

Re Steinhoff

IN THE MATTER OF:

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

and

Carolann Steinhoff

2011 IIROC 54

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District Council)

Heard: August 5, 6, 9, 10, 12, 13 and 16, 2010 at Vancouver, BC
Decision: October 6, 2011
(239 paras.)

Hearing Panel:

Stephen D. Gill (Chair), Brian Field, Barbara E. Fraser

Appearances:

Paul J. B. Smith, for IIROC Staff

Ronald N. Pelletier and Gregory N. Harney, for the Respondent

DECISION

INTRODUCTION

A young married couple in their early 30's each had a modest RSP account with their investment advisor. In the spring of 2008 they sold their first home, and then entered into an agreement to purchase a new home that was to be constructed. Their initial completion date was the end of September. After making a deposit on the new home, they had \$125,000 which was their down payment on the new home. In June, they consulted their investment advisor with respect to investing these funds. The funds were invested in the market, in stocks, utilizing significant margin. When the account was sold out on or about October 1st, 08 it netted approximately \$55,000.

NOTICE OF HEARING

¶ 1 By a Notice of Hearing dated April 8, 2010, (the "Notice of Hearing") the Investment Industry Regulatory Organization of Canada ("IIROC"), alleges that Carolann Steinhoff (the "Respondent") committed contraventions of the IIROC Dealer Member Rules while registered as a Registered Representative ("RR") at Wellington West Capital Inc. and working at a Wellington Branch in Victoria, British Columbia. The alleged contraventions are set forth in seven Counts, and the Notice of Hearing includes some forty-seven paragraphs entitled "Particulars", being a summary of the facts alleged and to be relied upon by IIROC at the hearing.

¶ 2 In the Notice of Hearing (Ex. 1), IIROC staff alleged that the Respondent had committed the following contraventions:

Count 1

On or about June 10, 2008, the Respondent, prior to opening a new joint account for CK and AK with a short term time horizon, failed to determine or consider the rate of return her clients were seeking or how much money they were prepared to lose in their account and thereby failed to learn essential facts relative to her clients contrary to IIROC Dealer Member Rules 29.1 and/or 1300.1(a).

Count 2

On or about June 10, 2008, the Respondent failed to ensure that the New Client Application Form (NCAF) for a new joint account of her clients, CK and AK, reflected the essential fact that the funds in the account would be needed approximately four months later to make the down payment on the Ks' new home, and thereby acting contrary to IIROC Dealer Member Rules 29.1 and/or 1300.1(a).

Count 3

On our about June 26, 2008 and subsequently on July 8, 2008 the Respondent entered orders in the joint account of her clients, CK and AK, to purchase 12 different securities totaling approximately \$240,000 without first obtaining approval from the clients as to the specific securities to be purchased, the amount of each security to be purchased, or the price at which the security would be purchased, when the account was not a discretionary account and thereby acted contrary to IIROC Dealer Member Rules 29.1 and 1300.4.

Count 4

On or about June 26, 2008 and subsequently on July 8, 2008 the Respondent entered orders in the joint account of her clients, CK and AK, to purchase 12 different securities totaling approximately \$240,000 when approximately \$120,000 of the money used to purchase the securities was borrowed on margin and when use of margin to that extent was inconsistent with the clients' investment objectives for the account. The Respondent thereby acted contrary to IIROC Dealer Member Rules 29.1 and/or 1300.1 (p) and (q).

Count 5

On or about June 26, 2008 and subsequently on July 8, 2008 the Respondent recommended and constructed a portfolio of investments for her clients, CK and AK, in their joint account consisting of 12 different securities totaling approximately \$240,000 and approximately \$120,000 of margin debt which was not suitable for the clients and inconsistent with the clients' objectives for the account, which was to ensure that a certain sum invested was available approximately four months later for the down payment on their new home. The Respondent thereby acted contrary to IIROC Dealer Member Rules 29.1 and/or 1300.1 (p) and (q).

Count 6

On or about August 26, 2008, the Respondent recommended that her clients CK and AK continue with previously purchased investments in their joint account when that portfolio was not suitable for her clients and inconsistent with their investment objectives. The Respondent thereby acted contrary to IIROC Dealer Member Rules 29.1 and/or 1300.1(q).

Count 7

On or about November 28, 2008, the Respondent made a false statement in response to an inquiry from her firm's Chief Compliance Officer, and Chief Regulatory Counsel, who had requested information from her after receiving a written client complaint from her clients CK and AK. The Respondent stated, in an email, that "Margin and leverage were brought up by (CK)" when in fact the Respondent knew that was not true. The Respondent thereby acted contrary to IIROC Dealer Member Rule 29.1.

¶ 3 On or about May 27, 2010, counsel for the Respondent delivered a "Response to Notice of Hearing" (Ex. 2) as per the Rules with some 30 paragraphs in which detailed responses were given to the allegations in the particulars.

THE PARTIES

¶ 4 This case involves the dealings between the Respondent and a married couple, whose names have been abbreviated and will be referred to as CK (husband), AK (wife) or Mr. and Mrs. K, or “the Ks”.

¶ 5 CK at the material time was in his early 30’s. He went to Camosun College in Victoria for 3 years and completed 3 programs, and received 2 diplomas. He graduated in business administration, specializing in marketing and also information technology. He explained that his information system training was on infrastructure, managing of systems, and how to set up networks in business administration. They did look at financial statements but it was at a very basic level. After graduating he was employed with B.C. Buildings Corporation for a number of years dealing in information technology, then moved to a company called Myra Systems where he was employed for a time in a technical role, and then transitioned into a sales role with a software company called Book King where he was employed for 3 years. He had recently transitioned to another software company called ACD Systems where he was a director of sales.

¶ 6 CK testified that at BCBC he was making about \$50,000 a year; by the time he left Myra he was in the \$70,000 - \$75,000 range per year; and at Book King he was targeting just over \$100,000 per year. He was at Book King in 2008.

¶ 7 AK did not testify, but CK provided an insight into her education and employment. She also was in her early 30’s and he advised that they had almost the same schooling and work experience. They met in college and graduated together. Her degree was in business administration. They started one week apart at BCBC and she worked at BCBC one year longer than he did. She was primarily involved in real estate and leasing, and dealing with various tenants. She then moved over to Myra Systems where she was a project manager, and he explained her role was basically to be the liaison between the government client and the technical staff on site. He said she was on long term disability at present as a result of a January, 2006 accident when she was run down by a car and suffered back injuries, a broken leg and a variety of other injuries.

¶ 8 AK was not on IIROC’s witness list. The panel was advised she would not be able to testify. CK testified that since the accident that caused her first miscarriage, she’s had five miscarriages in total, and at the time of the hearing she was 17 weeks pregnant. The specialist that she has been seeing since week one of this pregnancy has apparently asked her to stay away from stressful situations, and thus she would not be testifying. A medical report was not tendered. We did have the benefit of her IIROC interview which both parties referred to during the case.

¶ 9 CK testified that in September, 2008, at Book King, he was receiving a base salary of \$60,000 and a commission of about \$20,000 to \$25,000 per year for a total of \$80,000 to \$85,000.

¶ 10 The Ks were married in 2002; they purchased their first house in 2004.

¶ 11 The Respondent was recommended to CK by his parents and two other members of his family. He had no prior investment accounts with any other financial advisor before the Respondent. He consulted with the Respondent and opened an RRSP account in 2004. His NCAF listed his investment knowledge as limited. The Respondent advised CK on how to withdraw approximately \$15,000 in pension funds via the Home Buyer’s Plan, which funds were the down payment on their first house.

¶ 12 CK was required to pay back a portion of the Home Buyer’s Plan withdrawal each year, for 15 years, and also was making monthly contributions of \$200. When sufficient funds were in the account, for example in February, 2006, the Respondent would recommend the purchase of stocks and he agreed with her recommendations and the stock would be purchased. In March, 2006, Pelangio Mines Inc. at 82¢ a share and US Financial 15 – A at \$12.20 a share were purchased.

¶ 13 In August, 2007, on the recommendation of the Respondent, Opti Canada Inc. at \$22.39 a share and TDB Split Corp. - A at \$10.00 per share were purchased. CK said he did not know what TDB Split Corp. - A was.

¶ 14 In April, 2008, Extencicare Reit T/U at \$11.93 per unit was purchased on the recommendation of the

Respondent. CK said he didn't know anything about Extencicare, or what a Reit was. As of May 31, 2008, the value of CKs RRSP account was approximately \$18,725. He said that he rarely spoke to the Respondent except when one of these transactions was about to happen. He said he spoke to the Respondent twice a year at the most.

¶ 15 AK also opened a RRSP account with the Respondent in June, 2005, which in July, 2005 had a value of approximately \$2,600. At May 31st/08 AK's account stood at approximately \$5,200. From a review of the account statements, it appears that there were two transactions: In March, 2007 Templeton Growth was purchased for \$1,700 and in July, 2007 TDB Split Corp. – A in the amount of \$1,800 was purchased. Her NCAF listed her investment knowledge as limited.

¶ 16 The Respondent, Carolann Steinhoff, was at all material times an investment advisor with Wellington West Capital Inc. (“W.W.”) in Victoria. She has an extensive academic background, as her curriculum vitae (Ex. 21) demonstrates. She graduated cum laude with a bachelor of science from Concordia University in 1978; obtained a high school teaching certificate at the University of British Columbia in 1981; did graduate studies biology at the University of Victoria in 1986 to 1988; obtained her certified financial planner (CFP) certification in April, 2004; at the time of the hearing was enrolled at the University of British Columbia in a program leading to a certificate in business family advising.

¶ 17 Ms. Steinhoff has taken numerous securities courses. In 1988, she took the Canadian Securities Institute (“CSI”), Canadian Securities Course, Canadian Options Course and Canadian Futures Course. In April, 2004, she took the CSI Branch Manager's Course. In July, 2004, she completed a two year CSI course for Canadian Investment Manager, and also completed the Partners, Directors and Senior Officers qualifying exam. In March, 2006, she took the CSI Options Supervisor's Course. She has taken many other courses as well.

¶ 18 In terms of her work experience, in 1978 to 1986 she was a pharmaceutical representative with Johnson and Johnson; from 1988 to May, 1999 she was an investment advisor, director and Senior Vice President at Scotia McLeod Inc. where she was consistently in the top 1 percent of producers; May 1999 to January, 2004, she was a senior investment advisor with United Capital Securities Inc. where she was consistently in the top 1 percent of producers; January, 2004 to 2009, she was an investment advisor, a partner and Senior Vice President with Wellington West Capital Inc. and where she was consistently in the top 5% of producers. From 2009 to the present she has been an investment advisor and Senior Vice President with Queensbury Securities Inc. where again she says she is in the top 1% of producers.

¶ 19 The Respondent was not only employed at, but was an investor in Wellington West, and that arrangement led to her becoming co-manager of the Victoria office. She said she had 250 – 300 clients and most of her clients had assets under her management greater than \$1 million.

¶ 20 The Respondent said that it was her practice to make her cell phone number available to her clients; she sent out a daily news letter by email to her clients; she has a Bloomberg Terminal on her desk to provide research; she subscribes to Value Line; and she uses a software system called Brokers Ally; and she usually has four assistants and they use Brokers Ally for messages from her assistants re client's calls. She said she typically is in the office by 7:00 or 7:30 a.m. and would leave at 7:30 or 8:00 p.m. most days. She would work many weekends.

THE Ks SELL THEIR HOUSE, AND CONTRACT TO PURCHASE A NEW HOUSE

¶ 21 The Ks bought their first house in 2004. CK testified that they decided to sell the house before purchasing another house, and the process for listing started in the January – February, 2008 timeframe. He said that in March of 2008, the Respondent had called him with respect to a transaction in his RRSP account, and he mentioned to the Respondent that they were looking at selling their house, and the Respondent suggested that when he had the proceeds of the sale he should talk to her.

¶ 22 CK said the sale of the first house and the agreement to purchase the new house occurred very close together. The equity from the sale of the house would be approximately \$150,000, and they had to put a \$25,000 deposit on the new house that was to be built. So, in the result, they had \$125,000 which CK said they

would require for the down payment on the new house. The \$125,000 would cover the \$103,000 actual down payment, and the Property Transfer Tax, and other fees that would have to be paid. AK in her Statement (IIROC Interview) said they did upgrades to the house that also caused an increase in the down payment. (Ex. 21 page 5 lines 16-19).

¶ 23 CK said they used the same realtor for the sale of their house and the purchase of the new home, off the plan, in a phased development. The realtor was his brother's brother-in-law, and was the realtor for the development. They were buying off the plan, and at the time they signed for the purchase of the new house, it was bare land. For their temporary living accommodations they entered into an agreement to rent a condo, which agreement expired October 15/08.

¶ 24 CK said their realtor told them that the developers had never missed a completion date, and they should expect that their date would be firm. AK said in her Statement that the original completion date for the new home was September 28/08 but later it got moved to October 13/08. However, before construction actually started, they were told that the completion date could be pushed out 2 – 4 weeks.

JUNE 10, 2008 MEETING

¶ 25 One of the Respondent's assistants was Melissa Huston. Ms. Huston testified that she was 28 years old; that she moved to Victoria to attend university and graduated with a Bachelor of Arts in 2006. After graduation she looked for a job and was employed as a receptionist at Wellington West in November, 2006, and became the Respondent's assistant in March or April of 2007. She thereupon commenced taking the required courses to get licensed, and became licensed as an RR in April of 2008.

¶ 26 Ms. Huston said she was the Respondent's primary assistant and helped with most of the administrative tasks. She did portfolio reviews, preparing for client meetings; issued cheques; did currency conversions for clients; answered questions when they called; booked appointments; and helped prepare documentation. She said there was another part time assistant, and also two co-op students who did some administrative tasks. She was the Respondent's assistant until the Respondent left the company in June of 2009.

¶ 27 Ms. Huston described the use of the Brokers Ally system in the Respondent's practice: when clients called the assistants usually took the calls and they would record the conversations they had with the client in the program; then print it off at the end of each day and give it to the Respondent in her tray so that she was aware of the client communications that the assistants had throughout the day. Not every call was recorded in Brokers Ally; a simple one such as 'is she available? no she's not. well I'll call back later' type call would not get recorded. It was primarily used when there was something of note. The notes inputted on the system are retained on the system and can be reviewed subsequently; the Respondent had access to this system.

