, but she doesn't remember the particulars.

I did have a discussion with her, and I did make investment recommendations that she add two particular securities to her account during that time. She also had several conversations with staff members: however, doesn't recall specifics, even though my staff do recall specifics.

No discretionary trading ever took place in any account of Ms. L.M., and her complaint is received three years after she transferred her account out from Wood Gundy, even though she had confirmation slips, monthly statements, and, as she states, 26 of her conversations she initiated between herself and CIBC Wood Gundy." (Tr. p. 333, ll. 13 – 27)

¶ 110 With reference to Count #1 involving the complaint of H.G.D., i.e.

*in September of 2006 and February of 2007, the Respondent made unsuitable recommendations for the account of H.G.D., contrary to IDA by-law 1300.1(q) (Dealer Member Rule 1300.1(q) after June 1, 2008).*

¶ 111 The Respondent testified that H.G.D. was not clear about what exactly took place on September, 2006, at an in-office meeting where H.G.D.'s account was opened, investment objectives discussed and funds deposited.

¶ 112 The Respondent referred, in his testimony, to Exhibit 6, Tab 21, (Proposed Portfolio Additions –H.G.D. – Margin Account) and stated as follows:

“On September the 6<sup>th</sup>, I had an in-my-office meeting with Ms. H.G.D., which she says may have happened, but she doesn't recall if it happened for sure or not, but she does have some memory of it. She was depositing \$110,000 to a non-registered investment portfolio and directed me to deposit, of the \$110,000, \$10,000 in a money market fund that she could access at any time, and the balance of funds could be invested but would need to be available to her, should she decide to purchase another residence or an investment property.

We had done up a portfolio recommendation sheet, which we do in every case for clients who are investing large sums of money. And that is Exhibit 21 in Book 3 of 5.

And I had that sheet out on my desk during the meeting, and we were discussing the recommendations. And you'll note, in handwriting, that there are some changes made to it, and those changes were made as a result of discussing this with Ms. H.G.D.. She wanted different weightings changed, and we discussed the different securities and the benefits of each and the risk parameters. And I recall, also, during that meeting, she was discussing that perhaps she may use this money sometime down the road to purchase an investment property, but she wasn't sure.

At no time did she tell me she was thinking of buying a house with the money within a year. I asked her several times during the meeting what the time horizon was, and she told me, at the meeting, two to three years, but she wasn't sure. She just wanted to make sure she had some money available, and she needed to have \$10,000 available immediately, which is why she wanted it put in a money market fund. This meeting lasted approximately an hour and a half. And this was left in her client file, and IROC obtained it from CIBC.

Yes, I had asked her about the time horizon, and she said, “I am not really sure” I questioned her several times during our discussion, as we looked at the yields on the various investments. And Ms. H.G.D. felt she was satisfied with these recommendations and the yields they provided. I

specifically remember her not being happy with the yield on money market funds.”

(Tr. p. 334, ll. 21 – 27); (Tr. p. 336, ll. 8 – 27)

¶ 113 With reference to Count #2 involving her complaint of H.G.D., i.e.

*between April of 2007 and March of 2010, the Respondent made unauthorized trades in the account of H.G.D., contrary to Dealer Member Rule 29.1 (Investment Dealer Association by-law 29.1 prior to June 1, 2008).*

¶ 114 The Respondent testified as follows:

“On February 6<sup>th</sup>, 2007, Ms. H.G.D. called our office requesting her money market account to be liquefied and \$10,000 transferred to her Scotiabank bank account. This was authorized by her, and we processed the transaction the same day.

During this same telephone conversation, I mentioned to Ms. H.G.D. that her Gold Town shares, which she had only owned for five months, had generated a profit in excess of \$1,000 plus the dividends, and I recommended she sell the shares, take the net \$1,000 profit, and split it into two investments, China and India fund. We discussed this at that point in time, as she had no exposure to any of these sectors in her portfolio, and we agreed that it was a good idea.

When I asked Ms. H.G.D. what the \$10,000 was for, she told me the \$10,000 was for an investment. She did not mention to me during this conversation that she was thinking of purchasing a home.

On April 9<sup>th</sup>, Ms. H.G.D. called our office requesting that we transfer the balance of the funds in her non-registered account to her Scotiabank account. She indicated to me she was purchasing a home. During this discussion I had with Ms. H.G.D., I pulled her account up on the system and noted that the value of some of her investments was down. We discussed this and that it was not a good time to sell some of her shares.

I asked her why she was buying a house so soon after just moving, and she told me that she had changed her plans. I told her I would need a few minutes to do some calculations on how to redeem her funds in the best possible scenario, and could she give me a few minutes to do this, and I would call her back. I printed out her investment portfolio and spent a few minutes going over the securities and trying to figure out a scenario whereby she could sell them and recoupe the most money. At the time, as I recall, the account was down in value approximately \$5,000.00 from the total.

I called her back in 15 minutes, having looked up prices, and told her that if we liquidate everything today, depending on closing prices, there would be a shortfall of approximately \$5,000. She was unhappy about this and wondered why the downfall and what it was relating to. I stated that there were three securities, EpcO, Penn West, and Liquor Barn, which were down in value. I also explained to her that in order to keep the redemption fees low, we could sell fee-free shares in her RRSP and swap them for the shares in the non-RRSP. This would reduce her costs and not result in a transaction fee with respect to the swap. I did spend several minutes explaining what a swap was to Ms. H.G.D.. Ms. H.G.D. said, go ahead and sell what you need to, to get this thing working.

