

Re Green

IN THE MATTER OF:

The Investment Dealer and Partially Consolidated Rule

and

Catherine Elizabeth Green

2023 CIRO 16

Canadian Investment Regulatory Organization
Hearing Panel (Alberta District)

Heard: June 19-20, 2023, in Calgary, Alberta
Decision: September 26, 2023

Hearing Panel:

Omolara Oladipo, Chair, Bradley Whyte and David Johnson

Appearances:

Marie Abraham, Senior Enforcement Counsel

Catherine Elizabeth Green (self-represented and present by videoconference)

DECISION

INTRODUCTION

¶ 1 The Canadian Investment Regulatory Organization (“CIRO”) alleged that between August 2017 and September 2019, the Respondent Catherine Elizabeth Green (“Ms. Green”) failed to use due diligence to learn and remain informed of the essential facts relative to her client, contrary to Dealer Member Rule 1300.1(a). CIRO also alleged that during the same period, Ms. Green failed to use due diligence to ensure that investment recommendations were suitable for her client contrary to Dealer Member Rule 1300.1(q).

¶ 2 On June 19 and 20, 2023, this Hearing Panel held a liability and sanction hearing. At the conclusion of the hearing, the Hearing Panel reserved its decision and outlines its decision and reasons below.

¶ 3 This Hearing Panel finds that:

- a. the evidence that Ms. Green failed to use due diligence to learn and remain informed of the essential facts relative to her client is not convincing;
- b. the evidence that Ms. Green failed to use due diligence to ensure that investment recommendations were suitable for her client is clear, convincing and cogent.

¶ 4 To conclude, we find that between August 2017 and September 2019, Ms. Green failed to use due diligence to ensure that investment recommendations were suitable for her client, contrary to IIROC Dealer Member Rule 1300.1(q).

BACKGROUND

¶ 5 Ms. Green worked in the securities industry since 1999 and was a Registered Representative at the Calgary head office of Leede Jones Gable Inc. (“Leede”) from July 2004 to November 2019.

¶ 6 The complainant’s history on this matter was that in or around September 2011, he opened a Canadian Dollar Registered Retirement Savings Plan Account (the “CAD RRSP Account”) and a Canadian Dollar Cash

Account (the “CAD Cash Account”) at Leede. At that time, the complainant completed a New Client Account Application Form (“NCAF”) identifying among other things, his investment objectives. At that time, a different Registered Representative at Leede was responsible for the complainant’s accounts. At all material times, he worked as a hair stylist and was single with no dependents.

¶ 7 In or around November 2012, the complainant opened a Canadian Dollar Tax-Free Savings Account (the “CAD TFSA”), again at Leede. At that time, he executed another NCAF with the same Registered Representative as the 2011 NCAF.

¶ 8 The original Registered Representative managed the complainant’s accounts until she retired. In August 2017, Ms. Green became the responsible Registered Representative for the complainant’s accounts and filled out another NCAF (the “2017 NCAF”) for the complainant.

¶ 9 In April 2018 - after Ms. Green became the complainant’s Representative, the complainant opened three United States Dollar accounts in addition to the three Canadian Dollar accounts. The complainant completed a fourth NCAF (the “2018 NCAF”).

¶ 10 As of July 31, 2017, the value of the assets in the complainant’s accounts was approximately \$62,297 and they primarily held cash, exchange traded funds, and mutual funds.

¶ 11 Between August 2017 and September 2019, the complainant deposited approximately \$9,100 into his accounts and did not withdraw any funds.

¶ 12 In November 2019, the complainant submitted a complaint to Leede regarding Ms. Green’s handling of his accounts.

¶ 13 On or about November 29, 2019, Leede terminated Ms. Green’s employment in good standing and consequently, her authority to act in a registerable capacity on behalf of Leede. She subsequently joined and became registered on behalf of PI Financial Corp.

¶ 14 Pursuant to an agreement, the complainant was subsequently reimbursed by Leede for a portion of his losses.

CIRO’S SUBMISSIONS

¶ 15 Enforcement Counsel called two witnesses: the complainant and Ms. Aurora Kostiw, CIRO Investigator.

The Complainant’s Testimony

¶ 16 The complainant’s sworn testimony taken from his transcript of February 8, 2021 as well as his testimony of June 20, 2023 revealed the following:

- a. He had been a hairstylist for 25 years and his participation in investments started when his previous representative who had also been his client advised him to invest his first inheritance from his father.
- b. He had no other investment accounts elsewhere.
- c. He had no concerns with the previous representative’s handling of his accounts.
- d. After his original representative retired, he was referred to another representative, and eventually to Ms. Green.
- e. When he first met with Ms. Green, he made it clear to her that he wanted to keep 70% of his portfolio safe and “sort of play around” with the remaining 30%.
- f. He knew he “signed some forms” at the initial meeting with Ms. Green. He did not complete the 1017 and 2018 NCAFs and only signed them because Ms. Green told him that “all investments were high risk”.
- g. He was initially impressed with Ms. Green’s handling of his accounts. He understood from the increased regularity of her calls and requests for approval of trade every

week or every other week, that his portfolio continued to successfully grow under her management.

- h. Although the complainant acknowledged receipt of periodic and regular statements, he did not read them and relied on Ms. Green’s expertise.
- i. At the end of July or early August 2019, Ms. Green called him while he was attending to a client. He was unable to speak to her and later discovered when he returned her call the following day, that although she had reached out to ask for approval to carry out a trade, she had made the said trade by the time he returned her call and without his approval. The complainant admitted that he would have given his approval if he had spoken to her since he relied on her expertise.
- j. For the first time after the said unapproved trade, the complainant initiated a face-to-face meeting during which he learnt his portfolio had lost what he initially thought was approximately \$13,000. He mentioned the figure of the loss to Ms. Green, and she appeared to him to have agreed with the value. However, when he queried why he had not been made aware of the loss, she merely shrugged.
- k. When he asked his previous representative for a second opinion, that previous representative told him that the losses were worse than he thought, and he should contact Leede to address the issue.
- l. He did contact Leede and eventually settled with them to be paid a portion of his losses, as he felt it was the settlement or nothing.
- m. Another representative at Leede suggested that he liquidate the remnant of his portfolio and he did.