¶ 28 The Respondent testified in direct to the use of the Brokers Ally system and confirmed the above practice. She said she was very, very busy during the day, and at night when she emerged from her office she would check her inbox and check the notes. However in cross she testified that although it was possible for her to access the system, she never did. She reviewed the hard copy she received from her assistants, which she shredded at the end of the day. She said it never occurred to her to check the Brokers Ally system for relevant messages related to the Ks.

¶ 29 Ms. Huston said she knew who CK and AK were because she was originally aware of them as RSP clients of the Respondent, and she had spoken to them several times, mostly on the phone when they called in and had questions.

¶ 30 Ms. Huston identified a Brokers Ally Note that she made on Wednesday, May 28, 2008 after having a telephone discussion with AK. There is one line at the bottom of the note that was made by the other assistant, Bonnie, and Ms. Huston said she basically wrote down all the relevant details from the conversation with AK. She recalled the conversation, and said her note was accurate, and she gave it to the Respondent in the usual way. Her note has the date Wednesday, May 28, 2008 at the top and states:

“Ms. K called to let us know that they are going to be moving. Their house settles on June 13th, and they are going to be renting for a few months until their new home is ready. She said that they would have approx. \$100,000 to invest during that time from the sale of the house, but that it will need to be secure investments since it will be the down payment of their new home. She was going to check with her husband and call us back to let us know when a good time for them would be to come in and talk to Carolann about it. She also gave me their temporary mailing address: 4109 Cabot Place, Victoria, BC V8N 4V9, and they will be available only on their cell phones: 661-9787 is her cell phone and 857-5553 is her husband’s cell. I’ll ensure this information is put on our systems. – Melissa”

The second note right below the first states:

“Ms. K called back to book an appt. for June 10/08 at 4:30 – bonnie”. (Ex. 9 tab 4)

¶ 31 Ms. Steinhoff confirmed she received this May 28th Brokers Ally note from Melissa.

¶ 32 CK testified that he and his wife attended a meeting on June 10 with the Respondent. Their objective was to get advice on what to do with the funds (\$125,000) for the few months that they had between the sale of their old house and the completion of the new house. He said that they had seen commercials on TV about ING, but didn’t understand what it was, and they had concerns about income tax and fees. He said they were looking for advice as to where they could put their money. They had a chequing account at a bank but that earned little or no interest.

¶ 33 CK said the meeting with the Respondent on June 10 lasted in the range of 30 to 45 minutes, and in cross examination he agreed that it could have been an hour or more. He also agreed in cross they initially did a portfolio review of their RRSP accounts and approved some changes. The first part of the meeting was a discussion about how they were doing, what was going on, etc. and then the review, and then they got into a discussion about what to do with their down payment money. He said he put out the idea of investing it with ING and the Respondent was pretty adamant that they not invest in ING. CK said that the Respondent said she could do much better for them; for short term investing she could do better, and a 10% return was thrown around by the Respondent. They then moved on to the form to open the joint account.

¶ 34 CK stated that when the New Client Application Form (NCAF) was presented to them it was mostly filled out, except for some information on the first page that they went over and clarified. He said there were sticky notes on the document where they needed to sign. He said the Respondent told him that this was their standard form, like those they had already signed, and this was just opening a joint account. In cross examination he agreed that additional information such as their current annual income and their email addresses could well have been added at the meeting. He said the handwriting was not his.

¶ 35 He said they signed the NCAF without reading it.

¶ 36 CK said that the information on the third page of the NCAF (Ex. 9 tab 5 page 73) that is the 70% and 30% risk level was already on the form, as well as the tick for the Growth Target Mix.

¶ 37 CK said there was a discussion of risk, namely, what can you afford to lose on this? He stated that they reiterated that it was their down payment for their house and they didn’t want to lose anything. They didn’t necessarily need to make a lot of money off this money, but they definitely couldn’t afford to lose much money because they didn’t have any other funds for backup for the down payment. He said the discussion went back and forth, that he and his wife hadn’t really thought about what they could lose; eventually they said a maximum of \$10,000.

¶ 38 With respect to the third page of the NCAF and the “Request for Margin” box in the form, CK said there was no discussion of margin at the meeting, and he didn’t know what margin was.

¶ 39 With respect to the box heading “Leverage Risk Disclosure Statement” next to the Request for Margin box on page 3, CK said there was no discussion at the meeting of leverage, or the risk of leverage.

¶ 40 CK testified that at the time he signed the NCAF, they did not know they were opening a short account, and they did not know they were opening a margin account. CK testified that they just knew that the

Respondent was going to invest their funds, and there was no discussion of specific stocks. They signed the form, and they were going to leave the investing up to the Respondent.

¶ 41 AK in her IIROC interview Statement (Ex. 20) said when they met with the Respondent they told her that the money was the down payment for their new house, and that they thought about investing it in an ING savings account. They were willing to invest it with the Respondent and hopefully make more than the interest rates the banks were currently offering. She said the Respondent was strongly against the idea of an ING account and said she thought she could do a lot better than that. She said they didn't tell the Respondent what amount of money they were hoping to earn, just that they were looking for something better than the low interest rate. She said they told the Respondent that the most they would be willing to lose would be \$10,000. She stated there was no specific stock portfolio recommendations at the June 10th meeting, and no specific option was given to them.

¶ 42 With respect to the NCAF form, AK said most of the information was filled in prior to their meeting with the Respondent, and it had post-it notes indicating where they needed to sign. She said some information on the first page was filled in at the meeting, but other than that everything was already filled in. Specifically she said page 3 was already filled in.

¶ 43 With respect to page 3 and the box "Investment Knowledge" she said that was already filled in, and the Respondent did not ask either her or her husband what their investment knowledge was. There was no discussion about what a "Good" rating meant.

¶ 44 AK said that when the Respondent produced the joint account form she said it was standard for opening a joint account, and it was basically the same as their individual accounts that they had already signed. She said the Respondent ran through it very quickly and showed them where they needed to sign. She said the Respondent breezed over everything, and just said that it was similar to their individual forms.

¶ 45 As to the Investment Objectives and Risk Tolerance section, and the risk levels of 70% Medium and 30% High, AK said that this was all filled out when they signed. She said these percentages weren't discussed and weren't explained by the Respondent.

¶ 46 With respect to the Request for Margin, AK said that there was no discussion of margin or a margin account; the Respondent just pointed out where they needed to sign and kept saying it was standard for opening this account.

¶ 47 AK said that the Respondent did not explain they were signing up for a margin account, and did not explain or discuss a short sale account. She did not know what margin was, or what a short sale account means.

¶ 48 The Respondent testified that in June, 2008 she had been placed under close supervision. This meant that her account opening forms, and all transactions, were reviewed by compliance. She said every trade had to be pre-approved by the branch manager, Ms. Lyons, and that she had a procedure where she emailed the proposed trades to Ms. Lyons and she would get an email response saying approved, and the tickets would go in.

¶ 49 With respect to the meeting with CK and AK at 4:30 p.m. on June 10th, the Respondent said they were the last appointment of the day, and she needed at least an hour as she was going to do a portfolio review, and as well they wanted to discuss investing some money. She said when they commenced the meeting they exchanged some pleasantries, as is her practice, and then she did a portfolio review of their RSP accounts, and she referenced the portfolio review documentation that had been prepared, and the summaries (Exhibits 18 and 19). She said she went through the investments they had in their RSPs, and that she got instructions to liquidate some investments and acquire a new company she was recommending called Diagnocure. Those trades are reflected on the June 30, 2008 RSP statements of both CK and AK for settlement on June 16th. (Ex. 9 tabs 27 and 28).

¶ 50 The Respondent testified that the majority of the writing on the first page of the NCAF was her writing and said it was filled in during the meeting with the Ks. Certain things such as the account number and the

signature at the bottom of the third page by the branch manager and the date would be added later. But the bulk of it she testified was done with the Ks.

¶ 51 The Respondent testified that the Ks told her that they had sold their house and weren't sure the exact amount they would have to invest, perhaps \$120,000, and they were looking for different options because interest rates were so low. She said they did not mention ING; she said they said "bank". She advised them if they were looking for 100% risk free then the investment should be in money markets; liquid money market investments like treasury bills or very short term bonds, and that she showed them the current yields on her Bloomberg Terminal. She said the yields were low, perhaps 2 – 2 ½% per annum.

¶ 52 The Respondent testified that she told them that if they wanted to make as much money as they could in a short period of time that there were risks associated with doing that; and that she didn't have a crystal ball, and didn't know what the markets were going to do. She testified that they asked her what she would recommend if they decided to take a more aggressive strategy, and she explained the range of the investments, namely 100% certainty, and then the other end of the spectrum. She referred to Diagnocure: it would be at the high end of the risk spectrum and that is why they got into the mix of high versus medium. She testified she told them that stocks would be a very aggressive strategy and because the money wasn't available yet, and she wasn't going to make any specific recommendations, that they should go away, and they could advise her of their decision. She says she told them they could set up the joint account then so they could do the aggressive strategy.

¶ 53 The Respondent said there was a discussion of whether the Ks were prepared to accept risk, and they said that they were prepared to accept some risk. She denied that they said they could afford to lose only \$10,000. She denied that she told them she thought she may be able to make around a 10% return.

¶ 54 The Respondent testified there was a discussion with the Ks about the 70% Medium 30% High risk level on page 3 of the NCAF, and there was a discussion of the Growth Target Mix. She said she didn't use the Aggressive Growth Target Mix (on the left) because the decision had not yet been made as to the investment strategy.

¶ 55 With respect to the box on page 3 "Request for Margin" she testified that CK brought up the topic of margin, that it came up in terms of "leverage". She said that the Ks asked her what margin meant and she explained it by the way she explains it to everybody, namely that margin is the investment world's term for leverage for a loan. She said there was a general discussion of how margin worked.

¶ 56 The Respondent was asked by the Panel when she was explaining margin to a client could she describe the normal version of that explanation. The Respondent stated:

"My normal version of that explanation is that it's a facility that allows you to borrow based on the value of the security in your portfolio. I usually will set up - - as I said previously, most of my accounts are margin accounts and I explain to clients that even if they don't use margin to invest, they can use it as the facility if they need money in a short period of time and the market goes down. Rather than sell a security they can use that facility temporarily."

(Transcript Aug. 16, pages 115 and 116).

¶ 57 The Respondent testified that when they were discussing risk, she mentioned companies that were producing dividends that were higher; double or triple what you could get on short term fixed income investments. She said she advised them to go away and think about the strategy; that the differential between what she could get them on a fixed income investment and what they could get at the bank was minuscule so the only reason to come back to her and give her the money is if they were going to adopt the strategy of investing in individual stocks. She testified when the meeting concluded the Ks were going to go away and think about it and let her know. She testified the meeting lasted 1½ to 2 hours.

¶ 58 On November 12, 2008, Leslie Walters-Sagher of the Compliance Department at Wellington West (W.W.) sent an email to the Respondent in relation to the Ks, after receiving a complaint, and requested responses to 14 questions which were posed in that email. The Respondent responded by an email dated

November 30, 2008 (both emails are at Ex. 9 tab 30). However, 2 days earlier on November 28, 2008 the Respondent sent an 8 page email to Leslie Walters-Sagher and Sean Shore at W.W. with her “comments” on the Ks. On page 3, commenting on the NCAF, the Respondent said:

Margin and leverage were brought up by CK and were discussed at length. I completed the NCAF in my handwriting in front of them at the meeting on June 10, 2008. AK and CK **decided** to risk investing the funds in stocks rather than money market investments. They signed the NCAF that their objectives were Growth, which could include 100% in equity. They signed that their risk level was 70% Medium and 30% High. They signed that their investment knowledge was Good and that they had at least 4 years experience investing in stocks. They signed a request for margin which states....

I advised them that even though this agreement was signed, since the funds were not available for a few weeks, I would call them when the money was available in their account, to make specific stock recommendations. I pointed out that since markets change, there was no point in making specific recommendations on that day. I also advised them that they had a couple of weeks to think over the strategy and if, by then, **they had changed their minds about investing in stocks**, they could invest in a short term money market security. (Ex. 9 tab 33 page 338). (*Emphasis added*)

¶ 59 As part of the IIROC investigation the Respondent was interviewed, on oath, by David Zwarick and Michael Smith on March 26, 2009 in Vancouver; she attended with her counsel, Robert Cooper. The Respondent was asked:

DZ - So, as I understand your evidence its that they came to you, you said, here is your options and stuff. And they expressed to you that they were prepared to take more – a more aggressive stance and pursue a riskier option than T Bills?

CS – “They didn’t decide that day, they really did not decide that day. I actually said to them that you should think about this because the money isn’t available. I very definitely recall saying to them, you should discuss it amongst yourselves because you are assuming a lot more risk if you decide to be more aggressive....”(Ex. 11 tab 38 page 14)

¶ 60 In the Response to the Notice of Hearing filed by the Respondent dated May 27, 2010, the Respondent said this:

“12. The respondent advised CK and AK that even though this agreement was signed, since the funds were not available for a few weeks, the respondent would call them when the money was available in their account, to make specific stock recommendations. The respondent pointed out that since markets change, there was no point in making specific recommendations on that day. The respondent also advised them that they had a couple of weeks to think over the strategy **and if, by then, they had changed their minds about investing in stocks** they could invest in a short term money market security.” (Ex. 2 page 3). (*Emphasis added*)

¶ 61 With respect to the NCAF form, and the Request for Margin box on page 3, in the IIROC interview the following exchange occurred:

DZ – “Okay. Why didn’t you put down some indication that potentially the funds were needed as early as October?”

CS – I don’t know.

DZ – Whose idea was it to open a margin account and utilize leverage?

CS – It was their decision.

DZ – Whose idea was it?

CS – It was nobody’s idea.

DZ – Well someone must have brought – put the idea on the table.

CS – Well, I probably would have put the idea on the table but I - -

DZ – Why would you do that?

CS – Why would I do that. I don't know.

DZ – Have the clients ever utilized margin before?

CS – Their family has but they, specifically, haven't.

DZ – So the answer is no?

CS – The answer is no.

DZ - So, when you put the idea of margin on the table what did you tell CK and AK regarding margin accounts and use of leverage?