She was concerned about the account being down \$5,000 at that time and had stated that she required the extra sum. And I said that if she wanted to, she could set up a small line of credit, or, if need be, she could take it from her RRSP.

Several phone calls between Ms. H.G.D. and myself took place between April 9<sup>th</sup> and 24<sup>th</sup>. On several occasions during this period, Ms. H.G.D. called my office and asked what the amounts of funds were that had been sold and what the amount of the transfers were to her bank account. I provided this info to Ms. H.G.D., as requested.

During one of our conversations, Ms. H.G.D. indicated to me that she would transfer \$5,000 from her RRSP to her cash account to make up for the shortfall. Although about a year ago, it was brought to my attention that this was processed incorrectly as a Homebuyers withdrawal and not a regular dereg. It took some time to have this corrected, including Ms. H.G.D. having to provide us with the original incorrect tax receipt and a copy of her Notice of Assessment. This transaction was not fixable by myself, but was turned over to my assistant and our branch administrator for correction. It is my understanding from Ms. H.G.D. that it was finally corrected, and it took approximately two years to have that done.

To summarize, Ms. H.G.D.'s complaint comes over four years after the fact of when she received nine different confirmation slips, when her investments were originally made. Detailed monthly statements were sent to her each and every month. When questioned about the investment time frame for investing funds, in Ms. H.G.D.'s own words, she said she gave none. Ms. H.G.D. states that her tax problem was finally resolved and that she received a settlement from CIBC. And those are my comments on Ms. H.G.D.. “ (Tr. p. 336, ll. 15 – 27);

(Tr. p. 337, ll. 1 – 27); (Tr. p. 338, ll. 1 – 27); (Tr. p. 339, ll. 1 – 21)

**(b) Cross-Examination of the Respondent by Enforcement Counsel**

¶ 115 The Respondent admitted that the only notes he had of conversations with H.G.D. were those made on Exhibit 6, Tab 21 (The proposed Portfolio Additions –H.G.D. – Margin Account).

¶ 116 The Respondent could not recall completing the first-time Home Buyers Withdrawal Form from H.G.D.'s RRSP Account. He knew that H.G.D. had owned several houses before and would not be eligible for the first-time Home Buyers Program.

¶ 117 He testified that he had a personal relationship with H.G.D. for over 15 years and during that time there were many conversations about investments and H.G.D.'s portfolio.

¶ 118 Enforcement Counsel referred the Respondent to L.M.'s new client application form and the uncompleted entry under “Income”. The Respondent replied that L.M. was still working and did not require any income. Her income needs changed after her retirement.

¶ 119 Enforcement Counsel suggested to the Respondent that L.M. retired as a result of his advice. The Respondent replied as follows:

“Well, we don't tell people to retire. She asked – we did a number of projections, and she asked me what kind of income she could generate based on the capital she had, and I provided her with a 21 page report based on an investment mix. I think the return we felt was reasonable at the time, overall, was about 6.7 percent, based on historical data, which would generate her a return of about \$5,000 a month. And she felt that that was adequate, and she made the decision to retire.”

¶ 120 Enforcement Counsel questioned the Respondent on the risk levels stated in L.M.'s Know Your Client Form, i.e. 60% medium; 40% high for a 55 year old woman. The Respondent replied that those risk levels were conservative and her investments never reached those levels.

¶ 121 Enforcement Counsel questioned the Respondent about margin, risk and suitability for L.M.. The Respondent replied that L.M. was aware that margin incurred risk and when he suggested to her that she should reduce her margin debt, she refused to sell any securities. He stated that L.M. did not like to make decisions so he used managed money (income mutual funds) for this purpose.

¶ 122 Enforcement Counsel referred the Respondent to Exhibit 1, Tab 28, (Statement for July, 2006, disclosing a purchase, on margin, of Excel India Trust for \$25,000 and a statement for August, 2006, disclosing a purchase, on margin, of UTS Activity Small Cap. Corp. for \$20,000).

The Respondent responded as follows:

- A. Yes, we discussed them, and she indicates those in her notes.
- Q. And Ms. L.M. said, I'm fine with purchasing \$25,000 worth of this, to this security, on margin?
- A. We were trying to increase the return on the portfolio.
- Q. You were trying to increase the return. Ms. L.M. said, I'm fine with purchasing \$25,000, and then another \$20,000 on margin?
- A. Yes.
- Q. Okay. Despite the fact that she said it made her sick when she realized the amount of debt, correct?
- A. I don't recall her telling me it made her sick. (Tr. p. 366, ll. 11 -22)

¶ 123 A further exchange between Enforcement Counsel and the Respondent on L.M.'s margin account follows:

- Q. And those are the margin levels?
- A. Yes.
- Q. And would you agree that for the life of the account, she had a margin balance. It started off at \$33,000?
- A. That's what it was when it was transferred in, yes.
- Q. And then it ended up around 52,000. And if you look down to December of 2006, and it goes all the way to December of 2007, the margin level for that whole year period is over \$100,000; is that correct?
- A. That's correct.
- Q. And then following that, the next one, two, three, four, five – five months, it's just below \$100,000; would that be fair?
- A. Well, starting in the fall, we tried to pay it down considerably. And we did, as you can see from the securities that were sold. It was paid down to \$125,000. We were trying to whittle the margin down.
- Q. And then in June of 2008, it goes back up to 116,000, correct?
- A. Yes, and then back down to 38,000 in July.
- Q. Would you agree that this is a fairly excessive amount of margin for a retired 55-year-old woman with no income, whose account balance started out with 930--
- A. Yes, I would. Yes, I would. (Tr. p. 367, ll. 10 – 27); (Tr. p. 36, ll. 1 – 6)

¶ 124 The Respondent was given an opportunity to respond to evidence heard in his cross-examination by Enforcement Counsel. He stated as follows:

“Well, yes. Mr. Godfrey asked me about Ms. L.M.'s margin account, and specifically in October of 2007, when the margin balance increased to \$189,000. During the two years that this sort of took place, Ms. L.M. and I and my staff had many, many, many discussions regarding the margin. It was sort of an ongoing issue. And one of the ongoing issues was Ms. L.M. had a desire to get a greater return on her portfolio. Another ongoing issue was her failure to come to grips with the fact that she had made large withdrawals. And she kept referring back to this 900 and some thousand dollars that she had started with. Well, the fact of the matter is she withdrew a lot of the money, and we didn't have \$900,000 to work with.

