Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: George William Popovich

Heard: May 14-16, June 2-6, June 9-13, August 19, 2014 in Windsor, Ontario
Decision and Reasons (Misconduct): January 14, 2015

DECISION AND REASONS
(Misconduct)

Hearing Panel of the Central Regional Council:

Mark J. Sandler	Chair
Guenther Kleberg	Industry Representative
Glenda Towle	Industry Representative

Appearances:

Shelly Feld Francis Roy	))	Senior Enforcement Counsel, Mutual Fund Dealers Association of Canada
Roland Schwalm	)	Counsel for the Respondent

The Allegations

1. In its Amended Notice of Hearing, the Mutual Fund Dealers Association of Canada ("MFDA") alleges that George William Popovich ("the Respondent") committed the following violations of the By-laws, Rules or Policies of the MFDA:

Allegation #1: Between August 2004 and February 2009, the Respondent failed to use due diligence to learn the essential facts relative to clients SM, MH, WC and PC, GL, and SL and accurately record the essential facts on the clients' New Account Application Forms ("NAAFs"), contrary to MFDA Rules 2.2.1(a) and 2.1.1.

Allegation #2: Between August 2004 and February 2009, the Respondent:

a) recommended and facilitated the implementation of a leveraged investment strategy in the accounts of clients SM, MH, and WC and PC; and
b) recommended and sold a "return of capital" mutual fund ("ROC Fund") to clients GL and SL;

without ensuring that the leveraged investment strategy and the ROC Fund was suitable for the clients, in keeping with the clients' investment objectives and within the bounds of good business practice, contrary to MFDA Rules 2.2.1 and 2.1.1.

Allegation #3: Between August 2004 and February 2009, the Respondent misrepresented or failed to adequately explain the risks, benefits, material assumptions and features of:

a) the leveraged investment strategy that he recommended and implemented in the accounts of clients SM, MH, and WC and PC; and
b) the ROC Fund that he recommended and sold to clients SM, MH, WC and PC, GL, and SL;

thereby failing to present the leveraged investment strategy and [the] ROC Fund to the clients in a fair and balanced manner, contrary to MFDA Rules 2.2.1 and 2.1.1.

2. In particular, when dealing with clients SM, MH, WC & PC and GL & SL or their authorized representatives (collectively "the Clients"), the Respondent disregarded the advanced age, limited investment sophistication, low risk tolerance and potentially limited investment time horizon of the Clients. The Respondent also failed to adequately take into account the limited income and net worth of clients to whom he recommended leveraged investment strategies that had the potential to seriously impair the long term financial circumstances of those clients.

3. In some cases, the Respondent misrepresented essential facts relative to his clients on Know-Your-Client ("KYC") information forms that he completed on their behalf.

4. The Respondent recommended that the Clients invest substantial amounts of money in a ROC Fund without adequately explaining the operational features of the ROC Fund in a manner that the Clients could clearly understand. Most significantly, he failed to ensure that the Clients understood that a substantial proportion (and sometimes all) of the payments that the Clients received from the ROC Fund constituted the return of their principal investment and was not profit. As a result, the Clients were deluded about the extent to which the money that they invested (whether borrowed or saved) was at risk.

5. The Respondent also disregarded concerns about his conduct that were raised with him by his branch manager and failed to follow the policies and procedures of the Member to ensure that the investment and leveraging recommendations that he made were suitable. Subsequently, the Respondent refused to accept responsibility for any of his misconduct and blamed his branch manager, his assistants, the Member and family members of his clients (who he claimed influenced their decisions) for his contraventions.

6. Each of the Clients suffered substantial financial losses as a consequence of the Respondent's conduct and the Respondent failed to ensure that the Clients were aware of the extent to which the value of their investment portfolios had declined.

7. The Respondent contravened his suitability obligations to the Clients and the standard of conduct that all Approved Persons are required to uphold and displayed a flagrant and longstanding disregard for the consequences that his advice had on unsophisticated clients who relied on him to responsibly and diligently guide them with respect to their investment decisions and to safeguard their financial interests.

Positions of the Parties

2. Staff alleges, in essence, that the Respondent, as an advisor, recommended that multiple clients invest significant sums of money in ROC Funds when these investments were entirely unsuitable for them. This, it is said, is either explained by the Respondent's failure to take appropriate steps to "know" his clients, as that term is understood in the industry, or by the Respondent's financial motivation to make these recommendations, despite his knowledge of the clients' personal circumstances and background that made these investments unsuitable. A number of these investments were "leveraged," that is, they were made with borrowed monies, sometimes on the security of the clients' homes. Staff contends that this made these investments even more unsuitable for the clients. In any event, the Respondent failed to fulfill the additional obligations upon him to disclose the risks associated with leveraged investments and the features of a ROC Fund and ensure suitability. Finally, Staff alleges that the Respondent was not frank and forthcoming with his clients, his immediate supervisor or his corporate employer, contributing to and aggravating his misconduct.

3. In support of its position, Staff tendered the evidence of several clients, or persons associated with those clients, Mike Ford, the MFDA investigator, Richard Woodall, the Respondent's branch manager, Anita Radu, the alternate branch manager and office manager and Professor Eric Kirzner, a duly qualified expert. As well, Staff tendered a large body of relevant documents.

4. The Respondent maintains that he engaged in no professional misconduct. He took appropriate steps to understand his clients and their needs, and recommended investments, most particularly ROC Funds, that corresponded to their financial profiles as he understood them. Generally, but not invariably, he knew when his clients borrowed monies to make investments with him. When he was aware of this, he properly explained the nature of these investments and the leveraging strategy, including the risks associated with them, and obtained their informed instructions. In summary, he made recommendations, in good faith, that he felt were suitable for his clients, and never misled them as to what was transpiring. Any failings on his part did not rise to the level of misconduct. His supervisor did not act in good faith in his dealings with the Respondent and the Respondent's clients, and failed to properly fulfill his obligations as a supervisor.

5. The Respondent testified on his own behalf. He also placed reliance on documents, some of which were tendered during the Staff's case, and upon concessions made by various witnesses as to frailties in their recollections of events.

6. In deciding this matter, we have reviewed the entirety of the evidence, although not all of it will be recited in these reasons, together with the oral and written submissions of the parties, and the pleadings.

The Standard of Proof

7. There is no dispute about the applicable standard of proof. Staff bears the onus of proving the essential elements of each allegation on a balance of probabilities. Only evidence that is "clear, cogent and convincing" is capable of meeting the burden placed upon Staff.

8. The Respondent need not prove anything. There is no onus placed on him. His evidence must be considered along with the other evidence in determining whether the allegations have been proven. We need not affirmatively accept his evidence, in whole or in part, in order to conclude that an allegation has not been proven.

Assessment of Credibility and Reliability

9. A number of witnesses were called at this hearing. In determining whether the allegations have been proven against the Respondent, we have considered the credibility and reliability of each of these witnesses, including the Respondent. In doing so, we are mindful of the distinction between credibility and reliability.

10. Credibility concerns the honesty or sincerity of a witness. Reliability has to do with the accuracy of what the witness says. In evaluating what weight, if any, can be placed on a witness's account, both credibility and reliability must be considered. A witness may be honestly conveying his or her recollection of events, and therefore credible, but be mistaken in that recollection. A witness may be dishonest or insincere in his or her testimony, and hence lack credibility. To state the obvious, a dishonest or insincere witness's evidence must be viewed with particular caution. Although we are entitled to accept all, part or none of any witness's account, a deliberate lie by a witness may impact on whether any reliance can be placed on anything contentious that the witness says.

11. In this case, five of the Respondent's clients and/or family members associated with the clients testified. There was little, if any, challenge to their credibility. In other words, the Respondent did not seriously contend that they deliberately lied in their testimony. Instead, the Respondent submitted that their evidence was unreliable on contentious issues.