CIRO Investigator Ms. Aurora Kostiw’s Testimony

¶ 17 Ms. Kostiw prepared and presented a suitability analysis, a profit and loss analysis, as well as a ratio analysis (turnover and cost/equity ratios) for the period between August 2017 and September 2019, during which time the accounts were managed by Ms. Green. At the Hearing, Ms. Kostiw led the Hearing Panel through her analysis, including spreadsheets and tables summarizing her findings.

¶ 18 Ms. Kostiw also led the Hearing Panel through her review of the complainant’s holdings as well as the correspondence from Ms. Green to the complainant regarding his portfolio.

¶ 19 Prior to the Hearing, CIRO provided a “Will Say” on behalf of Ms. Kostiw. CIRO also provided transcripts of Ms. Kostiw’s interviews of the complainant and Ms. Green.

¶ 20 The following is a summary of Ms. Kostiw’s testimony from the foregoing sources:

- a. After Ms. Green became the Registered Representative responsible for the complainant’s accounts, the trading in his accounts primarily consisted of frequently buying and selling of equities.
- b. The information on each of the four NCAFs before this Hearing Panel were condensed by CIRO into individual tables and have been further condensed by the Hearing Panel into the table below. The 2017 and 2018 NCAFs showed a marked difference in the investment objectives from those of previous years. The bolded text in the last two rows of the following table tracks the identification of investment objectives and risk tolerance before AND after Ms. Green became the responsible Registered Representative for the complainant’s accounts.

	PREVIOUS REPRESENTATIVE		MS. GREEN AS REPRESENTATIVE	
Age when NCAF Signed	45 Years Old (September 2011)	46 Years Old (November 2012)	51 Years Old (August 2017)	52 Years Old (April 2018)
Estimated Net Liquid Assets	\$45,000	\$45,000	\$62,000	\$62,000

Estimated Net Fixed Assets	\$145,000	\$145,000	\$145,000	\$145,000
Annual Income	\$46,000	\$46,000	\$46,000	\$46,000
Investment Knowledge	Fair	Fair	Fair/Limited	Fair/Limited
Investment Objectives	25% Income	20% Income 80% Long Term Growth	100% Aggressive Growth	100% Aggressive Growth
Risk Tolerance	75% Long Term Growth	100% Medium	100% High	100% High

- c. The complainant's stated risk tolerance of 100% high and investment objectives of 100% aggressive growth, which were updated in August of 2017 after Ms. Green became responsible for the accounts, did not accurately reflect the complainant's actual wishes.
- d. The complainant's accounts represented almost the entirety of his liquid assets, and he had limited investment knowledge.
- e. Between August 2017 and September 2019, there were 77 buy orders in the complainant's accounts with an annualized turnover ratio (i.e., the number of times the equity in the accounts was liquidated and reinvested) of between 3.19 and 3.66. The total value of the buy orders for the complainant's accounts was approximately \$436,465.
- f. Further details of trading in the complainant's accounts between August 2017 and September 2019 were set out by CIRO in the following table:

Period	Average Portfolio Value (Net Equity)	Total Value of Purchases	# of Purchases	Total Value of Sales	Annualized Turnover Ratio
August 2017 to December 2017	\$68,786	\$91,448	22	\$67,928	3.19
January 2018 to December 2018	\$60,073	\$219,855	39	\$216,885	3.66
January 2019 to September 2019	\$50,261	\$125,162	16	\$122,837	3.32

- g. Another table below shows that the assets in the complainant's accounts were often concentrated in the information technology sector between January 2018 and September 2019:

Period	% of Assets Invested in Information Technology
January 2018	29.20%
February 2018	25.20%
March 2018	31.58%
April 2018	44.58%
May 2018	52.60%
June 2018	59.42%
July 2018	58.11%

August 2018	42.93%
September 2018	48.23%
October 2018	41.54%
November 2018	72.84%
December 2018	72.81%
January 2019	86.32%
February 2019	85.10%
March 2019	85.50%
April 2019	86.63%
May 2019	94.82%
June 2019	95.70%
July 2019	94.75%
August 2019	93.44%
September 2019	91.11%

- h. After Ms. Green assumed the role of representative for the complainant, his portfolio became increasingly heavily concentrated in the Information Technology sector. By the final months of being the complainant's representative, the Information Technology sector represented up to 91% of his portfolio.
- i. The value of the securities in the complainant's accounts declined by approximately 51% (including commissions), representing a \$31,622 loss. During that same period, the S&P/TSX Composite Index increased by 9.5%.
- j. The trading activity in the complainant's accounts was frequent and excessive. The complainant's accounts had an annualized turnover ratio between 3.19 and 3.66, and they had an annualized cost/equity ratio between 5.33 and 10.31.
- k. The trading activity in the complainant's accounts resulted in substantial losses for the complainant in the approximate amount of \$31,622 or 51% (including commissions), and generated significant commissions for Ms. Green.
- l. Between August 2017 and September 2019, the value of the complainant's accounts declined whereas the S&P/TSX Composite Index gained approximately 9.5% during that same period.
- m. The complainant's accounts incurred approximately \$14,954 in commissions and annualized cost to equity ratio (i.e., the minimum annual rate of return on the account equity that would have to be earned to break even) was between 5.33 and 10.31 for the complainant's accounts.
- n. Further details of the activity in the complainant's accounts between August 2017 and September 2019 are set out by CIRO in the following table:

Period	Average Portfolio Value (Net Equity)	Transactional Commissions Paid	Annualized Cost/Equity Ratio	Portfolio Profit/Loss (including commissions)	S&P/TSX Composite Return
August 2017 to December 2017	\$68,786	\$3,710	5.33	+\$12,881 (+21%)	6.6%
January 2018 to December 2018	\$60,073	\$7,356	10.16	-\$36,809 (-48%)	-11.6%