And so during this period of time, there were times when we – we were always in the mode that we wanted to pay the margin off. And then we would go through these discussions, where I want a better return, what can we do to get a better

Return and you'll see that from Ms. L.M.'s notes. She details that in her notes." (Tr. p. 369, ll. 11 – 27); (Tr. p. 370, ll. 1 – 3)

¶ 125 The Respondent refers to Exhibit 1, Tab 23, p. 4 (L.M. – Complaint Letter 2) and her note as follows:

"December 20, 206 David: He will take about \$50,000 to put in higher risk. \$5000 is not too much. Says we are not heavy spenders. Holdings are in conservative investments. He will take \$50,000 and put in higher yield to generate \$2000 to \$3000 per month in extra income."

And states:

"We had a discussion, and she wanted to increase the return on the portfolio. So we discussed a number of things, and we ended up putting \$50,000 into things that were – had a little bit more risk involved, to try and see if could generate a higher return on the portfolio. And Ms. L.M. was wanting to do that.

And back—I remember back in 2006, when we were doing this planning – and you had asked me, Mr. Godfrey, about how we came up with this 6 percent return and how we felt it was reasonable. We'd looked at annuity interest rates and long-term 20-year government bonds. And at the time annuity interest rates were paying 6 percent, and I think government 20 –year bonds are around 4 ½. And then, you know, you've got your various investment portfolios. And Ms. L.M. made the choice to go with an investment portfolio. We could have simply thrown the whole thing in annuity and be done with it, but she didn't want to do that.

And so, you know, in 2006, you have to remember, the market was doing much better, and nobody could foresee what happened over the next two years. Nobody foresaw what happened to the change of tax laws on income trusts. I mean, we're looking back six years now. Hindsight, being what it is, is 20/20.

But what I want to reiterate to you is that this margin was an ongoing thing from day one. And the reason that it ended up going higher is those were when we tried to – you know, Ms. L.M. had a desire to get a greater return on her portfolio, and so we made an attempt to do that. (Tr. p. 372, ll. 13 – 27)

## **K. THE POSITION OF ENFORCEMENT COUNSEL**

¶ 126 Enforcement Counsel submits as follows:

- a) IIROC's case rests heavily on the evidence of H.G.D. and L.M.. Their evidence was consistent; they had nothing to gain from testifying and, therefore, their evidence was believable and reliable.
- b) On the other hand, the Respondent's evidence was not "always in harmony with the surrounding circumstances, and, at times, strained the bounds of believability".

For example:

- i. Mr. Schayes had approximately 1200 accounts, comprising 600 families of accounts. He had no notes, with the exception of the few pages in regard to Ms. H.G.D. account. His testimony was in regard to client discussions and recommendations that spanned 5 to 8 years ago. Despite these impediments, Mr. Schayes' testimony was, at time, extremely detailed.

- ii. Despite the detail recalled about client discussions and recommendations, Mr. Schayes' evidence was not consistent on some of the larger issues such as the purpose for which Ms. L.M.'s CIBC account was set up. Mr. Schayes evidence on this issue was unreliable:
  - a. In his interview, he described how Ms. L.M. wanted her accounts to grow. He failed to remember that she needed income, and did not recall anything about the \$5,000.00 withdrawals;
  - b. In his testimony at the hearing, Mr. Schayes noted that Ms. L.M.'s CIBC accounts were intended to produce income;
  - c. When questioned about the fact that Ms. L.M.'s financial objectives in her NCAF's did not specify any income producing objectives, Mr. Schayes said it was because originally Ms. L.M. wanted growth. However, Ms. L.M. had retired about a year before filling out the CIBC NCAF's, which is inconsistent with a growth strategy. As well, Ms. L.M.'s margin account was set up for automatic \$5,000.00 withdrawals right after she transferred her accounts to CIBC (July of 2006).
- iii. In his testimony Mr. Schayes claims to have not read IIROC's Notice of Hearing, despite making it clear in his interview he went to IIROC.

¶ 127 On the issue of Suitability (Count 4 – L.M.), Enforcement Counsel submits that L.M.'s account holdings were unsuitable for her because they contained too much risk for a 55 year old retiree with no other sources of income. That risk is increased by the use of margin.

¶ 128 On the issue of Discretionary Trading (Count 5 – L.M.), Enforcement Counsel refers to IIROC Rule 1300.4 which provides as follows:

“1300.4 A Registered Representative may not exercise discretionary authority over a customer account unless:

- (a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;
- (b) the customer has given prior written authorization in compliance within compliance with Rule 1330.5;
- (c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval;
- (d) The Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and
- (e) The account is maintained at the Dealer Member of the Registered Representative.

¶ 129 Enforcement Counsel recognizes that the Respondent is not claiming that he had discretionary authority as required by IIROC Rule 1300.4, but that he sought approval from L.M. for all trades.