12. In particular, the Respondent contended that these witnesses were unable to recall with any precision their conversations with the Respondent, including what information was communicated to them about their investments and what information they communicated to the Respondent that would have influenced his recommendations to them. Counsel for the Respondent submitted that this was a reflection of factors, such as: (i) the passage of time; (ii) their inclination to trust the Respondent and as a result, their failure to give full attention to what he told them; and (iii) recollections coloured by subsequent events. Again, depending on the witness, these subsequent events included their losses (perceived or actual) in the market which

they attribute to the Respondent, the complaints or litigation involving the Respondent, and adverse comments about the Respondent made to them by his supervisor or others. The Respondent's counsel also cited evidence that at least one witness acknowledged that she advised the Respondent that she had a greater understanding of investments than, on reflection, she did.

13. We have considered these and other factors in assessing the reliability of the accounts given by these witnesses. All of the clients and/or family members were attempting to provide their best recollections of events. None of them attempted to mislead us. However, we recognize the limitations in their ability, at times, to recall with precision (especially in the absence of documentary assistance) what had been said to them or by them at the material time. We also acknowledge the tendency of several witnesses to too readily state that the Respondent had not advised them of certain things, when he may have done so. This tendency may have resulted, at times, from their current perception of the Respondent's conduct, rather than from an accurate and precise recollection of what the Respondent had or had not said.

14. For example, some witnesses testified or implied that while they were aware that they were invested in the stock market, they were unaware that there was even the slightest risk that the value of their investments could fluctuate downward. This recollection may have been coloured somewhat by their subsequent losses (perceived or actual) in the market. However, as elaborated upon below, we are satisfied that each of the clients never had an accurate understanding of the level of risk associated with their investments, though they may well have understood that the value of the investments could experience some relatively benign fluctuations.

15. In light of these reliability issues, we have carefully evaluated the evidence of these witnesses. Ultimately, our findings are not dependent on their detailed recollections of what was said, but on common sense inferences to be drawn from the totality of the evidence, including that of the Respondent.

16. For example, the evidence is overwhelming that the clients who leveraged their homes to invest in ROC Funds did so without any understanding that the security of their home could be jeopardized by these investments. The evidence is also overwhelming that none of the clients understood the key characteristics of a ROC Fund: most particularly, that it would not be unexpected that the regular payments they would receive would represent, in whole or in part, a return of capital, rather than profit, and that their investments could significantly diminish in value as a direct result. This lack of understanding was obvious from their testimony, their financial outlook, objectives and status. For the leveraged clients, this lack of understanding was also obvious from their unrestrained use of the regular payments from their ROC investments as if they represented pure profit.

17. There was no serious challenge to the expert opinion of Professor Kirzner. The limitations on his opinion were certainly explored with him, as were certain deficiencies in the underlying material upon which he relied. However, his evidence was unshaken in cross-examination and we accept it as accurate and helpful. Some of that underlying material was provided by Mike Ford, the MFDA's lead investigator. He testified twice. The second time, he identified several errors in his original work product after he had completed his earlier testimony. The cross-examination challenged the lack of timeliness of corrections to his work, and some of the underlying assumptions associated with his charts. However, his credibility was not attacked. We are satisfied that he gave credible evidence, and that his charts, as corrected, and subject to the limitations expressed by him in his evidence, were accurate.

18. Richard Woodall, the Respondent's branch manager and Anita Radu, the alternate branch manager, also testified. Woodall's credibility, in particular, was vigorously challenged by the Respondent. It is the Respondent's position that Woodall failed to properly fulfill his supervisory responsibilities, and bears significant blame for what transpired. The Respondent also contends that Woodall turned the Respondent's clients against him, skewed their perceptions of events, and was motivated to falsely describe the Respondent's conduct for a variety of reasons, including the soured business relationship between them. The Respondent also disputes Woodall's position that he was unaware of the Respondent's clients' leveraged accounts until

well after-the-fact since the transactional documents were presented to him for his review, initials and/or signature.

19. We reject the submission that any failure of oversight by the Respondent's supervisors or employer assists the Respondent on the key factual issues in this case. Simply put, any such failure on their part does not immunize the Respondent from findings of misconduct. Moreover, the Respondent did not fully comply with the conditions imposed on him by his employer as part of its close supervision of his activities. It is impossible to see how the Respondent can fail to fully disclose his transactional activities, and then plead that his supervisors' failings inure to his benefit. We need not evaluate whether his supervisors should have identified what we regard as problematic transactions in a more timely way or the adequacy of Mr. Woodall's explanation in this regard. We accept the credibility and reliability of the evidence of Woodall and Ms. Radu on key issues.

20. The Respondent testified in his own defence. Through cross-examination and in submissions, Staff took the position that the Respondent's evidence should be rejected as untruthful on key issues and that, even on his own testimony he failed in several respects to meet the standards of conduct required of him. In assessing his credibility and reliability, we did not view his testimony in isolation, but were mindful of the totality of the evidence and the ultimate burden of proof that remained with Staff throughout. As explained in our reasons, we found that his evidence defied common sense in a number of ways, and was incompatible with documents and other evidence that we accept as accurate. We are satisfied that on several important points, his evidence was demonstrably false.

The Respondent's Registration and Employment

21. The Respondent was registered in Ontario as a mutual fund salesperson from May 23, 1996 to February 26, 2009: first, with Worldsource Financial Management (May 23, 1996 to November 21, 2003), then with Performa Financial Group Limited ("Performa") (November 21, 2003 to June 30, 2006) and finally with Desjardins Financial Security Investments Inc. ("Desjardins") (June 30, 2006 to February 26, 2009). Desjardins acquired Performa on June 30,

2006. Desjardins terminated the Respondent on February 26, 2009. The Respondent is currently not registered in the securities industry.

22. At the material times identified in the Amended Notice of Hearing, Performa and Desjardins were Members of the MFDA. At the material times, the Respondent was located in Windsor, Ontario and conducted his financial services business using the approved trade name, "The Financial Investment Centre."

23. In 2003, the Respondent, Richard Woodall, who became the Respondent's branch manager, and another advisor, MD, amalgamated their business activities. Their arrangement contemplated that Woodall and MD would purchase 80% of the Respondent's book of business over a five year period (commencing at the end of 2003) and take over responsibility for servicing most of his clients. The business consisted of approximately 900 clients.

24. The Respondent, Mr. Woodall and Anita Radu, who became the alternate branch manager and office manager, testified about the implementation of the arrangement, its amendment, and the tensions that arose after the arrangement was entered into. For example, Woodall testified that the Respondent did not introduce Woodall and MD to some of his high net worth clients as contemplated. He felt that the Respondent denigrated Woodall and MD to those clients. The Respondent disagreed as to the root cause of these tensions and as to how he described Woodall and MD to his clients. It is unnecessary for us to embark on any detailed discussion of the business arrangement and its implementation. The relationship undoubtedly soured to some extent. Most significant here, the Respondent and Woodall had significant differences relating to the suitability of the Respondent's investment advice to clients concerning the Clarington Canadian Dividend Fund ("CCDF" or the "Dividend Fund") and the extent to which his clients' investment portfolios were sufficiently diversified.

25. In July 2007, the Respondent and Financial Investment Centre were sued by one of the Respondent's clients. The statement of claim alleged that the plaintiff was a "leveraged" client: that is, a client who had borrowed money to finance her investment with the Respondent. The plaintiff also alleged that the Respondent had engaged in various improprieties in connection

with her investments. (We place no reliance on the allegations for their purported truth. They are relevant only to the Respondent's subsequent state of mind and to contextualize the events that followed.)

26. As a result of this lawsuit, head office directed that the Respondent be placed under close or strict supervision. Mr. Woodall testified that the Respondent was required to provide a monthly log to Woodall showing all transactions completed for that month, including particulars such as whether a client's account was being leveraged. A daily blotter showing the Respondent's transactions had to be reviewed and signed by the branch manager. Copies of the transactional documents also had to be reviewed and initialed by the branch manager. The Respondent was also required to provide a list of all accounts currently leveraged as well as historical accounts that raised issues similar to those contained in the statement of claim.