January 2019 to September 2019	\$50,261	\$3,888	10.31	-\$7,693 (-17%)	16.3%
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- o. The investments recommended for the complainant’s accounts by Ms. Green were not suitable for him due to his, among other things, financial situation, actual investment objectives, time horizon, and actual risk tolerance level.
- p. Due to his age, the complainant had limited time to make up the loss for the holdings.
- q. Further, the investments recommended for the complainant’s accounts by Ms. Green were not suitable for him because they resulted in excessive trading and concentration in the Information Technology sector.
- r. Ms. Green had access to the complainant’s prior investment records at Leede.
- s. Ms. Green is not absolved of the responsibility of applying the “Know Your Client” (“KYC”) rule to the complainant’s investment objectives and experience with the NCAF.
- t. CIRO asked that Ms. Green be sanctioned on the following terms:
 - a term of suspension in a six-month range;
 - disgorgement of commission (in the amount of \$14,954);
 - fine in the amount of \$30,000; and
 - costs.

THE RESPONDENT’S SUBMISSIONS

¶ 21 In her initial response, dated January 12, 2023, Ms. Green contested CIRO’s allegations.

¶ 22 Ms. Green submitted that *“not only did I provide client care/due diligence in serving both [the complainant’s] mandates by providing safety and growth that meets the standard as set out by liroc [sic] Dealer Member rules but that I exceeded the standard by consideration of not only [the complainant]’s personal information but also his geographic and occupational risks providing him with a higher level of prudent financial advise [sic] with regard to his investment objectives.”* She further argued that as to the suitability of investments for the complainant, *“given the Macro and Market environment during the specified time period I provided recommendations that were appropriate and consistent with the [complainant]’s stated objectives and time horizon also exceeding the liroc [sic] standard regarding due diligence.”*

¶ 23 Ms. Green was also interviewed under oath by Ms. Kostiw and Mr. Godfrey on July 21, 2021. A transcript of the interview was made available to this Hearing Panel and Ms. Green before the hearing.

¶ 24 During the hearing, Ms. Green mainly relied on her written submissions to the Hearing Panel.

¶ 25 The Hearing Panel outlines a summary below of Ms. Green’s submission mostly repeating her own words. Among other things, Ms. Green stated that:

- a. She reviewed the Conduct and Practices Handbook when she first entered the industry and has reviewed it annually since then.
- b. The value of assets under her management was at its peak, \$2.5 million.
- c. She had been *“extraordinarily serious about providing over and above client service and financial advice”* to the complainant. She had met with him once she assumed conduct of the accounts and they *“thoroughly discussed his ambitions, his lifestyle and his need for both a balance of safety and of growth as with his age and while not unhappy with the performance of his portfolio under the advice of his previous*

- representative, he specifically expressed his need for increased growth and agreed to an increase of risk to his portfolio to potentially increase the returns of his portfolio.”*
- d. She discussed the difficulty in growing modest investment accounts. and that it often required higher risk to obtain higher reward.
 - e. She strongly warned the complainant of the rising volatility in the market and the potential for a correction of the entire market which would place not only higher risk equities at risk but all equities regardless including what could be defined as “safe”.
 - f. She relied on the complainant’s *“insistence on both safety and growth while reminding him that she could achieve both only with her 'best efforts'”*.
 - g. Her documentation of the complainant as “high risk” on the 2017 and 2018 NCAFs was her way of documenting her disclosure of the higher risk growth strategy with his account, not to document that he was a high-risk client.
 - h. She believed *“...if you're involved in investing, everything has potential for, like, 100 percent risk... ...[w]ell, 100 percent risk is that, you know, in any investment, you know, you have the potential to lose 100 -- 100 percent of your money.”* [Page 43, lines 6 to 16 of the transcript of Ms. Green’s interview.]
 - i. When asked if there are investments in which there would be less likelihood of losing 100 percent of one’s investments, she said *“[i]n this market environment, in in my personal opinion, you know, after you've had, you know, ten years of liquidity pumped into the system and you -and you don't know where the over-leverage is, I -- I -- no. You know, the -- anything can happen at any given time.”* [Page 43, lines 18 to 26 of the transcript of Ms. Green’s interview.]
 - j. She acknowledged that the Complainant was clear with her about the fact that he wanted to keep 70% of his portfolio in safe investments, and he was willing to risk the remaining 30%.
 - k. She considered the complainant’s age and the detrimental likelihood of stress brought on by any market losses.
 - l. The economy in Calgary and the beginning of Central Bank’s telegraphing higher interest rates had her concern for the protection of not only the complainant’s investment account, but also for his ability to maintain his personal income given his occupation.
 - m. Notwithstanding her stressing the dangers of the risks, the complainant *“was still willing to proceed and sign the High-Risk KYC disclosure with the comments provided regarding his knowledge of the risks he would be taking”*.
 - n. She advised the complainant against investing his second inheritance.
 - o. Her understanding of the United States’ rising interest rates and the performance of US bank stocks and quality blue chip value stocks in keeping with her *“'best efforts' to provide safety in high-quality blue-chip dividend paying United States’ stocks.”*
 - p. Her rationale for the concentration in cybersecurity for the complainant’s account was based on her understanding that *“tech is the way of the future, it is growthy, and Cybersecurity could be even considered the utility stock of tomorrow”*. When she thought the markets in the large cap space became increasingly volatile, she recommended an investment strategy that she thought would most likely rebound in the timeliest manner post-correction rather than the traditional safe investment thesis.
 - q. Her understanding that volatility in the cybersecurity sector in the summer of 2019 was caused by the “trade tariff wars” between the United States and China.