¶ 130 Enforcement refers to Exhibit 1, Tab 23 at page 8 (Communications with David and his staff) and submits that, in her testimony, L.M. stated that not one of the notes she made outlines a specific transaction.

¶ 131 Also, L.M. testified that trades were going through without her knowledge and referred to large trades of \$50,000.00 and \$30,000.00 of which she had no knowledge.

¶ 132 Enforcement Counsel concedes that L.M. had communication with the Respondent's office but not in respect of specific transactions.

¶ 133 Enforcement Counsel refers to L.M.'s evidence that she recalled a specific conversation when she directed the Respondent to seek her approval for big trades but they kept going through without her being

consulted.

¶ 134 On the issue of Unsuitable Recommendations (Count 1 – H.G.D.), Enforcement Counsel submits as follows:

- a) According to Mr. Schayes, Ms. H.G.D. is a former police detective who is very detail oriented. Her testimony could not have been more clear, and it was consistent with the letter she sent to CIBC:
  - i. She received \$110,000.00 as part of a settlement;
  - ii. She directed Mr. Schayes to invest that money in the money market as she was buying a house.
- b) Gil Gauthier introduced Ms. H.G.D. account statements and showed that only \$10,000.00 of Ms. H.G.D.'s deposit was invested in money market funds. The remaining \$100,000.00 was invested in:
  - i. Epcor Power;
  - ii. Golf Town Income Fund;
  - iii. Penn West Energy Trust;
  - iv. Bissett Dividend Income Fund;
  - v. BMO Guardian Monthly High Income Fund II;
  - vi. TD Real Return Bond Fund;
  - vii. TD Dividend Income Fund.

Mr. Gauthier testified that none of these were money market investments, but were mutual funds and Income Trusts.

- c) In addition to being unauthorized, the securities Mr. Schayes chose to invest in were not suitable for Ms. H.G.D.. This is not only because they were against her instructions, but also they were not suitable for her personal situation.
- d) Her intention was to purchase a property in the near future and she wanted easy and quick access to her money. Mr. Schayes initially invested \$30,000.00 of her deposit in funds with deferred sale charges. He then invested approximately \$11,000.00 more additional funds with deferred sales charges (\$41,000.00 in total).
- e) Both Mr. Gauthier, and Mr. Schayes testified that those fees are in place for approximately 6 years. Such an investment is not suitable for someone who is seeking quick access to her money for the purchase of a property. Such an investment is not suitable for someone who has clearly indicated they want to invest in the money market.

¶ 135 On the issue of Unauthorized Trading (Count 2 – H.G.D.), Enforcement Counsel submits as follows:

Ms. H.G.D.'s RRSP account statements revealed 34 trades which she did not approve, including an RRSP first time Home Buyers withdrawal. Ms. H.G.D.'s evidence in regard to her RRSP account was unequivocal: she did not authorize any transactions in her RRSP account beyond, those for her automatic deposit when the account was initially set up. Mr. Gauthier made clear in his testimony he did not include those transactions.

## **L. POSITION OF THE RESPONDENT**

¶ 136 On the issue of Unsuitable Recommendations (Count 1 – H.G.D.), the Respondent submits as follows:

- a) He did not have any access to the H.G.D. file from CIBC Wood Gundy.

- b) In late August, 2006, H.G.D. called CIBC Wood Gundy office to set up an appointment with him. On September 5, 2006, H.G.D. opened a non-registered investment account with CIBC Wood Gundy and told him that she had received a settlement of \$110,000 from a relationship break-up and wanted advice as to how to invest the proceeds. During the meeting, topics discussed with H.G.D. included current bond yields, GIC rates, money market rates, income trusts, dividend producing mutual funds, and blue chip stocks. The time horizon for the \$110,000 investment was discussed as well as risk factors.
- c) An account was opened with investment objectives of 30% medium term/70% long term, and 50% medium risk/50% high risk. During the 90 minute meeting H.G.D. told him that she specifically wanted the sum of \$10,000 of the \$110,000 to go into a money market fund. She stated that the reason for this is she wanted funds available to her on a short term basis.
- d) H.G.D. indicated that the balance of funds, \$100,000, would be available for longer term investment. When questioned about the time horizon for the remaining funds, H.G.D. was initially unclear. I specifically asked her whether she would be using funds to purchase another home, and she replied that "I have owned houses for a while and I do not want to get back into the housing market. I think it is too expensive, and I love the place I am living in now. I may look at an investment property of some kind a few years from now".
- e) H.G.D. indicated that it would be several years before she foresaw needing funds, but indicated she wanted flexibility in her choices and wanted to be able to have access to money from the portfolio.
- f) A number of specific investments were discussed with H.G.D. at the September 5<sup>th</sup> meeting including:
- TD Real Return Bond Fund
  - Liquor Barn Income Trust
  - Epcor Power
  - Penn West
  - Dividend producing mutual funds, Guardian Monthly High Income Fund, TD Dividend Fund, and Bissett Dividend Income Fund.
- g) H.G.D. agreed that the bulk of the \$100,000 was to be invested in "blue chip" type investments that produce income.
- h) He stated that he put together a proposal for H.G.D. with specific recommendations on September 6. The proposal was based on her investment goals and objectives, risk tolerance and time horizon. (Ref. Exhibit 6, Tab 21, p. 3)
- i) In the telephone call between myself and H.G.D. on September 6, 2006, we discussed investment recommendations. I noted that H.G.D. was not pleased with the money market interest rate of approximately 4%, and did not want to invest her funds at such a low rate. \$10,000 was allocated for the money market fund and she told me to increase the weightings of the three income mutual funds from 10% to 15% each.
- j) The resulting \$110,000 portfolio was invested accordingly: \$10,000 into the money market fund and \$100,000 in three income trust securities and the three mutual funds.
- k) The changes discussed during the conversation were noted by me on the proposed recommendations in the H.G.D.'s file, and the transactions were processed the same day.