27. By memorandum dated July 31, 2007, the Respondent listed his clients who were currently leveraged. SM was not referred to. In the memorandum, he claimed that it had always been his policy to deliver a statement of disclosure to all of his clients, although he reflected that when the accounts were opened, there was no requirement to obtain the client's written acknowledgement that the statement of disclosure had been received. He also said that there were no historical accounts that raised similar issues to those identified in the statement of claim.

The Clarington Canadian Dividend Fund

28. The Dividend Fund is a ROC Fund. Put in the simplest terms, ROC Funds are structured to provide a consistent monthly distribution to investors. If the mutual fund's underlying assets generate a sufficiently positive return as a result of interest income, dividends or capital appreciation, then the monthly distribution represents profits. Otherwise, the monthly distribution is only accomplished, in whole or in part, by returning the investor's own capital, diminishing the value of the investor's holdings in the fund. This is not unusual, especially where the monthly distribution per unit is high. Indeed, at some point, a ROC Fund may be compelled

to reduce, suspend or cancel the monthly targeted distribution that would otherwise be made to each investor.

The Evidence Pertaining to WC and PC[1]

29. WC and his wife PC began dealing with the Respondent in November 2002. At the time, WC was 64 years old. PC was 63 years old.

30. Only WC testified at the hearing. PC was emotionally unable to do so. However, WC outlined his own and his wife's background. WC left school to begin working after grade 10. He later completed a three year mechanical drafting course, a business program at the University of Windsor, a Dale Carnegie course and in the late 1970s or early 1980s, an MBA by correspondence from an American college. He said that most of his business school courses focused on marketing and labour relations, though he may have taken finance and accounting courses as well. After WC left school, he worked in a warehouse and later in retail sales. He then worked for a tool and die set manufacturing company, first doing manual labour, then drafting die sets and ultimately becoming a sales manager. After the company's Canadian operations ceased, WC worked for several small local die shops in Windsor. He retired in 2003, shortly after he began dealing with the Respondent.

31. PC completed a one year commercial course at St. Mary's Academy, the equivalent of a grade 11 education. She has no business education or experience. She has been a homemaker since her marriage to WC.

32. In 2002, WC and PC were referred to the Respondent by their son GC. He was then married to SC, a mortgage broker. WC and PC wanted to find out if they could increase their retirement income beyond their Canada Pension Plan ("CPP") and Old Age Security ("OAS") benefits. They were debt free and owned their home free and clear. They had about $200,000 in

[1] Initials are used, where appropriate, to protect the privacy of the Respondent's former clients or others who are not central to the narrative.

savings. They had never previously dealt with an investment advisor. Their previous investment experience was limited to the purchase of some guaranteed investment certificates ("GICs").

33. WC and PC transferred money to the Respondent as their investments matured.

34. WC testified that the Respondent recommended the CCDF, a fund that he said was comprised mostly of banks that were solid and secure as they were backed by the Canadian government. No other investments options were proposed by the Respondent.

35. The earliest Know-Your-Client ("KYC") document in the client file is a NAAF dated November 19, 2002. It identifies WC as a retired individual with fair investment knowledge, an annual income of $30,000 and a medium risk tolerance. A NAAF dated March 7, 2003 was subsequently completed for PC. The KYC information indicates that PC also has fair investment knowledge, and a medium risk tolerance. The annual income line for PC is left blank. WC's 2004 tax return shows gross annual income in the amount of $14,855.37.

36. WC did not recall any discussion about their risk tolerance. The $30,000 income figure listed on WC's NAAF might have been an estimate of the couple's joint annual income, but it was likely a high estimate. (We do not regard any inaccuracy in this regard as material.) WC could not account for why "fair" investment knowledge is attributed to his wife.

37. The Clarington Investment Application dated November 19, 2002 indicates that 100% of the clients' money is to be invested in the CCDF on a DSC basis. (DSC refers to deferred sales charges.) WC testified that he and his wife were not informed of the risks associated with the adopted investment strategy. They were told that the Dividend Fund would pay eight cents per unit per month on the basis of dividend income received by the Fund from the banks it invested in. WC testified that he believes that from time to time he was asked to sign blank forms, but that generally, the forms were filled out when he and his wife signed them.

38. On March 7, 2003, WC and PC signed documents in relation to their joint cash account in which an initial purchase of $31,000 in shares of the CCDF was made.

39. WC could not account for changes to the KYC recorded on a Transaction Form dated December 2, 2003 that indicates that his risk tolerance is reduced to "low" from "medium" and his investment knowledge is raised from "fair" to "good." Nor could he account for how "advanced" investment knowledge is attributed to PC in 2008 documents.

40. WC did not recall receiving a copy of the CCDF prospectus.

41. On January 27, 2005, a further purchase of shares in the CCDF of $142,500 was made in the joint account of WC and PC. WC testified that this came about when the Respondent advised him and his wife that some of his clients had been increasing the income that they received from their Dividend Fund holdings by accessing the equity in their homes by means of a line of credit. The Respondent recommended that WC and PC consider such a proposal to increase their income. According to WC, the Respondent estimated that they could increase their income by almost $17,000 per year if they implemented such a strategy. It seemed like a viable option for WC and PC so they contacted their daughter-in-law, SC, and obtained a line of credit of $142,500 which was approximately 75% of the lender's appraisal of their home.[2]

42. WC testified that there was no discussion of risk when the Respondent proposed the leveraged investment strategy to them. The Respondent described it as essentially a risk free opportunity to obtain a return on the equity in their home. According to WC, the Respondent did not advise them to consider borrowing a smaller amount. He did not warn them about the risk of a change in interest rates, the risk of a distribution cut by the fund company, the risk of a drop in the value of their portfolio compared with the value of their outstanding loan or any other possible risks of the strategy. WC testified that he and his wife frequently sought reassurance from the Respondent that the leveraging strategy would not jeopardize their interest in their house. The Respondent claimed that they had nothing to worry about. He had such confidence in the Dividend Fund that he had even recommended it to his father. WC testified that if the

[2] The Respondent's counsel noted in closing submissions that despite SC's support for the leveraging strategy that WC and PC employed, they remained on speaking terms with her and commenced no litigation against her. Initially, WC testified that SC was unaware that they had invested the mortgage proceeds with the Respondent, but in cross-examination, acknowledged that SC may have participated in correspondence respecting the ultimate use of the funds.

Respondent had told them that the strategy posed any risk to their home ownership, they would never have implemented it.

43. WC testified that he and his wife were not provided with a risk disclosure document when they opened their account or when they borrowed to invest.

44. WC and PC implemented the strategy by paying interest only on their line of credit. WC testified that they were never warned that there was any risk that the value of their portfolio might fall below the outstanding amount of their loan.

45. WC denied that tax benefits were a significant investment objective for him. His taxable income was minimal.

46. WC had no recollection of signing an acknowledgement form dated August 24, 2006. The acknowledgement purports to reflect that WC has been advised on the need for diversification, other possible investment options, and his acceptance of the risks associated with a portfolio concentrated in a single fund. Despite its contents, WC could not recall any discussion with the Respondent about the value of diversification or any risks of being over concentrated in one fund.

47. WC met with the Respondent and Mr. Woodall in April 2008. Woodall sent him a four-page document entitled "Portfolio Review and Suggestions." As a result, WC prepared a spreadsheet containing data that was available on Morningstar[3] about each of the funds that Woodall had referenced in his letter. WC concluded that based on the value of their investment in the Dividend Fund, it was generating a higher distribution than any of the other funds that Woodall recommended. Since income was his priority, he concluded that the Dividend Fund was the best choice for him and his wife.

48. Following the Respondent's termination, WC and PC were informed by Mr. Woodall that the income stream that they had been receiving from the Dividend Fund was not interest,

[3] Morningstar is an investment research company with publicly accessible investment information.

dividends and capital gains as they had been led to believe, but rather the return of their own capital. WC was flabbergasted. WC and PC submitted a complaint to Desjardins and eventually commenced a lawsuit. They felt that they had been significantly misled by the Respondent respecting the nature of the distributions they had been receiving.