- r. Had the complainant not filed a complaint, and had his account not been cashed out by Leede, the ensuing Covid pandemic would have led his account to trade well over \$100,000.
- s. The growth of the complainant's portfolio would have provided financial relief for the complainant because the Calgary downtown economy was gutted due to Federal green policies but also shut down for years due to the Covid pandemic.
- t. Had she provided traditional investment advice consistent with the IIROC model, she would have invested all his inheritance in 'safe' investments, which in the pandemic downturn would also have suffered severe losses, and he also would not have had any savings or income while the global economy was in a shutdown.
- u. At the worst of the pandemic, IIROC's pillar of safety, the Canadian bank stocks as well as anything owned by the banks, suffered short term losses of over 50%. *"The tech sector was flying during the pandemic shut down validating the notion that concentration is subjective and market volatility can have serious consequences for even equities considered safe and safe is simply based on an advisor's opinion or a regulators bias."*
- v. In a rising interest rate environment, the safe dividend model is even less safe as investors will reduce equity exposure and opt for higher yielding bonds. According to Ms. Green, there is no guarantee that Canadian Financials will ever trade back to their former highs, nor is there any guarantee that central banks will ever go back to lower interest rates.
- w. While a decade of low interest rates capital markets is moving into the new future of investing, the dividend payers likely to lose investor appeal. The wealth portfolio so popular in the Canadian equity market are also likely to falter as redemptions rise and the leverage used in the low interest bond market to support the model also becomes highly risky. Potential portfolio declines are likely and with little or no hope of rebounding ever as in her opinion, "[t]he math does not work".
- x. Her opinion that there was little reason for an average investor to invest long term in a conservative model in light of what she considered an ever-present market volatility of corrections and flash crashes due to extraneous factors that go beyond an advisors' ability to control through due diligence and fundamental analysis. She suggested this was contrary to the *"typical acceptable IIROC portfolio"*, which favored a model that only works in a low interest environment. However, losses are minimal, and returns are also minimal, net of fees.
- y. She did not have large accounts, and her approach to them was mostly short-term active trading.
- z. She believed that most Canadian investors were not interested in "forward-growth things", which she found in the United States' market. She was not as interested in the Canadian market options, which she thought only consisted of *"sort of speculative resources or the dividend model"*.
- aa. In 2018, she had her trading restricted under close supervision because her direct report at Leede was concerned about a series of losses on client accounts relative to the size of her overall portfolio.
- bb. The steps she took were not *"evident of negligence, but a well thought out analysis of the global capital markets and the economy"*.
- cc. Active management or trading in a bull market can provide superior returns and while clients are ambivalent to the commissions paid to an adviser in a bull market, when the markets decline, the commissions are still booked to the portfolio, but the returns

reflected raise the cost percentages, *“but it isn't the trading that impedes the performance of a portfolio it is overall market volatility”*. An advisor can hold two accounts, one actively traded in a bear market and one with very little trading and the year-end losses are usually similar.

- dd. The complainant’s portfolio was actively traded when the junior market was very strong, resulting in higher commission percentages and higher returns, and minimal trading when the markets declined, but the losses seemed to indicate that excessive trading was the issue. This is subjective, and the “evidence” that trading increase losses is another bias of IIROC’s.
- ee. Clients that prefer a transactional advisor allege that a portfolio that is actively managed in both good and bad markets helps to increase the returns and mitigate the risk, and that passive investing does little or nothing for performance over the long term.
- ff. According to Ms. Green, *“A responsible client that understands this is a mature client that listens to an advisor's rationale and makes a choice based on the advisor's recommendation, is patient during market downturns and accepts responsibility for their decisions. A client who claims losses after they have been advised of the risks as has [the complainant] is simply playing both sides of the Canadian liroc [sic] compliance model knowing full well if the portfolio does well, he can reap the reward of taking the risk and if not he simply files a complaint with the regulators claiming investor naivety [sic].”*
- gg. In closing, Ms. Green said:

“The most important question I ask of Madam Chair and this panel in my defense is that had I reassured [the complainant] that I would invest ALL his savings in a "Safe" portfolio and given the events of the last six years would [the complainant] have been better off or worse off financially today?

Also, now that there is a very different market environment from a low interest rate environment of even two years ago would I really be able to in good conscience reassure [the complainant] that his "Safe" portfolio would or will eventually rebound to a positive value? Being honest with clients about the nature of market risk is the number one priority of every advisor and I am proud to say I acted and advised in the best interests of [the complainant]’s Financial well being.”

¶ 26 The Hearing Panel notes that although Ms. Green appeared to have provided the complainant with some newspaper articles and summaries of the recommended trades, she did not provide any backup to her allegations to this Panel about the market performance and projections.

¶ 27 Ms. Green did not deny the allegations that she carried out trade in one instance, without prior approval by the complainant.

¶ 28 Ms. Green did not agree that any sanctions were warranted for her actions.

CASE LAW

¶ 29 CIRO Enforcement Counsel referred this Hearing Panel to three cases involving failure of a representative to comply with the KYC rules.

¶ 30 In reviewing the information and precedents before it, this Hearing Panel notes that on January 1, 2023, CIRO’s predecessors – Investment Industry Regulatory Organization of Canada (“IIROC”) and the Mutual Fund Dealers Association of Canada (the “MFDA”) - were consolidated into a single self-regulatory organization recognized under applicable securities legislation and referred to as New Self-Regulatory Organization of Canada (the “New SRO”). The New SRO subsequently changed its name to CIRO on June 1, 2023. Therefore, references below to CIRO, depending on the time and context, apply to CIRO and any predecessor entity.

¶ 31 The precedent cases are mentioned below as they were of assistance on the present matter.

Re Husebye 2016 IIROC 5 (“Husebye”)

¶ 32 *Husebye* is almost on all fours with the Ms. Green’s situation.

¶ 33 In *Husebye*, IIROC issued a Notice of Hearing on June 10, 2015, alleging that between November 2009 and December 2010, Kim Husebye contravened IIROC Dealer Member Rule 1300.1(q) when he failed to use due diligence to ensure that investment recommendations were suitable for his client.