CS – I don't recall.”

(Ex. 11 tab 38 page 29).

¶ 62 In the interview this exchange occurred:

DZ – “Now, after you put the idea of margin or brought it on the table or brought it up in a conversation, what did you recommend to (CK) and (AK) regarding the potential use of margin?”

CS – I don't recall, specifically.

DZ – Did you ever tell (CK) or (AK) that their use of margin was unsuitable or inappropriate given their situation or financial needs?

CS – I don't recall.”

(Ex. 11 tab 38 page 31).

¶ 63 Later, in the interview this exchange occurred:

DZ – “Now in June of 2008 did you ever ask them how much of the \$125,000 they were prepared or equipped to lose?”

CS – I don't know if I did or not.

DZ – Okay.

CS – I don't know.”

(Ex. 11 tab 38 page 59).

JUNE 24 – 26, 2008

¶ 64 The cheque from the Ks to Wellington West, dated June 22, 2008, in the amount of \$125,000 (Ex. 9 tab 34 page 519) was deposited in the Ks joint account on June 24/08 (Ex. 9 tab 7 page 250). CK said that AK dropped off the cheque.

¶ 65 CK testified that when they left the meeting with the Respondent on June 10, they had agreed that the Respondent was going to invest their money for them, but he had no idea in exactly what. He said it could have been a mix of GICs, stocks, etc. He testified there was no contact with the Respondent until early July, 2008, when he contacted her.

¶ 66 During cross examination, CK was pressed with respect to whether or not there was contact between June 24th and 26th. He was firm that the Respondent never contacted him after June 10/08 for the balance of the month. He said he had no intention of contacting her because they had had the discussion on June 10, the decision was made to invest with her, and they were going to let her invest in whatever vehicles she decided were appropriate. With respect to possible loss, he said that he assumed that it was her job to keep track of that and to deal with it. He assumed she would call him just like when she would call to buy RSP stock. It was put

to him directly that the Respondent called him about making a decision to invest in stocks, or electing something else, and he strongly denied he'd been called.

¶ 67 The IIROC investigators interviewed CK on April 2, 2009 and his "Statement", being the transcript of that interview, is in evidence (Ex. 14). The investigator asked CK who selected the specific stocks that were purchased in the joint account, and he said that the Respondent did, but that she didn't recommend the stocks at the June 10th meeting. He testified that the Respondent didn't make any specific stock recommendation, and they didn't know what had been purchased until July 4th when they picked up their mail and examined the stock purchase receipts. It was put to him by the investigator that the Respondent told them that shortly after the funds were deposited into the joint account she had phoned him and made specific stock recommendations. He denied any such call. He said he had no idea what she was buying with the joint account funds. (Ex. 14 pages 22-23).

¶ 68 AK in her Statement also said that no specific stock recommendations were made at the June 10th meeting (Ex. 20 pages 9-10) and she stated that she didn't recall any contact between the June 10th meeting and the period July 4th to 7th when they received their statements, and they then contacted her (Ex. 20 page 24).

¶ 69 CK in his November 12, 2008 complaint letter to Wellington West did not say there was contact between the Ks and the Respondent to approve the purchases made in late June. His narrative in the letter jumps directly from the June 10th meeting to July 4 when they received their stock purchase receipts and reviewed them (Ex. 9 tab 29 page 853). However, in a subsequent email to Wellington West he added a complaint that after the meeting on June 10, 2008 there was no discussion with the Respondent of the portfolio that was to be purchased. It wasn't until they received the confirmation slips in the mail on July 4, 2008 that they actually knew what securities were purchased, the quantity, the price paid, the commission fees, and what date the securities were purchased (Ex. 9 tab 31 page 68).

¶ 70 The Respondent testified that she was made aware on June 24th that AK had dropped off the cheque for \$125,000 and she called CK at work, thanked him for the business, and asked him what they had decided. She testified he said they wanted to make as much money as they could. She told him she would come up with a proposal and call him back once she had a chance to think about it, with some recommendations. She testified "he said that they were willing to leverage the portfolio to try to make more money, since interest rates were so low" (Transcript August 12, 2010 page 228 lines 15-18). The Respondent did not produce any telephone notes or other documentation with respect to this alleged June 24th call or the alleged June 26th call.

¶ 71 The Respondent testified that after the telephone call with CK, she did more research and designed a portfolio. She chose securities she didn't think were speculative. She did not think using margin in these circumstances was dangerous.

¶ 72 With respect to the portfolio, the Respondent said she did research on companies she was buying for other clients, and on companies she felt would produce gains in the foreseeable future. On June 26th, she called CK and gave him her recommendations, and received his instructions to go ahead. She testified that she identified the stock she was recommending; she identified the price; and she advised him of the number of units. She also said that she told CK that she would send out all the literature they had on the companies, and what the target prices were, and what they could expect in terms of returns on the portfolio. She said the literature was sent out. (This literature was not put in evidence.). She said that after the conversation with CK on June 26 where he said yes, the trades went in right away (on June 26th). No Trade Tickets were put in evidence, and no copies of emails to/from Ms. Lyons re approving the Trades on the 26th. The Respondent did not testify as to what she told them they could expect in terms of a return in the literature sent out.

¶ 73 In cross examination the Respondent said she did make notes of her meeting with the Ks on June 10th but she didn't know what happened to them. She said that she hadn't been able to locate them (Transcript August 13, 2010 page 130-131). The Respondent also acknowledged that she didn't send an email to CK and AK following the June 10th meeting confirming that they would let her know what options they were going with, or something along those lines setting out what had been discussed.

¶ 74 The Respondent also testified in cross examination that she would have made notes of her proposal for the securities to be purchased with the \$125,000, and would have had them in front of her when she made the phone call to CK June 26. However no notes were produced.

¶ 75 In cross examination it was put to the Respondent that she did not present any proposal for the purchases to the Ks, and that when the money came in she went ahead and purchased the portfolio on their behalf, and she did that without advising them; she said that wasn't correct. (Transcript August 13, 2010, page 157).

¶ 76 The June 26/July 8 purchases in the joint account were as follows:

Trade Date	CDN/US\$	Security	Cost	Approx. % of Portfolio
June 26/08	CDN	Detour Gold Corp	\$22,202	9%
June 26/08	CDN	Diagnocure Inc.	\$24,398	10%
June 26/08	CDN	Liquor Stores Income Fund	\$21,906	9%
June 26/08	CDN	Pelangio Mines Inc.	\$12,361	5%
June 26/08	CDN	Research In Motion Ltd.	\$25,830	10.5%
June 26/08	CDN	Suncor Energy Inc.	\$24,801	10%
June 26/08	CDN	TD Bank	\$26,040	10.5%
June 26/08	US	Allied Capital Corp.	\$14,643 US\$	6%
June 26/08	US	Bank of America	\$20,294 US\$	8.4%
June 26/08	US	Google Inc.	\$27,058 US\$	11.1%
June 26/08	US	Seaspan Corp.	\$19,683 US\$	8.1%
July 8/08	CDN	Volta Resources Inc.	\$5,815	2.4%
		Total: (no conversion)	\$245,031	

JULY 4, 2008

¶ 77 CK testified that after they sold their house, they arranged to have their mail sent to their parents home. The weekend of July 4 was his parents 50th anniversary and they stopped in at his parents place on July 4th to visit, and his sister SK had arrived to participate in the 50th anniversary celebrations. CK testified that included in his mail there were 3 envelopes: a large envelope with the NCAF, and two envelopes with what he called stock receipts. At the dining room table he proceeded to review the stock receipts to see what was purchased in both quantity and dollar amounts. He testified he quickly realized that there must have been an error because it started to total up more than the \$125,000 that they had given to Ms. Steinhoff. Without the exchange rate on the US stocks, it was roughly \$240 – 250,000. He testified that he was very confused as to what had happened, and didn't understand why they had more stock than the \$125,000 they had given to the Respondent. His sister SK and wife were sitting at the table when he was opening the envelopes.

¶ 78 CK said that he grabbed his phone and used the calculator on it to actually add up the numbers and make sure he wasn't mistaken. He said it was pretty easy to see it was well over \$125,000. There was a discussion with his wife, and his sister SK, that it didn't look right and he thought there must have been a mistake. They discussed that he should contact Ms. Steinhoff and find out if a mistake had been made.

¶ 79 SK testified at the hearing that she was a computer science graduate from the University of Victoria, had been employed with an oil company for 27 years and was currently in the IT department as a senior project manager, and she resided in Calgary. She said that CK was her youngest brother, and as it was their parents 50th wedding anniversary they had agreed to have a family dinner on their anniversary in Victoria. She'd flown out the day before which was July 4th. She said that CK and AK came over just after work around 5:30 or 6:00

and there was a stack of mail for CK which he picked up, sat down at the dining room table and commenced opening. She testified that CK opened several envelopes and they contained transaction receipts from the investments.

¶ 80 SK said it was evident to her from watching CK's body language that he was trying to comprehend what he was reading, and was definitely confused. After reviewing the transaction receipts he said something like "what the hell is this?" He said the slips were related to stocks and listed off a number of companies, and started adding up the dollar amounts on the transaction receipts. He was confused by the dollar amounts because they were quite a bit larger than the sum of money (she thought 100K to 125K) they had put in for the investment. He added up the numbers and commented that the dollar value was over \$200,000, and he couldn't understand why the paperwork didn't match the sum that they had invested. He was surprised there were stock investments.

¶ 81 SK testified that it was evident to her from CK's comments and reactions that what he was seeing was not what he expected. Both CK and AK were talking back and forth saying they didn't understand the transactions. CK said that he needed to get hold of his financial advisor because this wasn't consistent with what he thought he was going to be receiving; he mentioned that a few times. He needed to meet with the Respondent and try to get her to describe or explain to him what had been done. In cross-examination, she said both CK and AK were at the table, and both expressed surprise in respect of the stock transactions in the account.

¶ 82 AK in her Statement confirms that the Ks didn't know the amount of the portfolio until they received the confirmation slips, and added them up, and it came to more than the \$125,000 they had given Ms. Steinhoff. (Ex. 20 pages 16-17).

JULY 7 - 10, 2008

¶ 83 CK testified that he called the following Monday and got the Respondent's assistant, Melissa, and asked if he could speak to Ms. Steinhoff and was told that she was either in client meetings, or not available, and so he said he'd try back the next day. He testified he called on Tuesday, and again wasn't able to get hold of Ms. Steinhoff, but spoke with Melissa and told her that they got the transaction slips, the amount totalled up to more than the \$125,000 that they had given Ms. Steinhoff, and that he was a little confused, and thought that a mistake might have happened. He testified that at that point in the conversation Melissa mentioned that they could have a margin account. He then asked her what's a margin account? However she pushed him off, and said he needed to talk to Carolann, and that she'd pass on the message to her.

¶ 84 Melissa Huston testified that there were several phone calls with the Ks throughout the summer that the money was invested. She said the next major one, after May 28th, was after the securities had been purchased in their joint account. She recalled CK called "...and he was confused about the amount on the confirmation slips that he had received. The amounts totalled more than what they had brought in to invest. So to help explain it, I had a look at the account, and I explained that he had a margin account, and that's how it was possible to invest more than the money they had deposited. At that time he expressed confusion at to what a margin account was. At that point I thought it would be best if he talked to Carolann in more detail about the investment and how their account had been set up." She told CK that she would have Ms. Steinhoff call him back as she was unavailable to talk to him at that time. (Transcript Aug. 5/10; p. 10 – 11).

¶ 85 Ms. Huston said that as a result of the call from CK she had prepared a Broker's Ally note for the Respondent. However, there was a very important caveat. She testified that she did not record all of the details of the conversation with CK because the question he posed was something that they were told not to note in writing because it could be construed to raise questions with the compliance department. This direction had come from Ms. Steinhoff who told them not to report anything that could be construed as something maybe the compliance department may want to investigate further. For that reason she didn't record the thrust of CK's inquiry, or what the actual question was. (Transcript, August 5, 2010, pages 10 – 12).

¶ 86 However, Ms. Huston testified that, in fact, she did tell Ms. Steinhoff the truth about the call; she was

confident that she told Ms. Steinhoff because Ms. Steinhoff did want to know these kinds of questions and client comments about them. She just didn't record it in the Broker's Ally note.

¶ 87 Ms. Huston identified the Broker's Ally note she made for the Respondent on Tuesday, July 8th, 2002 (Ex. 9 tab 8) which had the day and the date, and stated:

"Mr. (K) called with some questions about purchases made with the cheque they deposited into their joint account. Carolann was with a client, so I have left her a note to call him back in her inbox. – Melissa"

¶ 88 Melissa also confirmed in her evidence that she didn't make a Broker's Ally note about every client telephone call; she didn't record simple calls such as "is she available? no, she's not. Well, I'll call back later". The practice was to record a note on calls where there was something they would like to keep a record of for the future and then they would make a note of that.

¶ 89 CK testified that Ms. Steinhoff called him back, in response to his call and message with Melissa. She told him that it wasn't a mistake; that it was the typical investment strategy for a short term investment, and reassured him that everything was okay, there was nothing to worry about. Asked how could they invest more money than they had given her, she explained that they could use leverage to use their money to invest. As to who was using leverage, Ms. Steinhoff didn't really explain who was leveraging what but just the fact that she was able to do that. He assumed it was Wellington West using leverage.

¶ 90 CK in his interview Statement, in relation to this telephone conversation, stated that Ms. Steinhoff didn't really explain how the investments could get to this amount, but justified that it was typical, don't worry, she had their best interests in mind. He said she was very convincing. (Ex. 14 pages 31-32).

¶ 91 On cross-examination, CK said he couldn't recall exactly whether Ms. Steinhoff called him back on the Tuesday afternoon or the Thursday afternoon, but thought it was Thursday. But she did give him a call back and was very reassuring that this was her normal investment strategy, and not to worry; and that's where it was left. She explained that she was able to leverage the money that they had invested, and that was pretty much the extent of that. He testified he restated to her that the funds were their down payment for their house and they were going to need the funds soon.