49. Even after the resolution of their lawsuit, WC and PC remain unable to pay down their line of credit until they sell their home. PC was afflicted with severe depression after the extent of the financial losses that WC and PC had sustained came to light.

50. Staff's analysis indicates that the value of the joint account that was substantially funded with the $142,500 loan that WC and PC obtained and invested in the Dividend Fund, dropped to a value of $85,979.33 by the date of the Respondent's termination. As of the same date, when the loan costs of the investment strategy and the distributions and redemptions received by WC and PC are factored in, WC and PC suffered a loss of approximately $22,770.23. However, Staff submitted that this figure substantially understates their losses because WC and PC were told that they could spend the portion of their distributions that exceeded their loan costs and they did so. As of the Respondent's termination date, if WC and PC had unwound the leveraged investment strategy by redeeming their investment in the Dividend Fund and using the proceeds to pay down their outstanding loan, WC and PC would have been left with a $56,888.40 shortfall (without taking into account any fees associated with selling the mutual funds or immediately paying off the loan). Of course, we recognize some artificiality in quantifying losses based on the Respondent's termination date.

51. Mr. Woodall also testified about his involvement with WC and PC. He was introduced to WC and PC at a meeting with the Respondent. Woodall gave them a several page review, but they remained with the CCDF. WC had earlier signed a document drafted by Woodall (with an acceptable modification by the Respondent) that reflected that he was prepared to leave his portfolio as is and to accept the risks associated with that. Woodall was comfortable with that, though he said he was unaware, at the time, that the clients were leveraged. He acknowledged that one of the transaction forms showed that money had been borrowed by the clients to invest, though he maintained that the particular document was not at his disposal when he reviewed the

portfolio. He was cross-examined, in relation to these and other clients, about the adequacy of the supervision in place at the relevant time.

52. The Respondent testified that he spent a considerable amount of time with WC and PC. He said that WC's investment knowledge was very good. Sometimes, the Respondent felt that WC knew more than he did. PC relied entirely on WC. The Respondent reflected in the documentation that PC had "higher than novice" investment knowledge because WC was, in reality, making the decisions.

53. The Respondent testified that WC approached him about borrowing some money to generate additional investment income. According to the Respondent, WC was very smart and conscious of his tax bracket – that is, how much income he wanted to have so as not to interfere with the supplement he and his wife were receiving. WC saw the CCDF as a way of getting additional income on a tax favourable basis. He made the arrangements to borrow through his daughter-in-law, SC. The Respondent arranged to have information sent to SC at her request.

54. The Respondent testified that he explained the CCDF to WC (and PC) the way it was explained to everybody:

> The amount of money he was investing, he would take the unit price at that time and that would give him X number of units and I treated that as that was his base units. Okay. And you had a choice. You could take the distribution each month and reinvest it back in which would increase the units every month. Or in his case, he was using – he wanted the income from the distribution which at that time was eight cents. Now – and I think I had some paper there and I would show them that. Okay. If it was eight dollars a unit when you purchased it and they paid eight cents that month and the fund did nothing, the eight cents now would come off the eight dollars and now the fund would only be worth $7.92. So you're taking from the base – and what I explained to clients is, if you leave your base units the same, the only impact – because you're in the market, is the unit value that's going to be affected. And if nothing changes, the unit value will continue to come down. If the fund goes up, then it would be the difference. And so that's basically how I would talk to the clients.

The Respondent testified that WC understood very well what was happening. He had already invested in the CCDF. The Respondent maintained that he offered no guarantees to WC and PC or anyone else. WC knew he was in the market.

55. More generally, the Respondent stated that if a client blankly stared at him, he would go through his explanation again or try to talk about it in a different way. He testified that he advised the Clarington people how he was presenting the CCDF to the clients, and they were "onside" with him. The Respondent maintained that he would not place clients in the Dividend Fund if they simply did not understand it. He would talk about the different companies, the banks that were in the fund. He would say, "You've got banks. You've got insurance companies, energy companies." The Dividend Fund was primarily involved in blue-chip assets. In response to queries from clients as to whether they could lose all their money, he said "yes" because they were in the market. However, he told them that he looked at it as a safe investment "because we're dealing with banks and if we think that our bank system is going under, talk to your bank manager and see what they (sic) have to say."

56. The Respondent was asked how he would explain leveraging, particularly in relation to WC. He said that what a client would look for is how much he was going to pay on his mortgage and whether the distribution would generate enough to pay the interest and help pay down his mortgage: "so knowing that the client was in the market, we would look at where the client would be with the mortgage in ten years [the investment horizon.]" He thought that he did a worksheet for WC or that WC did it himself.

57. In relation to disclosure statements or client kits, the Respondent testified that the office did not have what exists today. He would go through the documents he was aware of and fill those out. The Respondent always had a prospectus on his desk and they'd talk about it. A lot of clients would leave without it, indicating that they were not going to read it. He believes that WC did take one. The Respondent also believes that, at some point, Clarington sent it out to clients with a statement. He denies that he ever asked any client to sign forms in blank.

The Evidence Pertaining to SM

58. SM and her husband operated a pizza business together. They also owned a home and two residential rental apartments, a cottage and an empty lot. SM's husband passed away in March 2004. Her husband had always managed their finances during his lifetime. After his death, SM sought out the Respondent's investment advice. At the time, she was 62 years old. She had a grade 12 education. She continued to operate her pizza business and rental properties, but had no other business experience, and had never previously dealt with an investment advisor. Her income was derived from the pizza business, a pension from her late husband's employer, and OAS and CPP benefits. The rental apartments carried an outstanding mortgage debt of $90,000 to $100,000.

59. SM testified that she placed a great deal of trust in the Respondent and deferred entirely to his investment advice. What this meant, among other things, is that she often had no specific recollection of what transpired in their meetings. The Respondent explained certain things to her that were sometimes reduced to writing, but she would not have understood much or all of it. If the Respondent gave her written materials, they would not have meant anything to her, and she may have simply placed them in a drawer. She likely received the CCDF prospectus, but was unsure whether it was ever reviewed with her. She understood that her prime investment fund was tied to the stock market.

60. SM transferred the proceeds from term deposits and other investments, as they matured, to the Respondent's firm. On the Respondent's advice, she also cashed out an annuity containing the proceeds from her husband's life insurance policy and transferred that money to the Respondent for investment. However, most of the monies transferred to the Respondent for investment were leveraged. As more fully described below, SM mortgaged two rental properties and her home to invest with the Respondent. The Respondent invested most of the money in units of the CCDF. These units were purchased on a DSC basis. Even pre-existing mutual fund investments that were transferred to the Respondent's firm were immediately transferred into the CCDF, even if this resulted in DSC fees being paid by SM. SM testified that she was told by the Respondent that she would not incur any fees for his services.

61. SM did not know how to read a portfolio transaction summary. She testified that she was unfamiliar with the terminology on her NAAF such as "investment horizon" and on her account statements such as DSC and FEL (front-end-loaded). When asked in examination-in-chief, she could not explain the difference between mutual funds and segregated funds, or registered and unregistered investments. Nor could she describe the investments she owned or the reasons why the Respondent regarded them as good selections. She stated that she had "no knowledge of investing." The Respondent, who was actively involved in completing the KYC forms, reflected that SM had good investment knowledge. He also classified her investment horizon for all her investments as 10+ years.

62. SM testified that, early in her relationship with the Respondent, he referred her to SC, the mortgage broker. In September 2004, SC assisted SM in obtaining a mortgage on one of her rental properties. On October 22, 2004, SM provided $75,000 to the Respondent to invest in ROC Funds. This represented the entire mortgage proceeds, and the first monies advanced by SM to the Respondent.

63. In July 2006, SM obtained a mortgage on her second rental property. On October 10, 2006, she provided $100,000 of the $112,500 mortgage proceeds to the Respondent to invest in ROC Funds.