In summary, H.G.D. purchased \$10,000 in the Renaissance Money Market Fund, \$10,000 in TD Real Return Bond Fund, and \$90,000 in income producing income trusts and diversified income producing mutual funds.

- l) All investment recommendations were made with H.G.D.'s consent, and were within her established risk tolerance time horizon and were consistent with her previous 10-year investment history with me.

¶ 137 On the issue of Unauthorized Trades (Count #2 – H.G.D.), the Respondent submits as follows:

- a) On April 16, 2007 H.G.D. telephoned me and stated that she was buying a house and that she required \$90,000 from her non registered account by May 1, 2007. I had an approximately 30 minute discussion with her and noted that markets were currently down a bit and that it was not a good time to sell the investments. I asked her why she was buying a house so soon after her funds were invested, and she stated that she changed her mind. I reviewed her portfolio in order to evaluate the best options for selling positions in the portfolio to raise the required funds. I remember mentioning that there may be fees and penalties associated with selling the securities. She understood and asked that I should look into the details. I reviewed both her non-registered and registered portfolios and prepared a best case scenario for her, keeping in mind the lowest possible costs and retaining the investments with the best potential.
- b) On April 19, 2007, I called H.G.D. back to discuss her options noting that her portfolio was down approximately \$4,800. Strategies discussed were selling positions in the RRSP account and processing a swap for the same securities. Swaps between the registered and non-registered accounts could retain the India and China funds that were purchased with deferred sales charges. The swap would allow her to withdraw the extra funds from her RRSP. Sales of a number of mutual funds and income trusts were discussed and processed that day. As a result, approximately \$65,000 worth of funds was transferred to H.G.D.'s bank account on April 10, 2007.
- c) Further discussions between myself and H.G.D. took place on April 10, April 13, April 16, and April 17, 2007 to process the remaining sales and make bank transfers. (Exhibit 6, Tab 2, pp. 4 – 9 inclusive) H.G.D. acknowledges receiving monthly statements, transaction slips, and tax information.
- d) In February, 2007, the India and China mutual funds that were purchased with deferred sales charges. The funds came from the proceeds of selling the Golf Town shares.
- e) All trades were discussed with H.G.D. over this period of time and no discretionary trading occurred on this account.

¶ 138 On the issue of Due Diligence/Know your Client (Count #3 – L.M.), the Respondent submits as follows

- a) During 2004, L.M. was employed by Keyano College in Fort McMurray, teaching college level math and had written and published a math text book. For several years, L.M. was a client of mine at TD Waterhouse.
- b) Early in 2004, L.M. and I had several in-person meetings to discuss her goals and objectives, risk tolerance, and previous investment experience. She indicated that she had approximately 15 years experience investing in stocks, mutual funds, and bonds. Her existing portfolio of approximately \$110,000 was at National Bank Financial. In March 2004 M decided to move her existing portfolio "in kind" from National Bank Financial to TD Waterhouse, and have me serve as her investment advisor.
- c) On April 1, 2005, I (now at CIBC Wood Gundy) and L.M. had an in person meeting where she told me that she was considering retirement within six months and wanted to know her financial options. During October, 2005, L.M. notified me regarding her retirement, and on November 3,

2005 she received a 21 page written proposal of investment options and cash flow projections from me.

- d) The proposal was not available to be presented into evidence.
- e) After several follow-up telephone conversations, I learned that L.M. had approximately \$900,000 to \$950,000 of investable assets and she stated that she wanted to be able to generate \$5,000 per month income from these assets.
- f) L.M. did not indicate that she would require a large lump sum withdrawal from these funds, such as for the purchase of a house. I stated during conversations with her that she had indicated that her new fiancé, later spouse, would be "getting them a house in Manitoba with a shop, so he could work on cars".
- g) According to L.M.'s records (Exhibit 1, Tab 23, pp. 3, 4, 5, 6), L.M. had discussions with me and office colleagues 20 times during the period of June, 2006 to September, 2008. Over this 26-month period of time, L.M. documents three in person meetings with me lasting 1.5 to 2 hours each, on August 3, 2006, November 15, 2007, and September, 2008.
- h) During each of the three meetings held in my office, the following practices were completed.
  - 1. Portfolio performance review.
  - 2. Market performance review.
  - 3. Portfolio changes.
  - 4. Client status update, major financial changes, contact information changes.
- i) During the August 3, 2006 meeting in the CIBC offices in Edmonton, L.M. did not mention a house purchase or need for additional funds than the \$5000 per month.
- j) On August 9, 2006, L.M. called me to say she had bought a house and needed \$124,000. She spoke to me and I said that I needed a few days to calculate the best case investment scenario for a withdrawal of this size.
- k) On August 21, 2006, I telephoned L.M. to discuss options. She agreed to sell Brascan, TD Dividend Income Fund (partial) and Dividend 15 split corporate shares. The proceeds were \$158,919 and the excess funds above \$124,000 were used to reduce the margin debit. During discussion, I asked L.M. about her new husband's plans to purchase a house and shop. She stated: "well, he has no money".
- l) On August 22, 2006, I transferred \$124,000 to L.M.'s bank account as per her instructions.
- m) Subsequently, I expressed concern over the erosion of capital to L.M.'s portfolio, and recommended a reduction in the monthly income being taken. Her response was to take no action in the account. It took several more discussions between L.M. and I before she agreed to reduce her monthly income from \$5,000 to \$4,500. I had recommended \$4,000 but she insisted on \$4,500, as she stated she could not afford any less.