¶ 92 In his November 12, 2008 complaint letter to Wellington West, CK states that he had a telephone conversation with Ms. Steinhoff on Thursday, July 10, 2008. He states:

"She said the additional \$125,000 in funds invested wasn't an error and this was perfectly normal for a short term investment. I explained that we didn't have an additional \$125,000 and didn't understand how she could invest money we didn't have. Her response was Wellington West Capital Inc. is able to leverage funds in order to invest on behalf of their clients. She was very reassuring on the phone; over and over again she expressed to me how she had our best interest in mind and was confident the investments she had purchased would work out." (Ex. 9 tab 29 page 853).

¶ 93 Ms. Steinhoff, in her November 28, 2008, 8 page email to Wellington West stated:

"When Chris received his confirmations for the trades, he called and told me that he had programmed their stock portfolio on their computer at home so he could watch it every night. On every trade confirmation Chris received, the following instructions are very clear: ..." (Ex. 9 tab 33 page 338).

¶ 94 Ms. Steinhoff in her email of November 30, 2008 to Wellington West, responding to the 14 questions they had posed, addressed question 9 which was:

"9. Did the clients contact you shortly after the purchases were made to discuss the purchases? If so what date did they contact you and what did you discuss? Did the clients query you on why the purchases they made equated to more than the total amount invested of \$125,000? If so, what was your response to them? Do you have notes of this discussion? If so, please provide to me." (Ex. 9 tab 30 page 1000).

¶ 95 Ms. Steinhoff's November 30th response was:

“Yes, Chris did call me shortly after the purchases were made to tell me he had received the confirmations. He wanted to set the portfolio up on his computer so he could follow up. I vaguely recall he said he was setting it up on Google. I believe I provided him with the stock symbols. He wanted to confirm how the margin was paid for and I reiterated our discussion from the meeting that the debit interest is charged monthly and he would see it on his statement. I do not have notes of this discussion; this is my recollection only.” (Ex. 9 tab 30 page 1002).

¶ 96 Ms. Steinhoff, in the IROC interview on March 26, 2009, was presented with the July, 2008 note from Melissa Huston saying CK had called with questions about purchases in the joint account. She testified that she would have received the Melissa note, and would have talked to CK on or shortly after July 8th but didn’t recall exactly. She said she didn’t recall but returns all her messages and that she would have returned his phone call. She was asked:

“DZ Okay. So did you talk to Chris on or shortly after July 8th?

CS I would have. I don’t recall exactly, but I definitely – I return all my messages. So, I definitely would have return his phone call.

DZ Okay. What did you talk about?

CS **I have no idea.**

DZ Okay. Would you have any notes or records of your discussion with Chris?

CS No, I wouldn’t or I would’ve included them. If it was just questions about the confirmations or questions, I would’ve just answered the questions.

DZ Right. So you have no recollection of what the conversation was about?

CS **I have no recollection at all, no.** What I usually tell clients when I make the recommendations is they will be receiving their confirmations in a few days and when they receive the confirmations if they have any questions give me a call.”

(Ex. 11 tab 38 pages 44-45). (*Emphasis added*)

¶ 97 She then went on in the interview and said that she thought when she called him back he wanted stock symbols for the securities. However, she didn’t know whether that request was part of this call in relation to the Melissa note. (Ex. 11 tab 38 page 45-46).

¶ 98 In her evidence-in-chief, after she was taken to the Melissa note of July 8th, Ms Steinhoff testified that she called CK back on July 8th, and that CK asked questions about margin. She testified that they had gone over it in their initial meeting, when she made the original suggestions to him for the securities for the portfolio, and that CK said that they wanted to use margin. Then in the call on the 8th CK wanted clarification on how margin worked in terms of the interest that was going to be paid, and he wanted to know the stock symbols to put into his computer, which she gave him. She testified that he asked whether any margin was still available, and she explained that there was credit available if he wanted to use it; he did, and she recommended Volta Resources, and he agreed to purchase 10,000 shares of Volta and the trade was put in on the 8th of July and settled on July 11th. Volta was purchased at \$0.57 per share. (Transcript August 13, 2010, pages 9-11).

¶ 99 The Respondent also denied, in her testimony, giving instructions to Ms. Huston not to record notes of clients calls where the subject might arouse the interest of compliance.

¶ 100 The June 30th, 2008 statement for the joint account shows the deposit of the \$125,000 into the account, and shows the portfolio’s overall asset allocation at \$125,000. However, pages 3 and 4 of the statement show transactions to settle after June 30th, 2008 which include both Canadian and US transactions; however there is no total given for those transactions.

¶ 101 It was not put to CK in cross that in a conversation with Ms. Steinhoff on Tuesday, July 8th, he had given approval for the purchase of 10,000 shares of Volta Resources using margin in the joint account. It is also

not alleged in the Respondent's filed Response. (Ex. 2).

FRIDAY, JULY 25, 2008

¶ 102 Ms. Huston testified that she received a call from CK on July 25, 2008 and made a Brokers Ally note about it. The note has the date, Friday, July 25, 2008 and states:

“Mr. (K) called, as they now have the possession date for their house, and they need to talk to Carolann about their investments. She was just starting a client meeting, so I let him know that I would get her to call him back when she is available. – Melissa” (Ex. 9 tab 9).

¶ 103 CK testified that he made that call to Melissa to confirm the completion date on their house purchase and that Ms. Steinhoff did not call him back in respect of that message.

JULY 31, 2008 JOINT ACCOUNT STATEMENT

¶ 104 CK testified that their mail was going to their parents home, and that they likely saw this statement (Ex. 9 tab 10) in the first or second week of August. He said that they opened the statement and took a look at it, but that he really didn't understand it because it was considerably different than their personal (RSP) account statement. He said he didn't really know how to read it so it was just kind of put aside. With respect to how the investments were going, he testified he wasn't too sure. With the additional stocks that were purchased, it was difficult to understand what the total portfolio was actually worth at this time.

¶ 105 CK testified that apart from the July 10th, 2008 telephone call with the Respondent, he had no direct contact with her until towards the end of August. Ms. Huston made a Brokers Ally note on Monday, August 25, 2008:

“Mr. (K) called as their bank wants confirmation of the money they have for a down payment. They wanted to come in to see Carolann as soon as possible. Carolann let me know that they could come in tomorrow at 3:00 p.m., and he said that should work for them. He said that he would also email Carolann the letter the bank had sent them so that she knew exactly what the bank was wanting for confirmation. – Melissa” (Ex. 9 tab 11).

¶ 106 On August 25, 2008 at 9:36 a.m. CK sent an email to Ms. Steinhoff attaching part of the email they received from the bank. He said “We are obviously very concerned about the money needed as the last time I checked almost all the stocks had lost money from the original \$125,000 we invested.” (Ex. 9 tab 12).

¶ 107 The attachment was an email from Gerry Smith, at TD Bank, and it stated:

“Morning Anita: Just need to clarify balance of funds for down payment, total down payment required is \$128,067.00. Do you have a bank statement showing the balance of funds held for down payment, I need a copy of the bank statement please.

Regards, Gerry Smith” (Ex. 9 tab 12).

¶ 108 Ms. Huston was shown her Brokers Ally note of August 25, 2008 and she testified this was a call where CK was wanting to see Ms. Steinhoff as quickly as possible; she recalled there being urgency in his voice. She testified that she believed she would have put him on hold to check to see when Ms. Steinhoff would first be available to meet him since there was this sense of urgency. She did check with Ms. Steinhoff and then went back and confirmed the time of the appointment which would be the next day. She testified she definitely did recall the sense of urgency in CK's voice.

¶ 109 The Respondent, in her evidence-in-chief, said that she had a specific recollection of Melissa coming in re the phone call from CK, and then fitting them in as quickly as they could which was the next day. She confirmed that she had received the August 25/08 email from CK (Ex. 9 tab 12). The Respondent testified that she didn't recall any contact with the Ks between July 25 and August 25; and prior to August 25th, they hadn't expressed any concern.

¶ 110 Ms. Steinhoff testified in her March 26, 2009 interview that the idea to use 100% margin, as opposed to some lesser amount, was the Ks. She was asked why then did you recommend that they utilize 100% margin,

why didn't you keep it at some lesser amount. She answered:

“They wanted to be very aggressive; they decided that they wanted to do that. **We had many conversations throughout the summer about the portfolio, many conversations.** They were following on, not (AK) so much, but CK definitely was following it online and he's the person that I talked with most about this. And at no time – at no time was there any indication that they weren't prepared to continue with the portfolio. As a matter of fact, **in August when the market started to turn, I called them in to come to a meeting....**” (Ex. 11 tab 38 pages 32-33). (*Emphasis added*)

¶ 111 CK testified that the call on Monday August 25 to Ms. Steinhoff was a result of the lead story on the news on Friday night August 22nd that the markets had significantly crashed, which story caused them extreme concern and prompted the call on Monday. They wanted to make sure they were still okay and to see if this had affected them. He said he had also asked at the time of making the appointment to get an account balance on where their account was actually at, because they really didn't understand where it was at. With that he stated they hadn't had any contact with Ms. Steinhoff and didn't know how much money they had in the account.

¶ 112 The Ks both attended the meeting with Ms. Steinhoff on the afternoon of August 26. CK testified that Ms. Steinhoff had prepared a thick portfolio of news clippings and individual sheets on each stock they had in their portfolio; additional sheets for each stock with industry speculations, and a considerable amount of information that she presented to them. She reviewed each stock and what the industry professionals were saying it was going to hit. His recollection was there were still a couple of their stocks that were doing okay, and they had actually made money. But she was going over and over the different stocks that they had and where they were at. He felt she was trying to smooth over where things were at. He testified they also reviewed their RSP portfolios.

¶ 113 Then she presented the sheet that had the current value of their portfolio, which absolutely shocked them as it was at \$100,000. He testified they then had a significant conversation back and forth about how could this happen; they stated their risk level was only \$10,000; how could it even get to \$100,000; that it was a real shock to them because it was the first time they had actually been presented with what was the value of their account. He testified they told her again that they didn't have the money to make up the difference for the house down payment. He testified that her response was the markets were going to turn around. It's a slow time during the summer, people are coming back to work soon, things are still not that bad. She mentioned several stocks, and their prospects, or releases coming soon. She was trying to put some hope in this situation that it was going to turn around, and they shouldn't worry.

¶ 114 He testified that they were asking what their options were because they didn't have any other money hidden away. This was the down payment for their house. He testified that Ms. Steinhoff reassured them that it was going to work out; he said they weren't presented with any options; it was just here's where you're at but she was very reassuring that it would work out.

¶ 115 As to recommendations, CK said that during the presentation of the different stocks there were three that had actually earned money; Seaspac, Rim and one of the banks. One of the things Ms. Steinhoff said she would do to those three was put a stop loss on them, of obviously different values, as to which, when they hit, they would sell, and at least with those stocks they would make some money in case the markets kept going the way they were going. He testified he did not know what a stop loss was but she explained it. The explanation was once you put in a stop loss, if the price hits it they automatically sell.

¶ 116 As to the other stocks in the portfolio, she mentioned that a few of them had different things coming up and that they should turn around.

¶ 117 CK was referred to Ex. 9 tab 13 pages 58 and 59; he said these portfolio review pages with listings of their stocks were part of the documents she had at the August 26th review. Referring to page 58, he said the writing at the bottom near Research in Motion was Ms. Steinhoff's, and she put the “x” and the word “30 days” and “\$130.00, stop loss” on that when they were there. RIM was at \$133.50/share. Similarly on page 59, the Bank of America, there is an arrow and the word “stop” and the number “27”. Bank of America was

\$29.12/share.

¶ 118 With respect to the voluminous documentation that Ms. Steinhoff provided, CK said that while she reviewed all the stocks, and the articles, he did not go back and read them after she had given them to them. It was a bit of information overload because obviously the stocks were down, and the message was: here is what is projected. It was the same story over and over.

¶ 119 With respect to whether Ms. Steinhoff indicated that stocks could go down further, he testified her discussion was very much the opposite of that. She was very optimistic that every industry expert was saying everything was going to go back up, its going to rebound, things are going to turn around. There was discussion of whether or not they should sell, but they were in a predicament because they had already lost more than they were able to lose. Ms. Steinhoff's firm recommendation was to hang on, give it a chance, its going to rebound, things are going to be okay; pulling out now would not be smart.

¶ 120 AK, in her statement gave her recollection of what occurred at the August 26th meeting. She said there was initial shock on the Ks part because they were well over the \$10,000 that they had originally mentioned to Ms. Steinhoff that would be their comfort level, and they were concerned that they weren't going to have the funds for the down payment on the house. She said they told Ms. Steinhoff that, and that Ms. Steinhoff was going into all the financial experts and analysts and how they were all expecting that it was going to turn around. Ms. Steinhoff was confident that it was going to turn around, not to worry, and not to pull the stock at that time. They mentioned cutting their losses at the time, and mitigating, so it wouldn't be more than the current loss, but Ms. Steinhoff went on at great lengths going over what the financial experts and analysts said. How they were all saying that it was going to turn around, its just a blip, and not to worry. AK recalled that at the meeting Ms. Steinhoff gave a personal assurance that if it came down to it she would cut them a personal cheque. That was how confident she was that everything was going to turn around and that it would be fine. AK said that Ms. Steinhoff reassured them, and persuaded them not to sell out the account, and to leave everything there. She said as a result of the meeting with Ms. Steinhoff she was cautiously optimistic. (Ex. 28 pages 20 – 23).

¶ 121 In cross examination, CK also outlined the manner in which the meeting on August 26th had progressed, and when they eventually got the numbers for their account, it was a complete shock. He felt like the bottom had completely dropped out, they were past their limit of \$10,000. However, the Respondent's very strong recommendation was to stay the course. Her professional opinion was to definitely keep going, and they were there to get her professional opinion. He also testified that eventually the Respondent offered that if it doesn't turn around she would write a personal cheque. (Transcript August 10, 2010, Page 209 – 212).

¶ 122 The Ks accepted Ms. Steinhoff's advice, and they did not sell out the portfolio, although they said they agreed with the three stop loss directions.

¶ 123 With respect to the August 26th meeting, Ms. Steinhoff testified that a portfolio review was conducted by her, and that she went through the research, including financial and industry articles on each of the stocks in the portfolio. However her emphasis was that the market had declined, and that she didn't have a crystal ball and it was the Ks decision. She said she told them that if it's causing any anxiety they should sell; cut your losses right now if you are feeling uncomfortable. However she testified that the Ks did not make a decision on August 26th; they decided to go away and they were going to discuss it and get back to her. She testified that she did know that the funds would be needed in October for the down payment.