64. In July 2007, SM obtained a mortgage on her home. On October 30, 2007, SM provided $125,000 of the $127,400 mortgage proceeds to the Respondent to invest in ROC Funds.

65. There was no reflection in the available documents that the Respondent provided SM with a leveraging risk disclosure document for any of the above three transactions. Nor did he obtain approval for these leveraged investments from his branch manager or his firm's compliance department. SM testified that the Respondent did not warn her about any risks associated with leveraging. She maintained that if the Respondent had informed her that the strategy could result in the loss of her home, she would never have implemented it.

66. On documentation signed in October 2004 and October 2006, the Respondent checked off "No" to the question "Are you [SM] borrowing to invest?" On the October 2007 documentation relating to the investment made with the mortgage proceeds from SM's home, the Respondent checked off "Yes" to the same question.

67. During cross-examination, SM related the circumstances surrounding an office meeting arranged in the Respondent's absence at which Mr. Woodall, the office manager, advised her of her portfolio's most recent performance and alleged inappropriate conduct on the Respondent's part.

68. Staff's analysis indicates that as of February 2009, when the Respondent was terminated, SM had incurred a loss of $67,638.76 on a total investment of $364,100. That loss calculation does not include $7,510.70 that SM received as cash distributions that she believed constituted dividends that she could freely spend. If SM had redeemed the mutual fund units in her portfolio and attempted to repay her outstanding loans on the date when the Respondent was terminated, she would have faced a $109,876.19 shortfall.

69. The Respondent testified that SM was referred to him because her husband had passed away and she was unsure what to do with her investments. At their first meeting, she described what she owned. He arranged for an accountant to get involved in light of the complexity of her holdings. The initial account opening documentation was filled in by the Respondent and initialed by Mr. Woodall.

70. The Respondent felt that SM knew what stocks and investments were although her husband had handled most of their holdings. She ran the restaurant and knew about her apartment holdings as well. As a result, he felt that her investment knowledge was good. Based on her willingness to hold on to stocks, he felt that her risk tolerance was medium. He understood that she was not borrowing to invest in her initial series of purchases, so that question was answered, "no." Later on, the topic of leveraging came up when SM wanted to do some work on her house. She was going to take the difference between the proceeds from mortgaging her house and what she needed for renovations and invest it. According to the Respondent, he

was not the only one involved in discussing this strategy with SM. The accountant participated in a lot of the meetings. They talked about the fact that the restaurant was not doing well. It was draining her. So one of things they looked at was to use the house to get an income, leverage, write it off and use the income to keep the business going rather than taking personal money out of her pocket.

71. The Respondent maintained that the only leveraged transaction he was aware of involved SM's house. He also stated that the accountant explained the consequences of leveraging to SM. She also knew the consequences of being in the market. According to the Respondent, he explained to her and the accountant how the CCDF operated. He had no concerns about suitability given all of the assets in SM's portfolio and the conversations that included the accountant.

72. The Respondent testified that in 2008, he moved some of SM's money to a guaranteed investment since the market was going down, she wasn't selling the restaurant and her two daughters financially relied on her.

73. The Respondent could not recall whether SM was given a client kit. Whatever paperwork was there was filled out. He relied upon Anita Radu to tell him if documentation was missing. The prospectus was on his desk. The Respondent felt good about the fact that SM knew what was going on. He did not recall whether he changed her KYC information when he became aware of her intention to make a leveraged investment.

The Evidence Pertaining to MH

74. MH is a single woman with one son, who is a constable with the Ontario Provincial Police. Both testified at the hearing. MH was 67 years old when she first dealt with the Respondent. She had no prior investment experience and had never taken an investment course. She left school after grade 9. She worked as a hairdresser for several years before holding several positions at hospitals: first, as a registered nurse's assistant, then as an occupational therapist and finally, as a lab clerk for 27 years. She never earned more than $29,000 per year.

Following her retirement at the age of 60, her income consisted of her pension benefits, OAS and a small pension supplement from the College of Nurses. Between 2005 and 2008, her retirement income ranged from a low of $27,597 in 2007 to a high of $30,498 in 2008. She has lived in the same home, which she inherited from her father, for 44 years. Prior to her dealings with the Respondent, she had never placed a mortgage or other encumbrance on her home. She had never owned stocks, bonds, mutual funds, term deposits or similar instruments. She had no significant savings and no disposable income.

75. MH's son had some investment experience prior to meeting the Respondent. He had dealt annually with another investment advisor for several years to enable him to purchase some mutual funds in a registered retirement savings plan ("RRSP") that his former employer contributed to each year. These were not ROC Funds.

76. In 2007, MH told her son, Mr. H, that she had seen television advertisements describing reverse mortgages and was interested in obtaining a reverse mortgage on her home in order to supplement her income. Mr. H thought it would be wise to consult a mortgage broker that he was acquainted with. This happened to be SC, the same mortgage broker referred to earlier. SC discouraged MH from placing a reverse mortgage on her property. Instead, she referred MH to the Respondent and recommended that she discuss with him the possibility of investing the proceeds from a conventional mortgage on her home.[4] SC indicated that this would probably earn enough money to pay MH's mortgage and have money left over. According to Mr. H, SC stated that her parents had this arrangement and loved it.

77. Based on the referral, MH and her son met with the Respondent. MH told the Respondent that she wanted investment income and wanted the investment to grow. According to MH and her son, the Respondent told them that if they invested the proceeds from a mortgage with him, he could obtain a 12-15% return. MH would receive $989 per month from the mutual fund that the Respondent recommended. After deducting the anticipated monthly mortgage payment of $602.17 per month, MH would be left with approximately $390 per month in

[4]Mr. H already knew about the Respondent who had served as an investment advisor for a company Mr. H worked for.

additional spending money. After meeting with the Respondent, MH and her son again met with SC to arrange for a mortgage on MH`s home. In November 2007, MH invested $95,814.30 of the $112,000 in mortgage proceeds with the Respondent. The balance of the mortgage funds was used to pay for some renovations to MH's home.

78. The NAAF that the Respondent filled out for MH indicates that MH's income is less than $25,000, her investment horizon is 10+ years, her risk tolerance is medium and her investment knowledge is fair. (Although MH's income in 2006 was, in reality, $29,537, we place no reliance on the relatively minor understatement of her income in the opening document.)

79. MH maintained that she did not discuss her "investment horizon" with the Respondent and remained unfamiliar with the term when she testified.

80. According to MH and Mr. H, the Respondent did not disclose to them how he was compensated or inform them of the risks associated with the leveraging strategy. MH testified that she would never have employed the strategy if informed that she could lose her home. A client kit acknowledgement form was signed by MH. However, she and her son had no recollection of receiving from the Respondent or discussing with him some of the documents referred to in the form.

81. MH acknowledged in cross-examination that the term "invest" carries with it a connotation of risk. She also acknowledged that she trusted the Respondent implicitly and, as a result, was not really listening to what he was saying to her the day she first invested with him.

82. Mr. H also acknowledged limitations in his recollection concerning the interactions with the Respondent. The Respondent discussed the CCDF with them, but Mr. H could not recall whether its ROC feature was explained. He believes that the Respondent did describe what the Dividend Fund was invested in. He remembered that his mother received a prospectus at one point, but could not remember if the Respondent reviewed it with them.

83. When the leveraging transaction was processed, the Respondent was subject to strict supervision. As previously reflected, this required him to provide a monthly log to his branch manager, showing all transactions he completed for that month. The log was to show, amongst other things, any special or unusual information, such as the client's account being leveraged.

84. On MH's NAAF, in response to the question "Are you [MH] borrowing to invest?" the Respondent checked off "Yes." However, Mr. Woodall testified that the Respondent did not bring the leveraging transaction to his attention. It was not reported on his monthly log. Nor did he obtain approval from his supervisor or the Member's compliance officer of this leveraging strategy.