¶ 139 The Respondent, in his written submissions, states:

"Unfortunately there is no literacy test for clients; inside the financial advisor/client relationship you think that you have an understanding of the clients' knowledge and situation. When the current performance comes into question, the client resorts to denial or selective memory, and understanding. This was very much evident during Ms. L.M. testimony at the IIROC March 2014 hearing. I made every reasonable effort to know my client during fact probing questioning. I remained abreast of Ms. L.M.'s essential facts."

¶ 140 On the issue of Unsuitable Recommendations (Count #4, L.M.), the Respondent referred to Exhibit 1, Tab 25A, p. 5 as follows:

<b>LIRA</b>	<b>BRSP</b>	<b>Cash Margin</b>
100% long term	Objectives - 100% long term	100% long term
Risk Factors – 60% medium 40% high	Risk Factors – 60% medium 40% high	Risk Factors – 60% medium 40% high

¶ 141 And, also, to the evidence of Gauthier (who did a risk analysis of the four accounts of L.M. as of December 31, 2006, December 31, 2007 and September 30, 2008) as follows:

<b>Date</b>	<b>Margin</b>
December 31, 2006	18% Low Risk 82% Medium Risk
December 31, 2007	13% Low Risk 84% Medium Risk 3% High Risk
<b>Date</b>	<b>Margin</b>
September, 2008	10% Low Risk 77% Medium Risk 13% High Risk

#### **RRSP Account**

<b>Date</b>	<b>Margin</b>
December 31, 2006	14% Low Risk 86% Medium Risk
December 31, 2007	100% Medium Risk
September, 2008	100% Medium Risk

#### **LIRA Account**

<b>Date</b>	<b>Margin</b>
July 31, 2006	65% Low Risk 35% Medium Risk
December 31, 2007	42% Low Risk 58% Medium Risk
September, 2008	37% Low Risk 63% Medium Risk

¶ 142 The Respondent submits that regarding investment suitability (according to Gauthier's calculations) L.M.'s investment suitability remained well under her stated risk. The risk profile for all accounts was much more conservative than the client's investment objectives.

¶ 143 The Respondent submits that overall total portfolio mix ranged from 30% low risk/70% medium risk in December, 2006 to 19% Low Risk/75% Medium Risk, and 6% High Risk in September, 2008; and, states that

the investments in her portfolio were more conservative than her portfolio objectives allowed, and were well within acceptable portfolio risk analysis for a retired person with income requirements.

¶ 144 L.M., the Respondent submitted, agreed to the proposal based on a recommended asset mix portfolio that was projected to generate return of approximately 6.7% per annum, which, in 2005, was a reasonable rate of return. This return was achieved using a diversified portfolio of Income Trusts, dividend producing blue chip mutual funds, dividend producing stocks, and a small component of growth mutual funds and stocks to combat inflation. L.M. agreed to the recommendations and it was agreed that as her funds were transferred, they would be invested as agreed to the proposed recommendations. The investible funds arrived over the next few months and were invested, as per the agreed to proposal.

¶ 145 The Respondent submits that the investments met L.M.'s investment objectives and were suitable for her portfolio.

¶ 146 On the issue of Discretionary Trading, (Count 5 – L.M.), the Respondent refers to Exhibit 1, Tab 24, p. 2, para. 2 (L.M.'s Complaint Letter to Patton, CIBC Wood Gundy, where L.M. states:

“I asked him to speak with me before he made some of the big purchases I was being notified of – some \$30,000.00, some as high as \$80,000.00”.

¶ 147 Referring L.M. to her previous investment advisor, I.H., the Respondent refers to exchanges with L.M. under his cross-examination, as follows:

Q. And she discussed those investments with you --

A. Not monthly.

Q. --prior to investing it?

A. Not monthly, no. I can't remember. All I know is I put the money in an account and she would handle it as it came in. (Tr. p. 192, ll. 20 – 25);

And further:

Q. Do you recall us agreeing to make one of those or any of those investments in your portfolio?

A. No. I don't remember.

Q. You don't remember?

A. No.

¶ 148 The Respondent concludes that L.M. had no memory of previous discussions with her previous investment advisor regarding consenting to the investment selection.

¶ 149 Referring L.M. to Exhibit 1, Tab 24, p. 5 (L.M.'s Note concerning a telephone conversation with D.V.C. of November 14, 2007), the Respondent asked L.M.: “Do you recall having a conversation with my assistant, Donald D.V.C.?” L.M. answered: “I know that I spoke to various people, and he was one of them” (Tr. p. 209, ll. 12 – 15)

¶ 150 Commenting on L.M.'s evidence, the Respondent states that L.M. cannot remember whether she gave consent or not regarding authorizing the investment of her funds. She does not, he submits, either confirm or deny giving consent.

¶ 151 Referring to L.M.'s evidence of having made notes on 26 conversations with him and CIBC staff, the Respondent states that she can only recall parts of discussions regarding her portfolio, and changes made. He referred, in this regard, to a withdrawal of \$12,000.00 which L.M. claimed to have discussed with him. Respondent submits that this conversation could not have occurred because he was no longer with TD Waterhouse. This, he submits, casts doubt on her testimony.