¶ 124 With respect to the discussion of stop loss, Ms. Steinhoff testified that she explained the risks of stop loss orders. She recommended to them that it was better for her to just watch the portfolio more closely, and if she saw a little bump up on any of those three stocks, then she would phone them and get their instructions to sell. She said she did that with Bank of America. CK agreed that this call was made.

¶ 125 Ms. Steinhoff testified in chief that while the Ks made no decision on August 26th they did get back to her with an email including about how they were going to keep their fingers crossed and look to the stars or something. (Transcript August 13, 2010, Page 29 and 30).

¶ 126 CK testified that between approximately August 28, 2008 and September 9 there were emails back and forth between Gerry Smith, their Bank mortgage contact, and the Respondent's office because Smith needed confirmation of the down payment for the purchase of the house. Apparently Smith received that from Ms. Steinhoff's office, but CK said they didn't understand what had happened because on August 26th the account had been \$100,000. (Ex. 9 tab 20).

¶ 127 There is also a Brokers Ally note from Ms. Huston dated Friday, September 5th/08 that Gerry Smith from TD Canada Trust had called re an email he had sent to Carolann last week regarding the accounts of the Ks; Ms. Huston said the email was resent and she printed it off and had given it to Ms. Steinhoff to review before responding. Apparently the result of this exchange was that Smith was sent statements that were not only for the joint account, but included the RSP accounts of the Ks.

¶ 128 CK testified that the market took another crash on Friday, August 29th, and they became very concerned. They put in a call to get in contact with the Respondent. He said that most of the conversations were with Ms. Huston, to leave a message for the Respondent to get in touch with them, and then Ms. Steinhoff gave them a call back. At this point there was a lot more concern on their side. Information had been sent off to their bank re their down payment, and now the market was crashing again, and they were in a worse state than just earlier that week. He testified that in a period of approximately 10 days the market just kept going down. However he testified that Ms. Steinhoff reassured them, told them to hold on, things were going to work out.

¶ 129 CK testified that towards the end of September (September 27 – 29) there was a lot of discussion in the media about a bail-out plan, and they had their fingers crossed hoping that the bail-out plan was going to be accepted and there would be a market turnaround before they had to sell off. CK said that he had a conversation with Ms. Steinhoff on his cell phone and that Ms. Steinhoff had been in New York, and they had a discussion that things were looking good for the bail-out plan. Not much was said about their actual account; just more about where the market was going, and hopefully this bail-out plan was going to get approved. He did not know what the account balance was at that time, nor did he have a good idea of what their account was at.

¶ 130 In her evidence in chief, Ms. Steinhoff testified she was in New York City in the week prior to September 28, 2008 attending two conferences. She went to the World Business Forum for two days, and did a special management program with Marcus Buckingham for two days. She was in New York for a week.

¶ 131 In cross-examination, the following exchange took place:

“Q And during your time at the World Business Forum in New York from September 24th to September 27th, did you hear anything about the TARP program?

A I don't recall.

Q Do you recall that on September 29th that program was voted on in the US Congress? Do you recall that?

A No. I don't.

Q You have no recollection of that?

A None.

Q Do you recall that that US Congress voted down that bailout plan on that Monday, September 29th? You don't recall that –

A No, I don't.

Q -- 2008.

A No, I do not.

Q You have no recollection of that whatsoever?

A None.

Q Do you recall that that actually happened?

A I don't recall that actually happening.

Q You don't recall that the US Congress actually on the its first vote voted down the bailout program?

A No, I don't recall that.

Q You don't recall a speech by House Speaker Nancy Pelosi?

A No, I don't.

Q That certain people indicated – turned off some members of Congress and caused them to vote against the bill?

A No, I don't recall that.

Q Were you keeping up to date on what was going on in the financial markets at this time?

A Absolutely.

Q And you have no recollection of that?

A None.

Q Do you recall that it was ever passed?

A The TARP program?

Q Yes.

A Was actually passed eventually.”

(Transcript – August 13, 2010, Pages 111-112).

¶ 132 In cross-examination, the exchange continued:

“Q If I were to say – if I were to tell you that the US Congress actually voted down the TARP program in its first – when it was first brought before Congress and that it voted it down on that day, Monday, September 29th, you wouldn't be able to disagree with me, would you?

A I have no recollection of that happening on September 29th.

Q In fact, you have no recollection of it happening at all?

A That's correct.

Q And when you were at the World Business Forum in New York from September 24th to September 27th, did you have any conversations with anybody about the bailout program or the TARP program?

A I have no recollection.”

(Transcript – August 13, 2010, Page 112 – 113).

¶ 133 There is an email chain which begins from AK to Ms. Steinhoff on Saturday, September 27 requesting a call as they were signing the mortgage papers, and needed to meet with their lawyer and have their finances sorted. There is a reply email from Ms. Steinhoff on the same date indicating she was just back from a business meeting in New York City, and a further email from AK to Ms. Steinhoff on Sunday, September 28/08 confirming that CK and Ms. Steinhoff had a discussion that day. That email from AK ends:

“I will call Perry – our lawyer first thing Monday morning and find out when the funds for our down payment have to be in our account and will let you know. Keeping our fingers crossed and an eye in the sky for lucky stars”. (Ex. 9 tab 22).

¶ 134 CK testified that on Monday, September 29/08 it was announced the bail-out plan was not accepted. They were in a very bad financial situation, and his wife had extreme stress and anxiety. He was having to

leave on a business trip and would be leaving his wife alone, and he sent an email to Ms. Steinhoff on September 29/08 at 1:39 p.m. referencing their portfolio as follows:

“I just want to check in and see what your course of action is now that the “bail-out plan” has been rejected. We can’t even look at the market as it’s causing us to lose sleep and quite honestly the stress over the past few weeks has been unbearable. Anita and I had expressed to you we were prepared to lose about \$10,000.00 when we entered into this. We were not in a position to lose this amount of money. Quite honestly we are scared we are going to lose our house.

I have left Anita off this e-mail as she has caused herself to be physically ill due to worrying over this, she can’t get away from this as it’s all over the news. With my business trip coming up on Sunday, I am quite concerned about leaving her all next week if everything isn’t resolved.”

(Ex. 9 tab 23).

¶ 135 In cross, Ms. Steinhoff denied any conversations with CK re a bail-out plan, and denied she knew the bail-out plan failed on Sept. 29.

¶ 136 AK also sent Ms. Steinhoff an email on Monday, September 29 at 9:48 p.m. advising her that they had received a call from their lawyer and the funds for their down payment had to be available in their account no later than October 8th. (Ex. 9 tab 22).

¶ 137 CK testified that he had a telephone conversation with Ms. Steinhoff either September 29th or the next day. He said that her posture towards them had really changed; the reassurance of previous meetings and phone calls was gone. The situation was that they knew what they were doing; they were advanced investors; they understood the risks; what they were getting into; and very much putting the blame on them for the situation. They needed the money for their down payment by a date certain, and Ms. Steinhoff was asking verbal approval to sell the stocks when she saw that they were at their best in the next couple of days. They only had a few days left. He says he corrected Ms. Steinhoff: in fact they didn’t really understand a lot of the things that she had done; they didn’t know what half of the stuff was; it was definitely not their idea. But the switcharound had occurred. Further, he did not know at that point what their portfolio was worth. CK testified that over a few days in conversation with Melissa AK was told that their portfolio was down to \$50,000. He believed that was on or about October 3rd. They also gave instructions to sell their RSP accounts.

¶ 138 CK said that when he found out that the account was down to about \$50,000, he immediately called Ms. Steinhoff but he couldn’t get in touch with her. He had a conversation with Ms. Huston, and in that conversation indicated to her that he felt they were going to lose their house, and he needed to speak with Ms. Steinhoff. He finally got a call back from Ms. Steinhoff later that night and no options were being laid out. They had a limited amount of money, and they were extremely short of what they required for their down payment. He said in their conversation she made accusations that the Ks knew what they were doing; it was their idea; they were trying to be aggressive or trying to make money; and that he cut her off, and told her that wasn’t the situation at all. He thought the conversation was perhaps being taped. At one point Ms. Steinhoff said she would see if Wellington West would loan them additional money, but he felt they weren’t in a position to buy a new house and have to pay on a large loan. He testified the conversation wasn’t going in any direction trying to help them, but was very much accusing them of creating the whole situation, and that he ended the call.

¶ 139 After that call CK spoke to his parents, and his family, and it was a very awkward situation. The family advised them to try to complete the house purchase. AKs parents were able to arrange the funds for them through a line of credit. In the result they borrowed \$65,000 from AKs parents and completed.

¶ 140 The October 31, 2008 portfolio statement for the Ks accounts show the portfolios being liquidated, and it appears the value was \$60,258.69 (Ex. 9 tab 26).

¶ 141 In cross examination, CK confirmed that the Respondent had offered to put a stop loss direction on three of the stocks, and they had agreed that should be done. Further, he denied that Ms. Steinhoff ever suggested

that the portfolio she put in place at the end of June was an “aggressive strategy”. He also confirmed that in their initial discussions with Ms. Steinhoff, she indicated that she could probably get a 10% return although it was not a guarantee, but the amount was referenced many times by Ms. Steinhoff.

¶ 142 In her interview on March 26, 2009, Ms. Steinhoff was asked by the investigator about the email from CK sent on September 29 at 1:39 p.m. where he made reference to the bail-out plan being rejected, and his reference to telling her they were prepared to lose \$10,000. She was asked why she wouldn’t have sent something back in writing by email objecting to the \$10,000 claim. In response, she said she had a lot of clients panicking at that point in time, and she was spending her entire 12 to 14 hour day talking to clients, calming them down and trying to put things into perspective. Pressed on why she didn’t send a response back to CK, in writing, regarding the \$10,000 claim, she said she would have been too busy. (Ex. 11 tab 38 page 50).

¶ 143 All the securities in the Ks joint account were sold in late September and early October, 2008. Counsel for IIROC provided the following table:

Trade Date	CDN/US\$	Security	Proceeds	Profit/Loss
Sep 10/08	US	Bank of America	\$25,854 US\$	\$5,560 US\$
Sep 30/08	US	Google Inc.	\$20,295 US\$	(\$6,763) US\$
Sep 30/08	US	Seaspan Corp.	\$14,260 US\$	(\$5,423) US\$
Sep 30/08	CDN	Detour Gold Corp	\$10,7942	(\$11,408)
Sep 30/08	CDN	Diagnocure Inc.	\$14,280	(\$10,118)
Sep 30/08	CDN	Liquor Stores Income Fund	\$17,525	(\$4,381)
Sep 30/08	CDN	Pelangio Mines Inc. /PDX Resources Inc.	\$5,570	(\$6,790)
Oct 1/08	CDN	Research In Motion Ltd.	\$14,055	(\$11,775)
Oct 1/08	CDN	Suncor Energy Inc.	\$17,225	(\$7,576)
Oct 1/08	CDN	TD Bank	\$25,854 US\$	(\$5,236) US\$
Oct 1/08	US	Allied Capital Corp.	\$9,407 US\$	(\$5,236) US\$
Oct 3/08	CDN	Volta Resources Inc.	\$1,580	(\$4,235)
			Total Losses	(\$69,096)

¶ 144 Counsel for IIROC provided some further summaries:

- a) The transactions in the Joint K Account generated \$6,813 in commissions.
- b) The Joint K Account was credited approximately \$2,354 (not factoring foreign exchange) for income received primarily from distributions.
- c) The Joint K Account was debited approximately \$2,014 for interest charges on margin debt.

ANALYSIS

ONUS AND STANDARD OF PROOF

¶ 145 The parties cited a number of authorities in respect of the standard of proof including *Re: Boulieris* (2004) 27 OSCB 1597; *Octagon Capital Corp.* (2007) IDA CD No. 16, and D.M. Graydon (1987) TSE DD No. 20. The Supreme Court of Canada in *F.H. v. McDougall* (2008) S.C.J. No. 54, reviewed the conflicting case law, and set out the approach Canadian courts should now adopt. The court stated:

(4) The Approach Canadian Courts Should Now Adopt

40. Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all

important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

45. To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

(5) Conclusion on Standard of Proof

(49) In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

¶ 146 Thus in a case such as this, there is only one standard of proof and that is proof on a balance of probabilities. In all cases, the evidence must be scrutinized with care by the trial judge (or panel). The evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

THE RELEVANT RULES

¶ 147 Counts 1 – 7 all invoke Rule 29.1. It states:

“Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.”

¶ 148 Counts 1 and 2 invoke Rule 1300.1(a) which states:

“Identity and Creditworthiness

- (a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.”

¶ 149 Count 3 invokes Rule 1300.4 which states:

“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 with in compliance with Rule 1300.5;
- (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.”

¶ 150 Counts 4 and 5 invoke Rule 1300.1(p) and (q) and count 6 invokes Rule 1300.1(q). Those Rules state:

“Suitability Generally

- (p) subject to Rule 1300.1(r) and 1300.1(s), each Dealer Member shall use due diligence to ensure that the acceptance of any order from a customer is suitable for such customer based on factors including the customer’s financial situation, investment knowledge, investment objectives and risk tolerance.”

“Suitability Determination Required When Recommendation Provided

- (q) Each Dealer Member, when recommending to a customer the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such customer based on factors including the customer’s financial situation, investment knowledge, investment objectives and risk tolerance.”