85. MH testified that in October 2008, she consulted with the Respondent after her American girlfriend cancelled their joint travel plans as a result of the poor performance of the financial markets. The Respondent reassured her that unlike American banks, Canadian banks were regulated and consequently, in his view, she had nothing to worry about.

86. On December 2, 2008, Mr. Woodall sent the Respondent an e-mail informing him that he had spoken with MH and was surprised to learn that the Respondent had set up a leveraging investment strategy for her. He felt that there existed a substantial shortfall that left her unable to repay her outstanding loan. Woodall noted that MH "claims that she doesn't understand how her account can be down. She is only taking the dividends." He observed that "[h]er file has NO leverage disclosure forms, there is no indication anywhere that she borrowed this. This is all 100% non compliant, and you know the rules."

87. Mr. Woodall directed the Respondent to schedule a meeting (which Woodall would also attend) with MH to ensure that she was aware of the risks of her leveraging investment strategy and to complete the paperwork needed for the file. On December 23, 2008, the Respondent met with MH and Mr. H two and a half hours earlier than the meeting had been scheduled. RW was not in the office yet and was unable to attend. According to Woodall, in contravention of his instructions, the Respondent did not obtain a copy of MH's portfolio statement signed by the client acknowledging that she was aware of the current balance in her portfolio.

88. Mr. H attended the December 23, 2008 meeting. He was astonished to learn of the substantial decline in the value of his mother's portfolio (from $95,814.30 to approximately $54,000) in a little more than a year. Mr. H testified that he recommended that MH reduce the amount that she was receiving from the Dividend Fund and purchase additional units while the price of the mutual fund units appeared to be low.

89. During the December 23, 2008 meeting, MH was asked to initial a "Leveraging Risk Disclosure Document." Mr. H recalls the Respondent instructing MH to initial the four statements on the form so as to indicate her intention to authorize a reduction in the payments that she was receiving from the Dividend Fund. According to him, she was not alerted to the fact that the document was actually a leveraging risk disclosure document that she was being asked to sign and initial in order to acknowledge her acceptance of the risks of the leveraging investment strategy. He testified that MH could not have agreed to the content of the disclosure statement if she had understood what she was being asked to initial. It contained assertions that were inconsistent with her circumstances. For example, MH's income was not sufficiently steady and predictable to permit her to repay the loans when due without selling assets. MH could not tolerate investment return fluctuations. MH did not have sufficient assets to repay her loan if the lending institution required her to do so. Mr. H conceded that he did not recall all of the topics discussed in the hour-long meeting with the Respondent.

90. The Respondent also completed a Loan Request Analysis Criteria document during the December 23, 2008 meeting in which he indicated that MH had net worth sufficient to support the leveraging investment strategy as well as steady and predictable income, that the investments were suitable and in line with the client's KYC, that the client's age and time horizon were in line with the loan and that the strategy was in keeping with the client's best interests.

91. Mr. H testified that he was not upset with the Respondent on December 23, 2008 as he understood the markets to be down, evidenced by the status of his own mutual fund investments.

92. Staff's analysis reflects that on the date of the Respondent's termination, February 27, 2009, the value of MH's leveraged investment account was $49,826.49. The account had declined by $45,987.81. Although MH had received automatic withdrawals that diminished her loss by $14,957.00, she said that she had been told by the Respondent that the payments represented money that she could spend. So she did. If MH unwound the leveraged investment strategy on the date of the Respondent's termination by redeeming the balance of the account and applying it to the proportion of her debt that was attributable to the investment strategy, she would have been left with a $45,244.25 shortfall.

93. After the Respondent was terminated, MH and Mr. H attended a meeting with Mr. Woodall. He informed them that there were red flags all over MH's file as she did not appear to be an appropriate candidate for a leveraging investment strategy. MH was angry with the Respondent. Mr. H was also angry. He felt that the Respondent took advantage of his mother and deceived her. Shortly after the meeting, he advised his mother to take legal action and he helped his mother retain a lawyer for that purpose. After the litigation was settled, MH was left with a mortgage balance of approximately $62,000.

94. The Respondent confirmed that MH and Mr. H were referred to him by SC. They were looking initially at a reverse mortgage. MH relied on her son quite a bit. SC suggested that they look at alternatives to a reverse mortgage. SC was aware that her father-in-law, WC, was invested in Clarington.

95. The Respondent testified that he went through the marketing material with MH and Mr. H, and explained how the CCDF worked. He did not hear from them for some time. They returned, indicating that they had looked at it, and would like to proceed.

96. In relation to leveraging, the Respondent did a workup based on the suggested mortgage rate to show them exactly what would happen. He was confident that Mr. H understood because he owned mutual funds and he was very much aware that they would be investing in the market.

97. In relation to the KYC forms, the Respondent stated that the investment horizon was based on the length of the mortgage. If MH had come in herself, she was "less than a novice" in terms of investment knowledge. But because Mr. H was guiding her and making a lot of decisions, a higher level of knowledge was reflected. The risk tolerance was reflected as medium based on the fund itself. He checked off "yes" to leveraging and had MH initial it to ensure that she knew what she was doing. This was also done to ensure that Ms. Radu knew that this was a leveraged transaction.

98. The Respondent repeatedly stated that the only reason he allowed this transaction to proceed was the involvement of Mr. H. Mr. H knew exactly what was happening and he was going to be the beneficiary. The Respondent said that he probably would not have made the leveraged investment had he been placed in MH's situation. He would have been "dead against" this strategy if her son was uninvolved.

99. In cross-examination, the Respondent said that he did not recall talking about fees with MH. He maintained that he was uncomfortable that she was taking the entire distribution, rather than re-investing part of it, and discussed the distribution issue with her. A few weeks after the investment was made in November 2007, the value of MH's portfolio was already 5% lower than the amount invested, but the Respondent did not recall discussing that with her at the time. No leveraging financial disclosure document was prepared or signed in November 2007. The Respondent conceded that such a document was only prepared after the fact when Mr. Woodall brought this deficiency to his attention.

100. The Respondent testified that Mr. Woodall was scheduled to attend the meeting in December 2008 with MH and Mr. H. However, they came in early, so he met with him in Woodall's absence. According to him, his office tried to contact Woodall, but Woodall indicated that he was unavailable.

101. A portfolio summary shows that the total portfolio value of MH's account as at December 19, 2008 was approximately $40,000 less than its original value. The Respondent testified that MH had sufficient income to make her mortgage payments without the investment

proceeds. Indeed, he asked MH to initial an acknowledgement that her income was sufficiently steady and predictable to repay her loan when due without selling off all her assets. She also initialed a representation that her current assets allowed her to repay the loan entirely if the lending institution required that. He conceded that MH would have to give up her house on that worst case scenario.

The Evidence Pertaining to DM, GL and SL

102. DM is married and has four children. After obtaining a bachelor of social work degree, she was employed as a social worker for several years. She has worked as a homemaker since 1989. DM primarily testified about her dealings with the Respondent on behalf of her uncle SL and her father GL. However, the Respondent had serviced her modest insurance and investment accounts (involving RRSPs and RESPs) from 1989 to 2009. She had previously dealt with another investment advisor for a brief period when she first began to purchase life insurance and to contribute to an RRSP.

103. In May 2006, DM's uncle, SL, was admitted to a hospital after a fall while working on his roof. His dementia prevented him from returning home. He was in his mid-80s. He had no spouse and no children. DM and her father, GL, held joint power of attorney for SL. In September 2006, they opened a joint account in trust for SL that was serviced by the Respondent. Subsequently, in February 2007, they opened a joint account for GL that was also serviced by the Respondent. GL passed away in October 2008 at the age of 82. SL passed away in December 2011 at the age of 90.

104. SL had been a television and radio repair man. Until his hospitalization, he had lived his entire life in the house that his father built. He was very frugal. Unbeknownst to even his closest relatives, he had amassed a net worth of about $600,000 (including his house which later sold for about $130,000). His money was held in savings accounts, GICs and term deposits. A significant amount of money was also discovered in his home.