¶ 34 Three of Mr. Husebye’s clients complained to IIROC about transactions carried out on their accounts by Mr. Husebye. IIROC submitted that when Mr. Husebye recommended high risk, Leveraged Exchange Traded Funds (“ETFs”) to several of his clients, he failed to use due diligence to assess the risks associated with ETFs. The Hearing Panel found that Mr. Husebye had overlooked or disregarded clear, unambiguous disclosure of the significant risks associated with an investment in the ETFs and concentrated a significant amount of his clients’ accounts in these securities. In 2007, Mr. Husebye’s own analysis of the markets convinced him that the markets were going down. He recommended to all his clients, including the three complainants, that they sell their equities and remain in cash. When the market started to recover from the 2008 downturn, he believed, through his “wave theory analysis,” that the rise was temporary and that the market would continue to decrease in value.

¶ 35 Unfortunately, Mr. Husebye’s “strategy”, which sought to deliver the inverse or opposite of the performance of the index or benchmark they track, had the effect on the three complainants of doubling the impact on increases and decreases in value than did simple inverse Exchange Traded Funds.

¶ 36 One of the complainants in *Husebye* was with a previous advisor and her initial risk tolerance was recorded as 20% “lower-risk, income-producing securities”; 40% “moderate to higher-risk, income-producing securities”; and 40% “moderate-risk, growth-oriented securities”.¹ There was nothing in the category “higher risk, speculative securities and trading strategies”.

¶ 37 After Mr. Husebye took over that complainant’s account, he had her complete a managed account agreement, which included her KYC information. His fee was 2% of the value of her account. At the time, she was 52 years old, single, and was employed as a legal assistant. Her annual income was about \$50,000, and her net worth was about \$100,000, including \$40,000 in liquid assets. Her investment knowledge was listed as “limited”. Her general investment objectives and risk tolerance (there were now three categories rather than four in the earlier KYC forms) were listed as 10% income/low risk, 70% long-term capital appreciation/medium risk and 20% short-term capital appreciation/speculative trading/high risk.

¶ 38 The panel took into consideration, as mitigating factors, the fact that Mr. Husebye had not previously been the subject of complaints to IIROC, and sincerely believed that his strategy was suitable for his clients, to conclude that between November 2009 and December 2010, Mr. Husebye failed to use due diligence to ensure that investment recommendations were suitable for his clients, contrary to IIROC Dealer Member Rule 1300.1(q).

Re Lamoureux, [2001] A.S.C.D. No. 613 (“Lamoureux”)

¶ 39 In the second referenced precedent, the respondent Lamoureux was alleged to have acted contrary to the Act, the regulation, rules, and the public interest when he, as a registrant:

1. failed to fulfil the KYC obligation when recommending investments to his clients;
2. recommended that his clients participate in investments that were not appropriate for them and were not in keeping with their investment objectives;
3. failed to make his clients aware of material negative factors involved in the investment;
4. failed to ensure that his clients understood the investment;
5. failed to advise his clients of the dollar amount of the compensation that he was receiving from the investment, and its percentage of the investment; and
6. as such, breached the terms and conditions of his registration under the Act.

¶ 40 The respondent in *Lamoureux* placed a substantial portion of his clients’ net worth in a single risky

investment while at the same time prepared mandatory NCAFs that clearly misrepresented the clients' investment knowledge, risk tolerance and investment objectives.

¶ 41 The hearing panel of the Alberta Securities Commission in *Re Lamoureux* examined the obligations of registrants. According to the panel, a registrant, in recommending investments to clients must adhere to a three-stage process:

1. use due diligence to "know the product" and "know their clients";
2. assess suitability by determining whether a particular securities product is an appropriate match for a particular client; and
3. if a securities product is suitable for a particular client, the registrant can recommend the investment product but, in so doing, must make the client aware of material factors associated with the investment product.

¶ 42 The panel found that when the respondent in his testimony suggested that fulfilment of his obligations to "know his client" and to ensure suitability of investment recommendation was confirmed simply by a client's decision to make the investment, the panel said it suggested "*at best, a profound lack of awareness of the nature of a registrant's obligations*". The panel found that the obligation to assess suitability rests solely with the registrant and is to be determined after "due diligence" - knowing the product and the client - but prior to any recommendation being made. Although all the 11 clients signed several documents relating to their investment including an acknowledgment of the speculative nature of the investment, the respondent bore the responsibility for having recommended an unsuitable investment to them.

¶ 43 The panel found that the respondent failed to know the investment product and, in many instances, failed to "know his client" and fulfil his "suitability" obligation. The panel also found in some instances that the respondent failed to make his clients aware of the material negative factors associated with the investment in the Partnerships. As a result, the respondent did not adhere to his obligations, and his conduct breached the conditions of his registration and was conduct contrary to the public interest.

Re Myatovic & Lowe 2012 IIROC 47 ("Myatovic")

¶ 44 In this case, the Notice of Hearing alleged that Marco Myatovic ("Mr. Myatovic") and Doreen Lowe committed the breaches of IIROC's Dealer Member Rules.

¶ 45 Of the most relevance to this hearing was Count 4 of *Myatovic*, which dealt with the allegation by IIROC Enforcement Counsel that Mr. Myatovic failed to know his clients in that he opened the accounts for several clients without making sufficient inquiries into essential facts relative to the circumstances of the holders of the accounts.

¶ 46 The panel in *Myatovic* found that as to Count 4, Mr. Myatovic was in breach of the obligations behind the KYC rule and did not act the way any investment professional in all good conscience would have done when for instance, in the case of one client, he employed 63% of that client's remaining net worth to purchase shares in one investment.