¶ 151 In *Young Estate v. RBC Dominion Securities (RBC) and Houghton*, [2008] O.J. No. 5418, the Plaintiffs brought an action against the securities company (RBC) and the investment advisor claiming the advisor had failed to meet the duty of care required of an investment advisor and that the member firm had failed to adequately supervise him. The court reviewed various regulations, codes of conduct and practices that were applicable, and relevant case law:

“182. I was provided with Rule 31-505 of the Ontario Securities Commission, Regulation 1300.1, 1500 and Policy No. 2 of the Investment Dealers Association and the Canadian Securities Institute, Code of Ethics and Conduct, Introduction to Section 1 (Suitability) and the Conduct and Practices Handbook. I have reviewed the applicable provisions of same. I was also informed by the many cases provided with respect to the stockbroker liability. I do not intend to review in detail that case law. I have however gleaned a number of principles from the case law which I set out as follows:

1. Primarily, a broker’s relationship with the client is that of agent and principal. The agent takes instructions from the principal and carries them out with care, skill and diligence. Failure to do so may give rise to an action in breach of contract or negligence (*Varcoe v. Sterling et al* (1992), 7 O.R. (3d) 204 (Gen. Div.)).
2. ...
3. So long as a broker applies the skill and knowledge relied upon and advises fully, honestly and in good faith, the broker has discharged his obligation and is not responsible if the transaction proves unfavourable (*Varcoe v. Sterling, supra*).
4. The extent of the duty of care owed beyond the duty of executing instructions and acting honestly, will depend on the circumstances of each individual case and is a question of fact in each case (*Abrams v. Sprott Securities Ltd.*, [2003] O.J. No. 3900, 2003 CarswellOnt 3824 (C.A.)).
5. The standard of care which applies to an inexperienced investor is considerably higher than the standard that exists between a broker and a seasoned investor (*Abrams v. Sprott Securities Ltd.*,

- supra).
6. The duty on behalf of a broker will vary from that of an order taker to that of a fiduciary depending on the specifics of the relationship (875121 Ontario Ltd. v. Nesbitt Burns Inc., [1999] O.J. No. 3825, 1999 CarswellOnt 3247 (Sup.Ct.) and Hunt v. TD Securities Inc. (2003), 66 O.R. (3d) 481 (Ont. C.A.)). This is what has been referred to as the “continuum” or the “spectrum”.
 7. The nature and extent of the broker’s duty to his client will depend on the nature of the advice given during their business relationship (Davis. v. Orion Securities Inc., supra).
 8. If the client wants to make an investment that is not suitable for the client, then the extent of the duty to warn depends on the level of sophistication of the client (Robinson v. Fundex Investments Inc., [2006] O.J. No. 2976 (Sup.Ct.)).
 9. An Investment Advisor must explain the risks of a margin account. Because leveraging can magnify losses, it is critical that an Investment Advisor ensures that the client understands the risks of borrowing to invest, in particular the risks of using collateral, including investments made with monies borrowed, as security for loans (Daubney, Re, 2008 LNONOSC 388, 2008 CarswellOnt 2552 (Ontario Securities Commission)).
 10. The IDA regulations and the Conduct and Practices Handbook establish minimum standards. Breach of the standards is actionable where damages result (Varcoe v. Sterling, supra; Davidson v. Norman Capital Management Inc., [2005] O.J. No. 4965, 2005 CarswellOnt 7243 (Sup. Ct.); and Blackburn v. Midland Walwyn Capital, [2003] O.J. No. 621, 2003 CarswellOnt 864 (Sup.Ct.)).
 11. ...
 12. ...
 13. The cardinal rule of the brokerage business is the “know your client rule”. A broker who opens an account for a client is required to obtain from the client an “account application form” (in this case, referred to as the KYC form). The form is to contain detailed information about the client including age, employment, income, net worth, trading experience and trading objectives, as well as personal and family responsibilities. The broker has an obligation to the client to keep up-to-date on the client’s circumstances and be informed of any significant changes in those circumstances (Varcoe v. Sterling, supra; Blackburn v. Midland Walwyn, supra).
 14. The “know your client” rule is designed to ensure that portfolios are suitable for the client. Suitability is the cornerstone of the investment industry. (Robinson v. Fundex, supra).
 15. The concept of suitability involves a consideration of five factors relating to the investor: his age, his income and net worth; his investment knowledge; his investment objectives; and his risk tolerance. “On a best efforts basis”, the broker will ascertain all relevant information from the client, such as his awareness of risk and return; the time horizon for his investments, and his net worth (Davis v. Orion Securities Inc., supra).
 16. The “know your client” rule is related to another fundamental duty owed by the financial advisor to his client, which is to ensure that all investments made for the client are suitable for the client and in keeping with the client’s investment objectives and risk tolerances. An investment portfolio created by an advisor for his client must be suitable for the client. The advisor must also monitor the ongoing suitability of investments to ensure they continue to remain suitable when there are material changes in the client’s personal or financial circumstances, investment objectives or risk tolerances (Robinson v. Fundex, supra).
 17. The “know your client” rule and the suitability obligation are interwoven obligations (Daubney, Re, supra).

18. The Investment Advisor's duties with respect to suitability analysis cannot be dodged or somehow left to the client (Daubney, Re, supra).
19. An Investment Advisor is not a guarantor of financial success but owes an obligation to apply an appropriate degree of skill and knowledge and advise fully (Varcoe v. Sterling, supra).
20. An Investment Advisor has a duty to make a balanced presentation to a client and to ensure that the client is aware of all positive and negative factors in a transaction, prior to executing a trade (Abrams v. Sprott Ltd., [2001] O.J. No. 597, 2001 CarswellOnt 547 (Sup.Ct.)).
21. A market downturn is not an independent intervening act but rather a foreseeable event that an Investment Advisor should anticipate and so advise (Rhoads v. Prudential-Bache Securities Canada Ltd., [1992] B.C.J. No. 153, 1992 CarswellBC 16 (B.C.C.A.)).
22. There is no law that prevents competent adults from making their own foolish investments (Stonjanov v. Holland, supra)."

¶ 152 The Panel was supplied with a copy of certain sections of the Canadian Securities Institute "*Conduct and Practices Handbook Course*" including the section on account opening procedures. It states:

"The Cardinal Rule – Know Your Client

The Know Your Client ("KYC") rule relates to Standard A, Duty of Care, and is the cornerstone of all dealings with clients. The KYC rule requires that every member use due diligence:

- to learn the essential facts relative to every client and to every order or account accepted;
- to ensure that the acceptance of any order for any account is within the bounds of good business practice; and
- to ensure that recommendations made for any account are appropriate for the client and in keeping with their investment objectives.¹"

(Conduct & Practices Handbook Course, page 65)

¶ 153 The Handbook Course states the following with respect to investment objectives and risk tolerance:

"(xi) Investment Objectives and Risk Tolerance

The IA's initial discussions with the client must include a review of the client's investment objectives to determine what plans the client has for his or her money? The percentages of funds allocated to safety, income and growth can then be determined.

The client's risk tolerance should also be assessed to ascertain the degree of risk the client is willing to assume. **Obviously, the time horizon of the investments must be taken into account.** The following types of questions can also be asked to judge how risk-tolerant a client really is:

- What **range** of value are you willing to accept for your portfolio in *x* years? (i.e., high of \$20,000, low of \$4,000; high of \$12,000, low of \$9,000)
- How would/do you react to a decline in market value? Would/do you sell right away, wait a few weeks, wait a year, or hold on for the long term?"

(Conduct & Practices Handbook Course, pages 73-74) (emphasis added)

CREDIBILITY

¹ IDA Regulation 1300.1"

¶ 154 As will become apparent in these Reasons, credibility is an important element in this case. The evidence of the clients CK and AK is at odds with the evidence of the Respondent on significant issues.

¶ 155 Counsel for IROC cited *Young Estate v. RBC Dominion Securities*, supra, a December 17, 2008 decision of Justice H.S. Polowin of the Ontario Superior Court of Justice. The Judge stated that credibility issues have come into play in the case and that credibility determinations had therefore to be made. At para. 197 the court found helpful the instruction that is given to juries in civil cases with respect to determining credibility. It was as follows:

“In determining the credit to be given to the evidence of a witness, you should use your good common sense and your knowledge of human nature. You might, in assessing credibility, consider the following:

The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to color or tinge or shade his evidence in order to lend support to his cause.

Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony? It is always well to bear in mind the probability or improbability of a witness' story and to weight it accordingly. That is a sound common sense test. Did his evidence make sense? Was it reasonable? Was it probable?

Does the witness show any tendency to exaggerate in his testimony?

Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you consider more worthy?

Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.”

(Para 197).

¶ 156 In paragraphs 198 and 199, the Court stated:

198: “In determining credibility, I am also mindful of the test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

199: “This dicta has been followed by courts in Ontario, including the Ontario Court of Appeal in *R. v. Norman*, [1993] O.J. No. 2802 (QL), *Sulzinger v. C.K. Alexander Ltd.*, [1972] 1 O.R. 720 and *Wawanesa Mutual Insurance Co. v. Hanes*, [1961] O.R. 495.”

¶ 157 The Panel found both Melissa Huston and SK to be credible witnesses. Both were clear, concise, straight forward and consistent in their testimony. They both presented well in the stand. Ms. Huston’s testimony is consistent with the documents that she identified during her testimony. Her testimony was corroborated on key points by the Broker’s Ally notes and subsequent events such as meetings between the Ks and the Respondent. SK showed a good recollection of the events. SK’s testimony was consistent with both CK’s and AK’s testimony re the events on July 4.

¶ 158 The Panel took careful note of CK’s testimony both in direct and cross-examination. He gave his evidence in a clear and concise manner and was forthright in his answers. He was not argumentative or evasive on cross-examination. His evidence was consistent with his IIROC interview, and with his complaint letters to Wellington West. He had a good recollection of events, and his explanation for failing to mention certain events, such as the portfolio review of their RSP accounts on June 10, was reasonable in the circumstances. He made concessions where appropriate.

¶ 159 His testimony was also consistent with the documentary evidence with respect to telephone calls, meetings, emails, etc. He answered questions in cross-examination in a straight forward manner and his demeanour in the stand was good. He was clear in his responses and he held his ground. The Panel found CK to be a credible witness.

¶ 160 The Respondent, Ms. Steinhoff, caused the Panel a number of concerns. She is a very experienced financial advisor, and says she had 250 to 300 clients, most with a significant net worth. She said she worked long days, and was extremely busy. She set up a software system to permit her assistants to record messages for her and she says she was diligent about returning calls. She admitted that during the severe market decline in the summer and fall of 2008, she was extremely busy counselling her clients. This fact probably affected her ability to recall events.

¶ 161 The Panel found the Respondent’s personal demeanour as a witness very troubling and problematic. At times, particularly during her evidence in chief, she was prone to not answer the question, and dissemble into what were irrelevant or peripherally relevant events and considerations. When counsel brought her back to the point of the question, she would shift around in the stand, and look about as if she was trying to figure something out. She often gave her evidence in chief in a very assertive manner, but the Panel found that frequently her evidence did not have the ring of truth.

¶ 162 The Panel found her to be at times argumentative, and prone to cast aspersions on other witnesses, particularly CK. At times she was evasive on cross-examination, and on certain critical points, she was clearly uncomfortable, looking down rather than at the examiner, and failing to respond appropriately. In cross, frequently her answers were non-responsive, or self serving, and she would dissemble in her answers. As can be seen from the testimony we have referred to earlier in these Reasons, her evidence in chief and cross at the hearing was often inconsistent and contradictory with her previous testimony under oath at her IIROC interview, and at times inconsistent/contradictory with the self-serving email she sent to W.W. on November 28, and her email answer to the 14 questions of November 30th.

¶ 163 On a number of occasions the Panel simply did not believe the testimony of the Respondent. An example is she denied discussing the bail-out with CK, and denied knowledge that the bail-out plan was not passed, although she admitted she’d just been in New York City attending financial conferences.

¶ 164 The Panel was also very concerned with the lack of documentation from the Respondent, to support or corroborate her version of events. Clearly the portfolio strategy that was embarked upon with the Ks down payment money, and utilizing almost 100% margin, was aggressive and carried significant risk. However, the Respondent did not have one piece of concurrent documentary evidence to support her version of events. She did not produce the notes she said she made in respect of the portfolio she proposed to CK. She did not send a

confirming email or note to the Ks confirming their agreement to the portfolio strategy. She did not produce a copy of the notes or rate of return documents she said she sent to the Ks on June 26. She did not produce copies of the emails between herself and the Branch Manager proposing the trades, and obtaining approval although they would have been in her computer. She did not produce any of the trade tickets. She did not document CK's alleged approval to the purchase of Volta Resources Inc. on July 8th. She did not respond by email to the emails from CK and AK after the severe decline in the value of their portfolio, etc. Given the Respondent's experience, and the resources available to her, in our view the lack of meaningful documentation from her leads to an adverse inference.

¶ 165 There are other inconsistencies that caused the Panel concern. For example, there is no mention in the Respondent's Response to the Notice of Hearing of the telephone call and instructions from CK on July 8th for the purchase of Volta Resources. However, the Response goes into great detail on other points. Further, this was not put to CK in cross. Why? Our inference is Ms. Steinhoff's experienced counsel had not heard this evidence until she stated it in the stand.

¶ 166 We also note that in the Respondent's Response in paragraph 11, she asserts that margin was brought up by CK and says that they decided to invest in stocks; and in paragraph 12, asserts that if the Ks had changed their mind about investing in stocks, they could invest in short term money market security. She also had stated this in her November 28/08 email to W.W. (page 3). However, this was contradicted by her testimony at the hearing that no decision had been made by the Ks on June 10th.

¶ 167 The Respondent also testified that with respect to the portfolio she recommended to the Ks on June 26th, she mailed them the notes she had made on the research of the companies that were being purchased and on expected rate of return. She said in chief:

- “Q Can you finish off what you told him, please. I want you to tell the panel what you told Mr. K.
- A I told him what I would do is I would send out all the literature that we had on every one of those companies to corroborate what the target prices were, what the experts were saying about every one of those companies, and what they could expect in terms of returns on the portfolio.
- Q Was the literature sent out?
- A It was sent out.”

(Transcript, Aug. 12, page 233).

However, there was no documentary evidence to corroborate the Respondent's testimony, or that those notes were mailed or sent, or were received by the Ks.

¶ 168 Further, it was not put to Ms. Huston, or to CK, that the referenced literature was either sent out or received. Significantly this was said to include a statement re returns that the Ks could expect. This would have been a key document to corroborate the Respondent's testimony.

¶ 169 At the hearing, the Respondent testified that she didn't recall any contact with the Ks between July 25th and August 25th. However, in her March 26, 2009 interview, she stated: “We had many conversations throughout the summer about the portfolio, many conversations.”

¶ 170 CK testified that as a result of the market decline, and need to confirm the down payment money, he called the Respondent's office on Monday, August 25th, 2008. Ms. Huston spoke to him and made a Brokers Ally note of the call. However, the Respondent, in her IROC interview, stated: “As a matter of fact, in August when the market started to turn, I called them in to come to a meeting...”