105. GL had a grade 10 education. He first worked as a labourer in the automobile industry. Subsequently, he became a school custodian and gardener for the board of education. His retirement income was about $45,000 per year, made up of CPP, OAS and school board pension income. He also lived frugally, accumulating a net worth of about $500,000 (including his house which later sold for about $115,000). His money was held in bank accounts, and Canada Savings Bonds until his assets were turned over to the Respondent.

106. The Respondent assisted DM and GL in addressing their responsibilities as SL's attorneys for property. He introduced them to an accountant and a lawyer. The accountant prepared SL's tax returns which had not been filed for several years. They showed that SL's total income ranged from $13,612 in 2004 to $18,461 in 2006. The Respondent also advised DM to try to determine where SL's assets were held. As a result, DM provided the Respondent with lists of the bank accounts and investments of her uncle as she discovered them and the Respondent took steps to have the assets transferred to Desjardins.

107. While SL's assets were being transferred to accounts serviced by the Respondent, a bank manager contacted DM to question whether the investment changes that DM was making were safe. DM immediately posed the same question to the Respondent. She felt that she could not afford to lose any of her uncle's money. According to her, the Respondent reassured her that DM had nothing to worry about unless she thought the banks were going under.

108. NAAFs were prepared by the Respondent with respect to the joint account in trust for SL and later, for the joint account for GL. DM did not recall any discussion about how the KYC information should be completed for either. She disagreed with the characterization of her investment knowledge as good. However, she admitted that she may have answered affirmatively if asked whether her investment knowledge was good, albeit with no exploration of what that meant.

109. The Respondent recommended that SL's assets be invested in the CCDF. He indicated that he had invested his own father's money in the same fund. DM testified that the Respondent did not propose any alternative investment products.

110. DM asked the Respondent how he was paid. She testified that the Respondent replied that his "clients don't pay charges." He also told DM and GL that they could take out their money upon request and said nothing about possible deferred sales charges. According to DM, the Respondent also did not discuss sales charge options with her.

111. DM anticipated that SL would need access to some of his money to pay retirement home fees and maintenance costs for his house. She said that the Respondent was aware of these anticipated expenses.

112. DM testified that she was not provided with a copy of the prospectus and she was not informed about the core investments that the Dividend Fund was comprised of, the risks of investing in the Dividend Fund or the features of the Fund's distribution policy. She recalled that the Respondent told her that he anticipated that the investment would produce 10%-12% per year in income. In fairness, DM also acknowledged some inability to recollect whether certain documents were discussed with her or her father.

113. DM testified that after SL's assets were moved to Desjardins, the Respondent suggested that DM and GL consider opening an account for GL in light of his age. They followed this recommendation.

114. In total, financial assets of SL in the amount of $480,717.38 and financial assets of GL in the amount of $343,686.19 were transferred to Desjardins. The value of the combined portfolio was $824,403.57. Initially, all but a small amount of the combined portfolio was invested in the Dividend Fund.

115. On April 9, 2008, DM met with Mr. Woodall while the Respondent was in Florida. Ms. Radu had urged her to come in although DM felt uncomfortable about it. DM understood that the purpose of the meeting was to obtain instructions respecting the proceeds from one of GL's investments at the bank that had recently been transferred to Desjardins. At the meeting, Woodall asked DM to sign an acknowledgement that her advisor had discussed with her the need for

diversification, other investment options and that she understood and accepted the risks and potential losses associated with a strategy whereby a large percentage of the combined portfolio was invested in a single equity fund that was not guaranteed. DM refused to sign. Although she was relieved that the portfolio had realized a small gain, she was very surprised and alarmed to learn that the investments were not low risk guaranteed products. She believed that it was her responsibility to ensure that the money was preserved to address the health care and financial needs of SL and GL in the short term and to share among the family members to whom she would have to account after the men passed away.

116. DM indicated that she was a little unsure of Mr. Woodall's motives. She and her husband picked up that he had a certain amount of disdain for their advisor. Nonetheless, DM and Woodall agreed that they should meet again, along with the Respondent.

117. On April 16, 2008, DM met with the Respondent and conveyed what Mr. Woodall had told her. The Respondent was not too happy that the meeting that had taken place, but was respectful towards Woodall. The Respondent expressed complete confidence in the Dividend Fund, and described Woodall as the "glass half empty" type of person. DM remained uncomfortable with the existing strategy, knowing that there was a possibility that the monies could go down in value. So she provided the Respondent with an acknowledgement form she had crafted. It stated that:

- SL is 86 years of age and GL is 81 years of age and it is their wish for their money to provide for their needs as they age.
- It is their desire to keep their funds secure, reasonably accessible and sheltered from undue risk or loss.
- It is their desire that their money be protected from undue taxation at the present time as well as to plan ahead for their estate to transition as smooth as possible upon their demise.
- The majority of their money needs to be guaranteed and invested with that in mind. A modest return above that which they would have received had they left the money in their banking investments is expected. The exact percentage of their money to be

invested in this way should be agreed to after consultation and your advice and put in writing here.

- No high or moderate risks are desired at this time.
- Upon consultation it has been agreed that _____ % has been agreed to be invested in a low to somewhat moderate risk category with the understanding that any significant consecutive losses will be reviewed with the client(s) in a timely fashion, with full disclosure and a review of other possible investment options.

…

- I will strive to help my client develop a diversified balanced portfolio based on their age, circumstances and best suited to their unique needs.

118. A meeting was subsequently arranged for April 28, 2008. DM expected both Mr. Woodall and the Respondent to attend. DM testified that Woodall was not present for the meeting. The Respondent left her with the impression that Woodall had agreed to attend. According to her, the Respondent acted as though he tried to arrange for Woodall to join the meeting by calling him. He told DM that Woodall was too busy to attend. DM also testified that the Respondent advised her that Woodall had reviewed DM's acknowledgement form as well as the Respondent's proposal to address her concerns which Woodall supported.

119. DM left the meeting with the understanding that the Respondent would be transferring 85% of the portfolio of SL and GL into segregated funds which, according to the Respondent, would guarantee the principal of that part of their portfolio. The Respondent told DM that they had purchased the Dividend Fund at a good price and he strongly recommended keeping 15% of their investment in that fund. DM accepted that recommendation and instructed the Respondent to implement his proposal.

120. An additional meeting involving the Respondent and DM was scheduled to take place at GL's home on May 13, 2008. The evidence was unclear as to whether documents were signed that day to implement the changes discussed in April. However, no trades were processed in the accounts of GL and SL prior to June 27, 2008 despite the instructions from the client.

121. On June 27, 2008, the following events occurred:

(a) switches were made between DSC versions and front end versions of the mutual funds held by SL and GL;
(b) a change in the amount of $118,536.14 was made from the Dividend Fund (DSC) to the IA Clarington Dividend Income Fund (Series T6, DSC); and
(c) a redemption was made from the Dividend Fund (DSC) in the amount of $141,923.55 and transferred to segregated funds on July 3, 2008. The redemption resulted in a DSC fee of $3,627.19 being charged to the account.

122. On July 29, 2008, a further redemption in the amount of $68,200 was made from the Dividend Fund and transferred to segregated funds on August 5, 2008. A DSC fee of $4,339.41 was charged to the relevant account. The family holdings in segregated funds never approached 85% and the redemptions sometimes resulted in fees that DM said that they were not informed about.

123. On October 8, 2008, GL passed away. The Respondent comforted DM following her father's death. He also accompanied DM to a meeting with an estate lawyer. DM provided the Respondent with a copy of GL's death certificate. DM testified that the Respondent reassured her again during this period that his approach to the family portfolio had been implemented with the support of Mr. Woodall.

124. Throughout the fall of 2008, the investment accounts relating to GL and SL declined substantially in value.

125. In January 2009, DM needed access to some of the assets of GL's estate. She was unable to reach the Respondent in Florida so she contacted the branch office. She was told that transactions could not be processed in the estate's investment accounts without a death certificate. She was surprised by this response since she had provided the Respondent with a death certificate in October. The death certificate was later found in the desk drawer of the

Respondent. GL's investments declined further in value between October 2008 and January 2009.