¶ 152 The Respondent refers to a question put to L.M., in his cross-examination, about her telephone

conversation with D.V.C. on September 12, 2008:

“And at that time, did D.V.C. propose any trades on that date?”

L.M. answered:

“I don’t think so. I think we just talked about what might have to happen. I don’t recall”.

¶ 153 The Respondent submits that her response: “I don’t remember”, is important to the complaint of discretionary trading. He submits that L.M. cannot remember whether she gave consent or not to transactions. She recalls parts of conversations, and knows “something happened” but she does not either agree to or deny any specific transaction, and states, in her testimony that she was not paying attention on several occasions.

¶ 154 L.M., he submits, documents 20 discussions and meetings over the 26-month period, recalls having discussed investments and changes, received transaction slips yet cannot recall the specific details of the conversations.

¶ 155 L.M., he submits, acknowledged receiving a portfolio statement each month which she opened and put in her file; used online access to her accounts to monitor her investments; and had her income tax returns prepared and reviewed by an accountant annually.

¶ 156 The Respondent submits that in the period that L.M.’s accounts were at CIBC Wood Gundy, she recorded meetings and conversations which were followed by account activity and recorded by transaction slips which she acknowledge receiving, opening and reading. There is, he argues, a direct correlation between timing of conversations and transactions.

¶ 157 The Respondent submits that during the time L.M.’s accounts were at CIBC Wood Gundy, there were no compliance issues, or inquiries regarding any of her accounts. There was, he states, an “in-house” compliance officer in the Edmonton office at the time her accounts were at CIBC Wood Gundy. If discretionary trading took place, there is no question of supervision, or suitability from IIROC, nor in L.M.’s complaint.

¶ 158 The Respondent submits that he made several requests to CIBC Wood Gundy for access to client files, which were denied. Therefore, the ability to have quality of defence is compromised.

## **M. ANALYSIS**

¶ 159 The Panel has recognized and addressed two overriding issues which it views as relevant to a consideration of each of the five alleged contraventions. Those issues are:

- (a) The credibility, and, therefore, the reliability of the evidence of H.G.D. and L.M.; and,
- (b) The level of knowledge and understanding on the part of H.G.D. and L.M. of investment products and the operations of the investment market.

¶ 160 On the issue of the credibility of H.G.D. and L.M., the Panel agrees with Enforcement Counsel that IIROC’s case rests heavily on their testimony.

¶ 161 The Panel has found that their evidence was credible for the following reasons:

1. Neither witness had anything to gain from testifying for IIROC.
2. Their evidence-in-chief and under cross-examination, was consistent with their complaint letters.
3. Neither witness displayed any animosity or ill-feeling toward the Respondent and appeared to answer questions honestly and to the best of their recollection of events.
4. L.M.’s evidence was supported by notes which she recorded of conversations, meetings and other telephone calls with the Respondent or members of his team at CIBC Wood Gundy.

¶ 162 The Panel has considered the submission of the Respondent that his “ability to have quality of defence is compromised” because his requests to CIBC Wood Gundy for access to client files were denied.

¶ 163 To this submission, the Panel observes that there is no evidence to suggest that IIROC failed to disclose

to the Respondent any identifiable and relevant record which could assist the Respondent in his defence of the alleged contraventions.

¶ 164 On the issue of the level of knowledge and understanding which H.G.D. and L.M. had of investment products and the investment market, the Panel finds that both witnesses revealed a marked unfamiliarity with investments and market operations and forces, generally.

¶ 165 The Panel found that both H.G.D. and L.M. wanted and needed the knowledge and expertise of an investment advisor who they could trust and rely on to manage their investments prudently. That is why they were persuaded to acquire the services of CIBC Wood Gundy's Registered Representative, David Guy Schayes.

¶ 166 On this issue, the Panel referred to the Respondent's rating of L.M.'s investment knowledge as "good" in her NCAF form. The Respondent testified that he based his rating primarily on two factors:

1. L.M.'s teaching background in Grade IX mathematics; and,
2. Her past experience with investments in GIC's, stocks, bonds and mutual funds when she received investment advice from I.H..

¶ 167 The Panel has concluded that an informed and responsible registered representative would know that a teaching background in Grade IX mathematics would be an asset for an investor but would not create one.

¶ 168 Likewise, an informed and responsible registered representative would not conclude that an investor/client had good investment knowledge from having held GIC's, stocks, bonds and mutual funds on the recommendations of their investment advisor.

¶ 169 The Panel finds that the Respondent's rating of L.M.'s investment knowledge as "good" was ill-considered and inaccurate.

¶ 170 With reference to Count 1, i.e. that in September, 2006, and February, 2007, the Respondent made unsuitable recommendations for the account of H.G.D., the Panel accepts the evidence of H.G.D. that on September 5, 2006, she deposited \$110,000.00 with the Respondent as a Registered Representative of CIBC Wood Gundy and requested that the funds be invested in a non-registered money market fund so she could have ready access to purchase a home. The evidence reveals that the Respondent deposited \$10,000.00 in a non-registered money market fund but in September, 2006, the Respondent opened a margin account for H.G.D. and invested the balance of the \$110,000.00, without any authorization from H.G.D., in the following mutual funds and income trusts:

- Epcor Power;
- Golf Town Income Fund;
- Penn West Energy Trust;
- Bissett Dividend Income Fund;
- BMO Guardian Monthly High Income Fund II;
- TD Real Return Bond Fund;
- TD Dividend Income Fund;

¶ 171 In February, 2007, the evidence reveals that the Respondent made the following transactions, again without any authorization from H.G.D.:

1. the sale of TD Real Return Bond;
2. the sale of Golf Town Income Fund;
3. the purchase of Excel India Fund;
4. the purchase of Renaissance China Plus Fund.