¶ 171 CK testified, and AK said in her statement, that at the August 26th meeting, as a result of the Respondent's persuasiveness, they did not sell out the account and decided to stay the course. However, the Respondent testified that the Ks did not make a decision on August 26th but were to get back to her, and she testified that she got an email from AK talking about fingers crossed and lucky stars. However, the evidence is that the email from AK that mentions “keeping our fingers crossed, and eye in the sky for lucky stars” was sent

Sunday, September 28th/08 at 7:52 p.m.

¶ 172 With respect to margin, the Respondent testified at the hearing that the Ks asked her what margin meant and she gave them her usual explanation, and that there was a general discussion of how margin worked. The Respondent in her November 28th, 2008 email to W.W. stated that margin and leverage were brought up by CK and were discussed at length. However in her IIROC interview, the Respondent stated it was nobody's idea to open a margin account and utilize leverage but that she probably would have put the idea on the table, but she didn't know why she would do that. Asked when she put the idea of margin on the table what did she tell CK and AK regarding margin accounts and use of leverage she stated: "I don't recall". Further in the interview she was asked whether she ever told the Ks that the use of margin was unsuitable or inappropriate given their situation of financial needs; she said she didn't recall.

¶ 173 CK and AK both testified that in the June 10th meeting, they were asked how much they could afford to lose. CK said they couldn't afford to lose any of their down payment monies, but when pressed, and after further discussion, they said they thought they could lose up to \$10,000. In her evidence, the Respondent denied such conversation occurred or that the Ks had said they could only afford to lose \$10,000. However, in her IIROC interview, when asked if in June of 2008 she had ever asked the Ks how much they were prepared to lose she answered that she didn't know if she did or not.

¶ 174 CK testified, and AK said in her statement, that in the June 10th meeting with the Respondent when she was telling them that she could do much better than say a term deposit rate of return, that the Respondent mentioned possibly a 10% return. In her testimony, the Respondent denied such a conversation or mention of a 10% return.

¶ 175 As we described earlier in these Reasons, there is the conflict in the Respondent's testimony about whether the Ks made a decision to invest in stocks on June 10th. In her testimony at the hearing, she maintained the position that no decision was made on June 10th and that she received instructions on June 24th to proceed with the stock portfolio. However, in her November 28th, 2008 email to W.W., and in her Response, she said that the Ks made a decision on June 10th to invest the funds in stocks rather than in money market investments. CK testified that the Ks made the decision to invest with the Respondent, and to permit her to chose the appropriate investments, at the June 10th meeting.

¶ 176 The Respondent testified that in the conversation with CK on July 8th, they discussed using more margin, and she received instructions to purchase Volta Resources. These facts are not alleged in her Response nor are they mentioned in her November 28th email or her November 30th email. In fact Question 9 from W.W. in their November 12th/08 email to the Respondent asked whether the clients contacted the Respondent shortly after the purchases were made to discuss the purchases, and the Respondent replied in her email:

"9. Yes, Chris did call me shortly after the purchases were made to tell me they had received the confirmations. He wanted to set the portfolio up on his computer so he could follow it. I vaguely recall he said he was setting it up on Google. I believe I provided him with the stock symbols. He wanted to confirm how the margin was paid for and I reiterated our discussion from the meeting that the debit interest was charged monthly and he would see it on his statement. I do not have notes on this discussion; this is my recollection only."

¶ 177 In our view, if there had been a discussion between the Respondent and CK on July 8th with respect to increasing the use of margin, and purchasing Volta Resources, the Respondent would have recited those facts to W.W. and would have included those facts in her Response.

¶ 178 Having considered the totality of the evidence, and having had the opportunity to closely observe the Respondent in giving her testimony, we do not find Ms. Steinhoff credible. We don't believe she has any true recollection of the meetings with the Ks, or what was said. In our view, her testimony was at best largely based on her usual practices, and not on a true recollection of actual events as they occurred. The Panel has concluded that where there is a conflict between the evidence of CK and the evidence of the Respondent, we accept and prefer the evidence of CK.

FINDINGS

¶ 179 Both CK and AK had been clients of the Respondent, and received investment recommendations from her with respect to their RSP accounts. However, with respect to the RSP accounts, the interaction between the Ks and the Respondent was minimal. Both of their initial NCAF forms listed their investment knowledge as limited, and we find that by June 10/08, when they sought out the Respondent for advice on how to invest the down payment for their new home, their investment knowledge was still very limited. The Respondent had not done anything to increase their knowledge, and there is no evidence to suggest that their investment knowledge could be considered “good”.

¶ 180 The Ks were a young couple who were just starting out. They were progressing in their careers, but would not be considered wealthy, nor did they have high incomes. Essentially their net worth was in their house. When they sold their first house, and contracted to purchase a new house, to be constructed, they sought advice from the Respondent in respect of the investment of their down payment monies in the very short period of time between June 26th and their completion date in mid-September, or perhaps early October.

¶ 181 The sale by the Ks of their first house, and the agreement to purchase the new house occurred very close together, and prior to the meeting of June 10th. We find that the original completion date for the new home was September 28/08 but they were advised that that date could be pushed out two to four weeks. However, that was only a possibility, and the investment advisor could only plan to invest the Ks’ down payment from June 26th to approximately September 28th.

¶ 182 The note made by Ms. Huston on Wednesday, May 28/08 after her telephone discussion with AK is of paramount importance in this case. It imparts significant information to the Respondent: they are going to be renting for a few months until their new home is ready; they have approximately \$100,000 to invest during that time (a few months); it will need to be secure investments since it is the down payment for their new home. According to the Ks, when they met with the Respondent on June 10th, they did not depart from these points but in fact reinforced them. What they sought was advice on what they could do with their down payment funds prior to advancing them for the completion of the purchase.

¶ 183 At the meeting with the Respondent on June 10th, the Ks did seek advice on what to do with their funds, and did mention ING and explained that they didn’t understand it and had concerns about income tax and fees. They knew that their chequing account earned little or no interest. They hoped they could make some money, but they didn’t have to. They told the Respondent that they didn’t have additional monies for the down payment; these funds were their down payment.

¶ 184 The Respondent recommended against an ING account and advised them that if they wanted a no risk investment, it should be money market investments like treasury bills or short term bonds, and she showed them the current yields.

¶ 185 The Respondent advised the Ks that on a short term investment, she felt she could invest their funds in the stock market, and that she felt she could do much better than the money market yields. She discussed companies that she had other clients investing in, that she thought were going to make an imminent move up, and also stocks that paid a significant dividend on a regular basis. She informed the Ks that she might be able to make a 10% return.

¶ 186 In this discussion between the Ks and the Respondent, there was a discussion of risk and they were asked what they could afford to lose; the Ks reiterated that it was their down payment for their house and they didn’t want to lose anything. However, when pressed, they said they could lose a maximum of \$10,000.

¶ 187 The NCAF form for the new joint account was completed at the June 10th meeting. The first page was reviewed and some information was added. However, the balance of the NCAF, and in particular page 3, had already been filled in prior to the arrival of the Ks. There was no discussion between the Respondent and the Ks with respect to their investment knowledge being “good” vs. “limited”; there was no discussion between the Respondent and the Ks of the “investment objectives and risk tolerance” section of the form, or with the choice for a 70% medium 30% high risk level, or a growth target mix. There was no discussion or explanation of a

margin account, or leverage, or short sales or a short account. There was no discussion of the commissions to be charged, or their impact on the rate of return. The Ks signed the NCAF without reading it as they trusted the Respondent who advised them that the terms were the same as the NCAFs for their RSP accounts. There were stickies on the form indicating where the Ks should sign, and they signed and gave the form to the Respondent.

¶ 188 Neither CK nor AK knew what a margin account was, or what margin was, or what a short account was or what a short sale was. They did not know they were opening a margin account and did not know they were opening a short account.

¶ 189 When the Ks agreed to sign the NCAF form, they made their decision to give their down payment funds to the Respondent to invest, and told her to proceed. The Respondent had explained the types of investments she would make, and had indicated the range of return she hoped to achieve, and the Ks trusted her judgment and gave her carte-blanche to invest the funds. She had sold them on investing in the market.

¶ 190 When the Ks funds were deposited into the joint account on or about June 24th, the Respondent designed a portfolio, including utilizing margin, and made the investments. There was no contact between the Respondent and CK or AK. The Respondent purchased stocks in the manner she had described to the Ks in their June 10th meeting, being a mix of speculative companies that the Respondent felt were about to make a good gain, and companies which would produce good dividend income.

¶ 191 The Respondent denied she engaged in discretionary trading, and that is, in our view, because she felt she obtained sufficient instructions from the Ks in the June 10th meeting, and their approval. She had their permission to make the investments that in her judgment would give them a good return in the short period of time they had.

¶ 192 There is no documentary evidence to support or corroborate the Respondent's version of events between June 10th and July 4th. Given the fact the Respondent is a very experienced financial advisor, and was operating under close supervision, and had previous experience with the regulatory bodies, if the Ks had, with full knowledge, agreed to the aggressive strategy that was embarked upon, in our view it is highly improbable Ms. Steinhoff would not have made a paper trail for her file. In our view she would have confirmed their instructions in some manner, for example by email, or a note or a memorandum to them, with a copy to the file. She did not.

¶ 193 Further, if the Respondent had obtained her instructions from CK, (which we don't accept), and had explained every stock, the amount, the value, and the commission, as she described, she would had to have explained margin because the total value of the portfolio would have been apparent from that discussion. She was obliged to tell CK and AK the value, use and risk of margin. She was also required to advise them that a significant commission was going to be paid to her as a result of the purchases, and that commission on buys and sells would affect the rate of return .

¶ 194 We accept the evidence of CK, AK and SK with respect to the events on July 4th at the parent's home, and the opening of the envelopes containing the transaction documentation. The reaction of CK (and AK) was confirmed by SK, and we accept her, and their evidence.

¶ 195 We accept the evidence of CK and Ms. Huston about the telephone conversation they had on or about July 8th about the purchases in the joint account, and the fact that CK was confused about the amount on the confirmation slips: they totalled more than the funds they had given the Respondent to invest. Ms. Huston, being the diligent assistant, looked up the joint account and explained to CK that they had a margin account, and that's how it was possible to invest more money than the money they had deposited. As she stated, CK didn't know what a margin account was, and at that point, Ms. Huston bailed and referred him to the Respondent.

¶ 196 We find that Ms. Huston failed to include the true nature of the enquiries made by CK in his conversation with her, in the Brokers Ally note, because the Respondent had instructed the assistants not to record anything that could be construed as problematic or questionable by the Compliance Department or that perhaps would trigger enquiries. But she did tell the Respondent the true facts.

¶ 197 The Respondent did return the telephone call of CK. CK explained he didn't understand how the Respondent had invested more money than they had deposited, and the Respondent assured him it wasn't an error, and was perfectly normal (to invest in this manner) for a short term investment. She obscured how a margin account actually works and assured CK that Wellington West was able to leverage funds and that is how she made the investment. We find that she was very reassuring to him and told him that was a normal investment strategy, not to worry, and that she had their best interests in mind, and was confident the investments she had purchased would work out. There was no discussion of how the margin would be paid, particularly if there were losses, and there was no discussion of commissions charged on the purchases.

¶ 198 Further, in our view there was no discussion between the Respondent and CK on July 8th, with respect to margin or Volta Resources.

¶ 199 The Ks likely saw the July 31/08 joint account statement in the first or second week of August. The portfolio summary under the heading Portfolio Value shows four different "total portfolio value" numbers: \$125,000 being the last period: June 30, 2008. It then has a column for cash showing -\$122,015.80. It then has This Period: July 31, 2008 securities: \$232,140.17. It then has a column: total cash and securities: \$110,124.37.

¶ 200 Below the Portfolio Value table there is another heading Portfolio's Overall Asset Allocation which shows equities of approximately \$232,000, a debit balance and owed securities of approximately \$122,000, and a total of \$110,124.37.

¶ 201 When CK saw the statement, we accept that he really didn't understand it because of all the different portfolio values, and he put it aside. They were very busy in the summer, he admitted they weren't paying attention to the investments at that time, and he assumed if there were any issues to be addressed the Respondent would have called them.

¶ 202 There was no contact between the Ks and the Respondent between July 10th and August 25/08. There was however a very significant market decline.

¶ 203 On the evening of August 22nd the lead story on TV was that the markets had significantly crashed, and this was seen by the Ks, and it caused them extreme concern. On Monday August 26th CK called the Respondent's office and spoke to Ms. Huston wanting to meet as soon as possible, and Ms. Huston made a Brokers Ally note of the call for the Respondent. As he told Ms. Huston he would, CK sent an email to the Respondent at 9:36 a.m. on August 25th attaching part of an email from the bank which required the Ks to provide confirmation of the down payment required, namely the sum of \$128,067. CK said in his email "we are obviously very concerned about the money needed as the last time I checked almost all of the stocks had lost money from the original \$125,000 we invested." We note also that on the copy of the email that was made an Exhibit someone has written on that the word "file" with an arrow pointing at CK's name.

¶ 204 CK in his telephone conversation with Ms. Huston on August 25th specifically asked for an account balance as they didn't know the value of their account at that time.

¶ 205 The meeting was arranged and took place on the afternoon of August 26th and was attended by the Respondent and the Ks. The Respondent had prepared a portfolio review, with many articles and clippings on the market and stocks in the Ks portfolio. At the early part of the meeting the Respondent reviewed each stock and what the industry professionals were forecasting; the Ks were quite stressed and with all the information that the Respondent was referencing it was information overload.

¶ 206 When the Respondent finally presented a sheet with the current value of the Ks portfolio, they were shocked because the value was approximately \$100,000. This was a real shock to them and there was a serious conversation between the Respondent and the Ks back and forth about how this could happen; their risk level was only \$10,000; they didn't have the money to make up the difference; this was the down payment for their house; what were their options; and they had no additional money. The Respondent assured the Ks that it was going to work out; the market was going to turn around; rebound; they were through the slow summer and things were going to start to improve; several of their stocks had releases coming out which would increase their

value; etc., etc. The Respondent was very reassuring that the portfolio would work out, and they should stay the course.