¶ 47 Of relevance is that the panel found that Mr. Myatovic's breach of his KYC obligations was not that he failed to learn the essential facts about the account holders since he knew that they were unsophisticated investors, had minimum income and net worth, and were in financial straits. Instead, Mr. Myatovic's breach was encompassed in what action he took or permitted to be taken under his watch with respect to the setting of the investment objectives and risk tolerances to enable the investments in question. He clearly breached his gatekeeper obligations with respect to the suitability of securities being purchased and the concentration of securities in the client accounts. Further, the panel found that Mr. Myatovic ignored the best interests of his clients in hiding behind the terms of a Risk Acknowledgement Letter and permitting the investment objectives and risk tolerances to define the purchase of the shares on their behalf.

Analysis

FIRST ISSUE: Failure to use due diligence to learn and remain informed of the essential facts relative to her client, contrary to Dealer Member Rule 1300.1(a).

¶ 48 CIRO Enforcement Counsel alleged that Ms. Green failed to use due diligence to learn and remain informed of the essential facts regarding the Complainant, thereby failing to comply with the KYC Rule.

¶ 49 The onus of proof is on CIRO Enforcement Counsel to establish, on a balance of probabilities, that Ms. Green failed to use due diligence to learn and remain informed of the essential facts regarding the Complainant.

¶ 50 CIRO Enforcement Counsel relied on *Myatovic* which was upon by matter examined the KYC Rule in some detail.

¶ 51 This Hearing Panel examines the First Issue in light of Ms. Green's KYC obligations.

¶ 52 This Hearing Panel accepts our obligation to carefully parse the allegations made by CIRO Enforcement Counsel to ensure that our findings are fully in line with these allegations. We do not accept that CIRO Enforcement Counsel have established the allegations of failing to use due diligence to learn and remain informed of the essential facts regarding the Complainant on the basis of clear, cogent and convincing evidence.

¶ 53 As to the allegation that Ms. Green's failure to use due diligence to learn and remain informed of the essential facts relative to her client, in contravention of Dealer Member Rule 1300.1(a), we have nothing before us to suggest that there were essential facts for the Complainant that Ms. Green did not learn. The four NCAF's before us show the Complainant's limited financial circumstances. Ms. Green did indeed learn the essential facts about the Complainant and in one instance, she refused to invest his inheritance based on her reporting that his age and his limited financial circumstances did not place him in a position for easy recovery of any losses suffered by his portfolio.

Conclusion on the First Issue

¶ 54 This Hearing Panel finds that the evidence that Ms. Green failed to use due diligence to learn and remain informed of the essential facts relative to her client is not credible and convincing. We therefore find Ms. Green not liable for the breach of Dealer Member Rule 1300.1(a) as alleged in the Notice of Hearing.

SECOND ISSUE: Failure to use due diligence to ensure that investment recommendations were suitable for her client contrary to Dealer Member Rule 1300.1(q).

¶ 55 The Panel in *Myatovic* pointed out that the KYC rule is one of the basic tenets that defines the relationship between a Registered Representative and his or her client.

¶ 56 The KYC rule extends beyond that of securing the requisite knowledge about the prospective client. The Registered Representative must then use this knowledge to assist the client in the definition of the investment objectives and risk tolerances for the trading activity to be carried on in the account. Most importantly, if the investment objectives and risk tolerances selected for the account by the prospective client appear to be out of line, and if the Registered Representative has learned about the prospective client's knowledge of investing and capital markets and the prospective client's financial circumstances, the Registered Representative has an obligation to work with the prospective client to ensure that these investment objectives and risk tolerances are suitably amended.

¶ 57 In *Myatovic*, the panel rejected the respondent's argument that the clients were properly cautioned before signing a risk acknowledgement letter and therefore they all knew the risks involved in trading the securities.

¶ 58 *Lamoureux* also examined the KYC and "suitability" obligations and established that although they are conceptually distinct, both obligations are so closely connected and interwoven in practice, that the terms are sometimes used interchangeably.

¶ 59 The KYC obligation is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance.

¶ 60 The "suitability" obligation is the obligation on a registrant to determine whether an investment is appropriate for a particular client. Assessment of suitability requires both that the registrant understands the investment product and knows enough about the client to assess whether the product and client are a match.

¶ 61 *Lamoureux* also discussed the CSI's Conduct and Practices Handbook (the "CPH"), which identifies the "first step" toward compliance with this policy is made by means of a NCAF which must be completed when

opening each account. However, the registrant must maintain a continued awareness of the client's personal and financial circumstances to assist the client in entering his investment objectives on the NCAF.

¶ 62 The first stage involves the "due diligence" steps undertaken by the registrant to "know the client" and to "know the product". Knowing the product involves carefully reviewing and understanding the attributes, including associated risks, of the securities that they are considering recommending to their clients. Knowing the client was discussed above.

¶ 63 Only after the "due diligence" of the first stage is completed, can the registrant move to the second stage in which they fulfil their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for that client.

¶ 64 Overall, the panel in *Lamoureux* found that neither obligation can be fulfilled merely by completing forms or by following a procedure in a perfunctory fashion, as such forms and procedures are merely "tools that can assist in performing a task and that may provide reminders or evidence of efforts undertaken or not undertaken". The Panel acknowledged evidence about the procedures wherein the representatives complete the forms and provided the breakdown in the investment objectives section. Ms. Green confirmed that she in fact completed the 2017 and 2018 NCAFs.

¶ 65 By recommending a securities transaction to a client, a registrant enters the third stage of the process. Whether a particular transaction has in fact been "recommended" is to be determined objectively, taking into consideration the content, context, and manner of communication from a registrant to the client, to assess whether it could reasonably be understood as a suggestion that the customer engage in a securities transaction. At this stage, when making the client aware of a potential investment, the registrant is obligated to make the client aware of the negative material factors involved in the transaction, as well as positive factors.