¶ 172 The evidence reveals that approximately \$40,000.00 of the funds invested by the Respondent, and without any authorization, was invested in funds with Deferred Sales Charges.

¶ 173 The evidence reveals that in 2008, H.G.D. noted from her Income Tax Assessment that the Respondent had removed \$5,500.00 from her RRSP Account for a First Time Home Buyers withdrawal without her knowledge or approval. Over a period of approximately three years, H.G.D. attempted to obtain an explanation from the Respondent as to why such a withdrawal had occurred as she knew that she would not qualify.

¶ 174 The Respondent explained to H.G.D. that the withdrawal was a mistake made by an employee of CIBC Wood Gundy who had incorrectly input the wrong code on the transaction which resulted in the withdrawal of funds from her RRSP account.

¶ 175 The Panel rejects the Respondent's explanation and finds from the evidence that the withdrawal of \$5,500.00 was made to offset losses incurred by the sale of equities, purchased without authorization, from funds which H.G.D. believed were, on her instructions, invested in a non-registered money market fund to purchase a home.

¶ 176 It is not in dispute that the Respondent advised L.M. that based on her liquid net worth of \$939,225.13, as of December 2005, he could achieve a monthly income of \$5,000.00 on her retirement at age 55.

¶ 177 The Panel accepts the evidence of Gauthier that the essential facts that a registrant must consider in being informed of a client are:

- (a) Financial circumstances;
- (b) Personal circumstances;
- (c) Investment knowledge
- (d) Income;
- (e) Age;
- (f) Stage of life.

¶ 178 The Panel has previously held that the Respondent's assessment of L.M.'s investment knowledge as "good" was ill-considered and inaccurate.

- L.M. testified that she did not know what margin meant.
- L.M. had no other source of income.
- L.M. was 55 years of age.

¶ 179 L.M. testified that she started seeing negative signs in her statement from CIBC Wood Gundy and learned from an assistant of the Respondent that the Respondent was borrowing money to invest in her name. L.M. noted interest payments totaling \$10,134.59 for one year.

¶ 180 The Panel accepts the evidence of Gauthier that use of margin increases the risk level of an account as a result of the leverage being used and that the use of margin for L.M. was unsuitable because she was 55 years of age, retired, unfamiliar with investments and the investment market and relied solely on her accounts for income.

¶ 181 It is not in dispute that L.M.'s account with CIBC Wood Gundy was not a discretionary account or a managed account. Therefore, Dealer Member Rule 1300.4 applies:

"1300.4 A Registered Representative may not exercise discretionary authority over a customer account unless:

- (a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;
- (b) the customer has given prior written authorization in compliance within compliance with Rule

1330.5;

- (c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval;
- (d) The Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and
- (e) The account is maintained at the Dealer Member of the Registered Representative.

¶ 182 Gauthier testified that 89 trades were conducted on L.M.'s account when at CIBC Wood Gundy.

¶ 183 The Respondent concedes that L.M. did not have a discretionary account or a managed account at CIBC Wood Gundy but that she authorized all trades in advance.

¶ 184 The Respondent refers to L.M.'s words which show that 24 phone calls were made to his office over a 26 month period.

¶ 185 Under cross-examination by the Respondent, Gauthier was asked, if, at any time in his investigation of L.M.'s complaint to IIROC, she gave any indication that she sold a security or bought a security with her instructions. Gauthier replied "No, she did not. She said she did not give any instructions or confirmation to purchase or sell any security."

¶ 186 Under examination by Enforcement Counsel, L.M. was asked if conversations with the Respondent or his team members took place before or after the trades.

L.M. replied:

"Sometimes before. Sometimes—often I would be phoning because I would see a \$50,000 trade, a \$30,000 trade. Something that was a big amount. And I didn't know why or what, and I would sometimes see a fee – a transaction fee, and I 'd think there's a lot of money going to that and wondered—I requested—I asked why, and at one point I said I would like to be called, because my former investor called me for \$3,000, 6,000, and I remember one time David saying: You want me to call? I said: Yes. So I got a few calls and then no calls again."

## **N. CONCLUSION**

¶ 187 The Panel has concluded that the Respondent, David Guy Schayes, has, on the balance of probabilities, committed the following contraventions:

### Accounts of H.G.D.

1. In September of 2006 and February of 2007, the Respondent made unsuitable recommendations for the account of H.G.D., contrary to IDA by-law 1300.1(q);
2. Between April 2007 and March of 2010, the Respondent made twelve unauthorized trades in the account of H.G.D., contrary to IDA by-law Rule 29.1.

### Accounts of L.M.

3. Between June of 2006 and September 2008, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to L.M., contrary to Dealer Member Rule 1300.1(a) (Investment Dealer Association by-law 1300.1(a) prior to June 1, 2008);
4. Between June of 2006 and September of 2008, the Respondent made unsuitable recommendations for the account of L.M., contrary to Dealer Member Rule 1300.1(q) (Investment Dealer Association by-law 1300.1(q) prior to June 1, 2008);
5. Between June of 2006 and September of 2008, the Respondent engaged in discretionary trading in the account of L.M., without the account first having been approved as a discretionary account,

contrary to Dealer Member Rule 1300.4 (Investment Dealer Association by-law 1300.4 prior to June 1, 2008).

¶ 188 A date will be set by IIROC to address penalty.

**DATED** this 15th day of September, 2014.

Benjamin Casson

Chair

Martin Davies

Industry Representative

Peter McWilliams

Industry Representative

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