¶ 207 There was also a discussion in this meeting, initiated by the Respondent, about putting a stop loss on three of the stocks that had actually earned money: Seaspan, RIM and one of the banks. The Ks said that they agreed to put stop losses on those three stocks and there are the notes the Respondent made. The Respondent said there was no agreement to put stop loss on because she felt stop losses weren't in their best interests, but that she would call them and get approval to sell if they started to move. However the parties were not *ad idem*; the Ks thought the stop loss was in place; the Respondent thought it wasn't.

¶ 208 There was also a discussion in this meeting of whether or not the Ks should sell the portfolio, but they were in a serious predicament because they had already lost more money than they could afford to lose. They were persuaded to accept the advice of the Respondent to hang on, to give the market a chance to rebound, and that things would eventually work out; that selling out would not be the smart thing to do. The Respondent told the Ks that if it came down to it, she would cut them a personal cheque. The Ks accepted the advice of the Respondent, and did not sell out the account.

¶ 209 We find on the totality of the evidence that the Respondent did not tell the Ks in the August 26th meeting that if the state of the account was causing them anxiety they should sell and cut their losses. The Respondent sold them on not selling, and on staying the course on the basis that many industry experts were predicting the market would recover. The Respondent did not explain the risks of further market declines. She did not give a balanced presentation.

¶ 210 The Respondent did not initially respond to the August 26th request to send a confirmation to the TD Bank of the account balance re the Ks funds for their down payment. Ms. Huston testified in respect of her Brokers Ally note she made on Friday, September 5th/08 that Gerry Smith from the TD Bank had called re an earlier email to the Respondent and he needed confirmation of the down payment funds.

¶ 211 In response, documentation was sent from the Respondent's office to Gerry Smith. The documentation was presented in the best possible light to the Ks and combined the joint account and the RSP accounts.

¶ 212 CK and AK noted that the market took another crash on Friday, August 29th and that for a period of approximately 10 days, the market just kept going down. They were very, very concerned, and contacted the Respondent but she again reassured them, and advised them to hold on; that things were going to work out; and they accepted her advice.

¶ 213 Near the end of September, CK and AK noted there was a lot of discussion in the media about a bail-out plan in the United States that had to be approved by Congress; CK discussed this with the Respondent, who had just been in New York at a financial conference. They hoped the bail-out plan would be approved and the market would improve. At this time, CK did not know what the account balance was or where their account was at. There is an email chain between the Ks and the Respondent beginning on Saturday, September 27th as the Ks are in the process of signing their mortgage papers. CK had a business trip planned for early October and they needed to get all their ducks in order for the house closing. On Sunday, September 28th AK sent an email to the Respondent that ended "keeping our fingers crossed and an eye in the sky for lucky stars".

¶ 214 CK testified that on Monday, September 29th/08, it was announced that the bail-out plan was not passed by the United States Congress. CK testified the Ks were in an extreme financial situation and that AK was suffering severe stress. He was going on his business trip and was going to have to leave AK alone, and he sent an email to the Respondent on September 29th/08 at 1:39 p.m. referencing that the bail-out plan had been rejected. He wanted to know what the course of action was; the stress over the past few weeks had been unbearable; they had expressed they were prepared to lose about \$10,000 but they were not in a position to lose the amount of money that has been lost in the account; they were scared they were going to lose their house. Notwithstanding the references in this email to the bail-out plan, and the \$10,000 loss, there was no evidence that the Respondent replied to this email.

¶ 215 CK and the Respondent had a telephone conversation on either September 29th or the next day. CK said

in that conversation the Respondent's attitude towards the Ks had radically changed and her reassurance and confidence from previous meetings and phone calls was gone. She now put the responsibility squarely on them, alleging they were advanced investors, they understood the risk, and they were very much responsible for the situation. As they needed the money for their down payment, she sought approval to sell the stocks, in the next few days, when the timing looked right. They only had a few days left. In that conversation, CK disputed the Respondent's version of events and told her they didn't understand a lot of the things that she had done; they didn't know or understand how the account worked; and the whole thing was not their idea. Further, he didn't know what their portfolio was worth at that point. Subsequently, they were told by Ms. Huston that their portfolio was down to about \$50,000; he believed that was on or about October 3rd.

¶ 216 After the Ks found out their account was down to about \$50,000, CK called the Respondent and left messages with Ms. Huston that he thought they were going to lose their house. Eventually, he did have a telephone conversation with the Respondent but she did not present to him any options. He knew they were extremely short of what they required for their down payment, but the Respondent once again put the blame on their shoulders. He cut her off, and disagreed with her description of the situation. He thought the conversation was perhaps being taped. She offered to see if Wellington West would loan them the additional money; he declined the offer.

¶ 217 The Ks gave instructions to sell out the joint account, and also to sell out their RSP accounts. The Ks spoke to their family, and fortunately were able to arrange the funds (\$65,000) through AK's parents, and were able to close the purchase.

¶ 218 With reference to the period of the summer and early fall of 2008, and the climate of the financial markets, the Respondent had a lot of clients panicking at that point in time and she was extremely busy spending her entire day talking to clients, calming them down, and trying to put things into perspective. With respect to the email from CK of September 29th, they were out of time and in our view she decided not to respond.

¶ 219 At the time that the Ks consulted the Respondent about possibly investing their down payment funds, the Respondent was a very experienced financial advisor. She had 250 to 300 clients and a very significant amount of funds under her administration. The Ks, her clients, were inexperienced investors. They sought her advice with respect to possibly investing their down payment funds for a few months. She knew they had signed a binding contract to purchase their new home, and that their closing was scheduled for late September or early October. The Respondent knew the plans the Ks had for their money: it was committed as the down payment for their new house. Further, the Respondent knew, because the Ks told her, that her clients did not have other funds on hand to supplement that down payment.

¶ 220 Further, on June 10th the Respondent did in fact determine from the Ks how much money they thought they could afford to lose: the amount was \$10,000. She also, albeit indirectly, determined that they would like to make a return greater than say 2% per annum, which was about the rate that term deposits or money market accounts were paying. But this information had to be taken into account with the overriding objective of the clients which was to have the funds on hand to make the down payment, and not to lose any of that money. They told her they didn't need to make money on these funds.

¶ 221 In our view, although the Respondent did discuss with the Ks their investment objectives, i.e. to make, if they could, more than the amount they could make on a term deposit, she failed to give them balanced, prudent and responsible advice given that their commitment for the funds were to the down payment for the house in about three months. It appears that the Respondent totally lost sight of that objective, and the fact that this young couple did not appear to have the personal resources to hang on if the market should decline prior to making the down payment. We have no doubt that the Respondent was assuming a docile short term market, without significant fluctuation, and also was supremely confident of her ability to obtain a return, in that short period of time, of perhaps even 10%. She sold the Ks on her ability, and convinced them that it was prudent to invest the funds in the stock market based upon her recommendations. We have no doubt this was done in good faith, but it was an entirely unsuitable and inappropriate recommendation for these clients.

¶ 222 The Respondent appears to have ignored certain essential facts: that this young couple were just starting out in their careers, and the down payment funds were essentially their net worth, and they were very inexperienced investors. As was said in the *Young Estate* case, supra,:

“the ‘know your client’ rule was designed to ensure that portfolios are suitable for the client. Suitability is the corner stone of the investment industry.”

“the concept of suitability involves a consideration of five factors relating to the investor: his age; his income and net worth; his investment knowledge; his investment objective; and his risk tolerance....”

(at para. 182, para 14 and 15).

¶ 223 Further, in the *Young Estate* case, supra, the Court stated:

“16. the ‘know your client’ rule is related to another fundamental duty owed by the financial advisor to his client, which is to ensure that all investments made for the client are suitable for the client and in keeping with the client’s investment objectives and risk tolerances. An investment portfolio created by an advisor for his client must be suitable for the client. The advisor must also monitor the ongoing suitability of investments to ensure they continue to remain suitable when there are material changes in the client’s personal or financial circumstances, investment objectives or risk tolerances.”

(para. 182, para 16).

¶ 224 In this case, it is our view that the portfolio that the Respondent created for the Ks, utilizing extreme margin, was completely unsuitable. It most certainly did not suit their investment knowledge. It most certainly did not reflect their investment objectives, which had to be to have their down payment funds in hand in approximately three months.

¶ 225 Given that in this case the clients overriding objective was to have their down payment funds in hand in approximately three months, the portfolio designed by the Respondent was completely unsuitable because it exposed the Ks to unacceptable risk. Their instructions to the Respondent were that they could not afford to lose any of the down payment. She ignored that. There was no point in pressing this young couple about what they could afford to lose, when they had already stated they could not afford to lose anything. In a worst case scenario, the Ks could lose their entire investment, and also could end up owing W.W. a substantial amount.

¶ 226 In the *Young Estate* case, supra, the Court stated:

“21. A market downturn is not an independent intervening act but rather a foreseeable event that an Investment Advisor should anticipate and so advise (*Rhoads v. Prudential – Bache Securities Canada Ltd.*, (1992) B.C.J. No. 153, 1992 CarswellBC 16 (B.C.C.A.)).

(Para 182, Para 21).

The Respondent had 30 years experience in the business, and knew, or ought to have known, of the potential volatility of the markets. She claims she left the investment decision, that is whether to invest in the markets or not, to this young couple, but clearly they did not have sufficient investment experience to make a reasoned decision. They were seeking her advice.

¶ 227 In the *Young Estate* case, the Court stated:

“An Investment Advisor must explain the risks of a margin account. Because leveraging can magnify losses, it is critical that an Investment Advisor ensures that the client understands the risks of borrowing to invest, in particular the risks of using collateral, including investments made with monies borrowed, as security for loans...”

(Para. 182, Para 9).

In this case the Respondent did not explain margin, or leverage, to her clients. Further, the portfolio she designed was extremely margined and completely unsuitable and inappropriate. Even when enquiries were made by CK after July 4th, the Respondent failed to inform him fully of the potential consequences of the use of

margin in their portfolio.

¶ 228 Further, if the Respondent had explained to the Ks the commissions that would be charged on the buy and sell of the portfolio she put in place, they would have quickly realized that they could easily lose money just on the payment of commissions. The rate of return on the account would have to cover off not only margin interest, but the commissions charged in order to show any kind of gain. This was not explained by the Respondent to her clients.

¶ 229 Notwithstanding that it wasn't suitable for these clients to invest in the stock market, the Respondent, in her quest to obtain a significant return for the Ks, put them into a very significant margin position. This did not fit with the Ks investment knowledge, their investment objectives, or their risk tolerance.

¶ 230 Further, by July 31st/08, the Ks portfolio had declined in value to \$110,000; a \$15,000 loss. Given that they would likely need their down payment funds in two months, this was a disastrous turn of events, and most certainly was a material change in the financial circumstances of the Respondent's clients. In the Panel's view, at that point, the investment portfolio was even more unsuitable for these clients than it was on June 26th. Given the loss incurred, and potential risk, the Respondent should have advised her clients the portfolio should have been sold. Appropriate measures could have been taken at that point, including potentially the sale of the client's RSP accounts, and they had two plus months in which to cover any shortfall. Instead, the Respondent continued to give seriously flawed advice to the Ks, and encouraged them, and indeed sold them on leaving the funds invested and exposed to further risk; risk that the Ks at that point could not tolerate.

¶ 231 These young, unsophisticated and inexperienced clients were convinced that the Respondent had their best interests at heart, and, based upon her representations, were sold on the representation that she could bail them out of this completely untenable situation. They were understandably under a great deal of stress due to their deteriorating financial situation, but they accepted the representations of the Respondent and her opinion that they should stay the course. They hung in until they were absolutely forced to sell, and the result was a financial disaster. Fortunately, with the assistance of parents they were able to borrow the funds to complete their purchase.

CONTRAVENTIONS

¶ 232 In the Notice of Hearing, IIROC alleges contraventions in seven counts. We will deal with them in order. Based on the totality of the evidence, including credibility, and our Findings, in our opinion we have clear, convincing and cogent evidence upon which to base our conclusions.

¶ 233 Count 1: in our view, the Association has not proven Count 1. The Respondent did, in an abstract manner obtain the rate of return the clients were seeking and she did determine how much money they were prepared to lose. She did learn the essential facts.

¶ 234 Count 2: in our view, IIROC has failed to prove Count 2. The Respondent knew the client's plans for their funds, and clearly it would have been prudent to note on the NCAF for the new joint account the fact that these funds were the down payment for the clients' new home. However, the form is not really designed to elicit that type of information. The Respondent testified that the form did not require that information to be presented. It could have been placed in the "comments" section at the bottom of page 1, but wasn't required.

¶ 235 Counts 3, 4 and 5: in our view, Counts 3, 4 and 5 are really the same transaction. Based on the totality of the evidence, we have found that the Respondent did not obtain the approval from the clients to the specific securities to be purchased or to the portfolio or to the use of margin. The portfolio was inconsistent with the clients investment objectives and risk tolerance. The portfolio was unsuitable for these clients at inception, and after the market initially declined. We find that IIROC has proven Counts 3, 4 and 5.

¶ 236 Count 6: in our view, this Count is simply a continuation of the portfolio in the face of a very severe market decline. There is no doubt that once the portfolio had declined, that is as early as July 30th, the Respondent, based on her research and market knowledge, was convinced the market would rebound. It appears she held to this view to the end, and she persuaded the clients to stay the course. It is our view that a

material change had occurred by July 30th, and the unsuitability was patently obvious. That circumstance was even more egregious by August 26th, when the Respondent's clients were now in an even deeper hole financially, and extremely stressed; but she convinced them to stay the course. We find that IIROC has proven Count 6 in relation to Rule 1300.1(q).

¶ 237 Count 7: based upon our findings of credibility, and the totality of the evidence, it is our view that margin and leverage were not discussed on June 10th. Therefore, we conclude that the Respondent did make a false statement as alleged in Count 7 and IIROC has proven Count 7.

SUMMARY

¶ 238 In summary, for the reasons we have set out, we have concluded that IIROC has made out its case, in the respects we have indicated, on Counts 3, 4, 5, 6 and 7.

¶ 239 This Decision may be signed in counterpart.

DATED at Vancouver, British Columbia this 6th day of October, 2011.*

Stephen D. Gill, Chair

Brian Field

Barbara E. Fraser

* The delay in publication of this decision was due to illness involving the Chair who apologizes to the parties for the delay

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