¶ 66 Of importance, the panel in *Lamoureux* noted that "*disclosure of material negative factors in the third stage of the process is intended to assist the client in making an informed investment decision. It should be emphasized that such disclosure cannot ameliorate deficiencies in either of the first two stages of the process. If a registrant recommends securities that are not suitable for a particular client, then disclosure by the registrant during the third stage is irrelevant to their suitability obligation in stage two. The registrant's failure may have been the result of not knowing the client, or not knowing the securities, or an error in the suitability determination but, once the improper recommendation has been made, it does not matter whether or how the registrant discloses the material negative factors, or whether the client claims to understand and accept the risks involved in the investment. The registrant has failed to fulfil their obligations.*"

¶ 67 There is no evidence that Ms. Green presented any potential other investments to the complainant in this case.

¶ 68 The complainant's informed decision about whether to invest in a concentration of Information Technology specific investments required his understanding of several factors, which, alone or in combination may represent risks to him. Mere information that "all investments are high risk" even if it provided the complainant with any information regarding the risk of Ms. Green's concentration of his portfolio, might have provided the complainant at best, with only a partial and not very informative depiction of any such risks.

¶ 69 As a less sophisticated investor, the complainant would have required considerable explanation from Ms. Green to be "aware" of the risks she appears to have acknowledged. According to *Lamoureux*, "*[w]here investors are reasonably relying on such explanation by a registrant, the quality and extent of that explanation will weigh more heavily than the flow of documents in a determination of whether the registrant made the investor aware of the risks involved in the transaction.*"

¶ 70 Ms. Green confirmed that she had sensed that the complainant was not engaged in the decision making. At page 32, line 4 to page 33, line 10 of the transcript of her interview, the following conversation ensued:

Ms. Kostiw: Okay. And did you have frequent meetings with Mr. XX to talk about the trading and what was going on in --

Ms. Green: No, not -- I -- you know, I always -- I always called him. When I called him, I -- you know, he was always very -- you know, he wasn't -- I'm not sure he always listened, but I was always trying to tell

him. And he was just, Fine, you go ahead; fine, you go ahead. You know, he was quite abrupt with me. And so at that point, because I thought -- you know, so I did send him -- you know, I thought, you know, he I'm not sure he's really, you know, paying attention. And so I would send a letter every day, and I would send portfolio updates to him. And then everything was fine. And then, you know, the economy kind of got bad, you know, towards, you know, things that the portfolio kind of rolled over a bit and was getting a little more volatile, you know, at the top of summer of 2018 and then, you know, got, you know, a little more so. And then twenty -- and then by Christmas of 2018, I called him because we had that crash, and he said, What's happening with my portfolio? And I said, Well, you know, you're definitely bruised, but you're not broken. And I did tell him that day that, you know, we -- we had some problems. And then it was sort of at that point, after that, you know, he was running into financial difficulties. He wasn't working. They were paying him \$20 a night to sweep the floors. And -- and I -- you know, and I -- and I think just the stresses and the volatility of the market at that time just sort of had him knee-jerk, and I begged him. You know, when we had that discussion, I said, Please be patient. This is going to work, and...

¶ 71 Ms. Green's breach of her KYC obligations lie not in her failure to learn essential facts about the complainant. Ms. Green appears to have known the essential facts about the complainant. She very well knew that the complainant had modest income and net worth. She knew that he was not flush with funds and hence her refusal to invest his inheritance. What she did with that information with respect to the setting of the investment objectives and risk tolerances to enable the concentrated investment and trading in the complainant's accounts is the crux of the matter and the foundation of her lack of compliance. She ignored the best interests of her client in hiding behind the NCAF which she completed and had the complainant sign.

¶ 72 Ms. Green's somewhat similar argument suffers the similar fate as the respondent's in *Myatovic*: considering the demonstrable lack of investment sophistication, Ms. Green's argument as to the acceptance of risks by the complainant is unacceptable and does not absolve her of her KYC obligations.

¶ 73 Ms. Green appeared to have had free rein over what investments she traded in on behalf of the complainant and when to do so. Her submissions revealed that she was so intent on trading in short term investments, that she neglected to assess whether the proposed concentration of investments was suitable for the complainant.

¶ 74 The panel in *Husebye* restated the CPH and its treatment of the KYC rule as the cornerstone of all dealings with clients. Per *Husebye*, the CPH lists a large number at 5.5 of considerations in determining suitability of investments for a client:

- net worth
- earnings
- age
- dependents
- degree of risk in proposed transaction
- knowledge of securities (or options or futures) markets
- investment objectives
- temperament
- accessibility
- existing portfolio
- existing non-securities investments (i.e., pension, real estate, etc.) and
- time horizon of the investment (when is the money needed?).

¶ 75 Considering the foregoing, Ms. Green should not have recommended the investments she did in the Information Technology industry concentration.

¶ 76 As we have found that Ms. Green should not have recommended the strategy and concentration she did in the first instance, it is not necessary for us to determine whether she made the complainant aware of the risks associated with her strategy. However, were a determination on that point necessary, we would have found that Ms. Green failed to make the complainant aware of the risks associated with the investment. While she may have

forwarded articles to him as to opinions on the proposed strategy, she did not ensure he understood it. He in fact testified he did not read the documents, and she sensed he was not paying attention to her strategy. We find that the complainant's receipt of statements and articles did not contribute to his understanding of the risks inherent in Ms. Green's strategy for his investments.

Conclusion on the Second Issue

¶ 77 This Hearing Panel finds that the evidence that Ms. Green failed to use due diligence to ensure that investment recommendations were suitable for the complainant is credible and convincing.

CONCLUSION

¶ 78 This Hearing Panel acknowledges that its task is to determine whether the investments made on behalf of the complainant were suitable, within the clients' risk tolerance, not whether the complainant knew the details of how the investments operated or the risks involved.

¶ 79 This Hearing Panel also acknowledges that there is no bright line test to determine when an investment is high risk and we note that as the Alberta Securities Commission panel stated in *Lamoureux*, "*suitability determinations...will always be fact specific.*"

¶ 80 CIRO Enforcement Counsel referred the Panel to the finding of the panel in *Re Phillips* 2013 IIROC 52 at paragraph 56: "*the responsibility to use due diligence, in recommending a security to a client, rests solely with the registrant. It cannot be transferred to the client even if the client acknowledges that he is aware of the risks associated with the investment.*"

¶ 81 This Hearing Panel found the 2017 and 2018 NCAFs prepared by Ms. Green were an unreliable representation of her client and merely appeared to have been drafted by her to support her recommended strategy that the complainant's investments be concentrated in the Information Technology sector.

¶ 82 Notwithstanding that the complainant signed the 2017 and 2018 NCAFs, and that he received periodic and regular statements, but failed to read them or advise Ms. Green that he did not understand them, we do not believe that the complainant really understood the products that were being bought for him by Ms. Green. In fact, the complainant testified that he completely relied on Ms. Green's expertise to the extent that he never questioned or refused her requests for approval to carry out any of the trades.

¶ 83 Ms. Green herself must have known the complainant relied on her expertise as she did not deny the allegation regarding the one instance when she carried out a trade notwithstanding that her attempt to obtain preapproval from him by phone failed.

¶ 84 This Hearing Panel considered the concentration of the investments by Ms. Green. As the panel stated in *Myatovic*, "*once the account has been opened, the Know-Your-Client Rule then extends to the trading in the account. The registered representative has an ongoing obligation to ensure that the trading in the account reflects the investment objectives and risk tolerances of the client as outlined in the NCAF. This obligation includes monitoring the concentration and the suitability of the securities traded in the account. Monitoring concentration imposes upon the registered representative the requirement to ensure that the holding of securities in the account are not so weighted in favour of one or more securities so that the concentration of the holdings in these securities increases the risk in the account to an extent which exceeds the risk tolerances defined for the account.*"

¶ 85 Ms. Green suggested that the investments were suitable investments for the complainant and that in recommending the investments, she fulfilled her duties as a registrant to him. We disagree.

¶ 86 As noted above, hearing panels in the precedent cases cited by CIRO in similar measures reiterated the requirement that a registrant, in recommending investments to clients must adhere to a three-stage process:

- (1) use due diligence to "know the product" and "know their clients";
- (2) assess suitability by determining whether a particular securities product is an appropriate match for a particular client; and
- (3) if a securities product is suitable for a particular client, the registrant can recommend the

investment product but, in so doing, must make the client aware of material factors associated with the investment product.

¶ 87 Ms. Green was in a position of a skilled, knowledgeable, and experienced financial planner. She certainly presented her submissions holding herself out to be one. Notwithstanding the information on the NCAF, the complainant was not sophisticated or experienced and would not have had the capacity to assess the risk without specific guidance by Ms. Green.

¶ 88 Ms. Green appeared to have been of the opinion in her submissions that her KYC obligations to ensure suitability of investment recommendation was confirmed simply by the complainant's decision to make the investment. Interestingly, she relied on the fact that she refused to invest an inheritance on behalf of the complainant as evidence of her diligence in carrying out her obligations.

¶ 89 As in *Husebye*, Ms. Green placed a substantial portion of the complainant's net worth in a concentrated risky investment while at the same time preparing mandatory NCAFs that at best, exaggerated the clients' investment knowledge, risk tolerance and investment objectives.

¶ 90 In no instance did Ms. Green recommend any alternative investment and appears to have suggested to the complainant that all investments carried comparable amount of risk.

¶ 91 We find that the subject concentration of the complainant's investments in the Information Technology sector was relatively high risk, specifically for a client whose net worth was not high, who was closer to retirement than not, who did not understand (or fully understand) the investment products and could not afford to gamble with his assets.

¶ 92 We found that Ms. Green failed to know the investment product and failed to fulfil her "suitability" obligation. We found that this conduct breached the conditions of her registration and was conduct contrary to the public interest.

¶ 93 While Ms. Green may not be beyond redemption, she has failed to recognize or acknowledge her wrongdoing and has shown no remorse. The Hearing Panel considered, as an aggravating factor, the fact that Ms. Green never acknowledged her responsibility for the losses incurred. She continued to rely on her unsupported allegations that "but for" what she considered the premature forced liquidation of the portfolio by Leede, the complainant would eventually have been made whole.

¶ 94 Ms. Green advised the Hearing Panel that she has left the investment industry and has no intention of returning.

¶ 95 This Hearing Panel does not consider Ms. Green's intention to not re-enter the industry as a mitigating factor and there are no mitigating circumstances other than Ms. Green having no prior disciplinary record and her submissions regarding her inability to pay. However, the seriousness of her misconduct outweighs those factors.

¶ 96 The Hearing Panel is aware of the factors to be considered in fashioning an appropriate sanction. Any sanctions imposed should be preventive, protective, and prospective in nature.

¶ 97 We have considered the evidence in the case, the law, the Sanction Guidelines and CISO Enforcement Counsel's submissions, both written and oral as well as the Respondent's (mostly written) submissions. The penalties we impose below are intended to deter Ms. Green and others. We believe that the sanctions imposed in the Order below will meet the mandate reposed in us to enforce high quality regulatory and investment industry standards, protect investors, and maintain competitive and efficient capital markets.

ORDER

¶ 98 This Hearing Panel hereby orders Ms. Green to pay:

1. a global fine in the amount of \$30,000;
2. disgorgement in the amount of \$14,954; and
3. \$5,000 in respect of costs of the hearing of this matter.

¶ 99 As Ms. Green has advised this Hearing Panel that she has left (and has no intention of returning to) the

industry, the following sanctions will only apply if Ms. Green decides to return to the industry contrary to her advice to this Hearing Panel.

¶ 100 Approval of Ms. Green's subsequent registration with CIRO will be contingent upon the following terms:

- A. she must successfully complete the CPH course;
- B. she must successfully rewrite the CPH exam; and
- C. a subsequent CIRO registration must be conditional upon Ms. Green being placed under close supervision for a period of at least 6 months.

Dated at Calgary, Alberta this 26 day of September 2023.

Omolara Oladipo, Chair

Bradley Whyte

David Johnson