126. DM testified that during this period, she learned that Mr. Woodall had not been involved in the management of GL's and SL's accounts after her meeting with him in April 2008. DM sent an e-mail to the branch office and demanded an accounting. Woodall and Radu prepared a report and spreadsheets, effective as of January 10, 2009, accounting for all transactions in the investment accounts of GL and SL. The report was delivered to DM.

127. The analysis of Mr. Woodall and Ms. Radu indicated that approximately 30% of SL's holdings were moved into segregated funds in July 2008 and approximately 30% of the holdings in the joint account of GL and DM were moved into segregated funds in August 2008. No changes had been made to GL's registered account.

128. DM contacted the Respondent by telephone in Florida after receiving this information. She testified that during the conversation, the Respondent disputed the numbers she had been provided. He claimed that he was accessing records of the accounts online and the figures that he was examining were not the same. DM never learned what the source of the Respondent's information was.

129. On January 13, 2009, DM sent a complaint letter to Mr. Woodall. This resulted in a Member Event Tracking System ("METS") report to the MFDA, an investigation of the Respondent's conduct by the Member and by the MFDA and ultimately, the termination of the Respondent on February 27, 2009.

130. Staff's analysis reflects that $824,403.57 was provided to the Respondent for investment on behalf of GL and SL between October 2006 and November 2007. Of that amount, $58,184.50 was redeemed for various reasons by the clients. As a result of the performance of the investments, GL and SL incurred total losses of $176,727.65 between October 2006 and February 27, 2009, when the Respondent was terminated.

131. The Respondent confirmed that DM and her husband were originally his clients on the insurance side. Then, he placed them in some mutual funds and in RESPs for their children. DM's husband became perturbed that DM's father and uncle were only getting one or two percent on their investments. As a result, the Respondent raised the CCDF. DM knew that this involved the market – she and her husband had mutual funds. At the Respondent's suggestion, DM talked to her bank manager and asked whether he could see his bank going under. She felt confident as a result because banks were involved and these were blue-chip assets. According to the Respondent, he gave her the same explanation given to others about how the Dividend Fund operated and was satisfied that she understood it. The prospectus was made available to her though he could not recall if she took one. He would have provided a client kit to her, and would have reviewed the documents in it. He said that he did explain the fee structure involved.

132. The Respondent testified that he prepared the KYCs pertaining to the GL and SL's accounts on the premise that DM would be making the investment decisions. Her father had said right in the office that this was going to be DM's money and that she was to make the decisions. The Respondent later acknowledged that DM would not be the sole beneficiary of the estates of GL and SL, but reiterated that she was to make the investment decisions. In the Respondent's opinion, DM was the client.

133. In 2008, the Respondent became aware that Mr. Woodall had met with DM and her husband. He testified that they were disturbed by how Woodall dealt with the situation. They found his approach to be unprofessional. Woodall had expressed concerns to them about a lack of diversification. As a result, another meeting was set up. DM wanted the Respondent to talk to Woodall and get him involved in re-balancing the portfolios of her father and uncle. The Respondent explained to Woodall that DM and her husband were very upset with how he handled things. The Respondent also discussed how to diversify the account with Woodall. The Respondent then conducted a lengthy meeting with DM and her husband about the portfolios.

134. The Respondent acknowledged that DM had asked to have Mr. Woodall present. However, he knew that Woodall had decided not to attend the meeting because of how the client

felt about him. The Respondent did not get into all that with DM. Woodall knew what the Respondent would be presenting to the client.

135. The Respondent confirmed that he received a telephone call from DM while he was in Florida. She was upset with "the numbers." He went on the computer to see if he could make head or tails out of what she was saying. He acknowledged that she did not get the answers she wanted at that time. He later learned that there was a mix-up between her uncle's and father's portfolio so the computer was not giving him an accurate picture. Ultimately, the problem was corrected.

The Evidence of Eric Kirzner

136. Professor Kirzner is a Professor of Finance and the John H. Watson Chair in Value Investing at the Rotman School of Management, University of Toronto. He has been the director of the Capital Markets Institute at the University of Toronto since May 2012, a director and chair of the audit committee for Equitable Group Inc. since 2004, an advisor to the Canadian Credit Management Foundation Investment Committee since 2005 and external advisor to the Hospitals of Ontario Pension Plan since 2002. He served as a director of the Investment Industry Regulatory Organization of Canada from September 2010 to September 2012, was vice-chair of the Investment Dealers' Association equity trading committee from 2000 to 2008, and chair of the Scotia Securities independent review committee from 2007 to 2011. He is the author of several books including the Buyer's Guide to Mutual Funds. He has testified as an expert witness in court proceedings on behalf of both plaintiffs and defendants and in regulatory disciplinary proceedings on behalf of both discipline counsel and respondents. In these proceedings, we accepted, without objection, his qualifications to give expert opinion testimony on investment products and strategies and more particularly, on the suitability of investment advice provided by advisors to retail investors in connection with ROC Funds. He was also qualified to opine on the risks and suitability considerations that inform investment recommendations in connection with the purchase of such products, including situations in which such purchases are coupled with a leveraging strategy.

137. Professor Kirzner explained the key characteristics of a ROC Fund. Such a fund will typically set a target annual cash flow payout (such as 8%) for a unit holder. If it is an all equity fund and the markets are up, for example, 15 or 18% and the fund has done as well as the market, the fund will have no difficulty in making the 8% payout. Otherwise, the fund will have to do something else (sell off assets of the fund, borrow to shore it up, sell new units and utilize those proceeds or use its cash reserves) to create enough cash flow to pay out the targeted distribution to the unit holder. All of these methods have potential negative side effects for the ROC Fund and its unit holders, including of course, the decline of the net value of the unit holders' investments. So, for example, if the fund has a targeted payout of 8%, but only generates returns sufficient to pay out 6%, the fund would pay out 2% as a return of the investor's capital. Moreover, if the core mutual fund's investments are declining in value, these methods may not be adequate to maintain the targeted payout – meaning that the payouts will have to be reduced or eliminated.

138. Professor Kirzner found it difficult to articulate an advantage to a ROC Fund, not otherwise available through other investments. For example, an investor can always buy units in the related[5] non ROC mutual fund and sell off units each year as needed to create the same cash flow. Indeed, even when the market is flourishing, the increases in net asset values respecting a ROC Fund will be lower than those respecting the associated non ROC mutual funds. Retail investors generally do not understand the total ROC concept and the distinction between income and return of capital. Accordingly, when an advisor recommends the purchase of a ROC Fund, it is essential that the advisor explain how the ROC fund works, the specific risks associated with a declining asset base and the other risks associated with such a fund. A client's investment knowledge or lack thereof is of particular significance in evaluating his or her ability to understand the features of the investment, including its risks.

139. Professor Kirzner testified that a leveraging strategy utilizing ROC Funds involves the use of the cash flow distributions from the ROC Funds to pay off the loans. It brings with it a number of additional risks: for example, even if distributions remain consistent, an increase in

[5] A core mutual fund will typically have various series of funds differentiated by load fee situations and/or distribution policies.

interest rates could affect the sustainability of the strategy, both because rising interest rates are often associated with declining asset values, and because loan costs may be rising as well. As well, a ROC Fund could be forced to cut its target distributions since in a period of flat to weak markets, it eventually will be unable to fund the shortfall. If the cash flow distributions drop, they may be insufficient to meet the mortgage or loan payments. The value of the investments may fall below the value of the loan. In some instances, the investor may no longer have the needed collateral to support the loan. He opined that a strategy involving a high payout fund, in combination with leverage, is not going to work in most scenarios. In his opinion, such a strategy will only work if markets keep rising; "even one or two weak periods can be sufficiently catastrophic as to destroy the strategy. The ROC Fund has to earn a rate of return at least equal to the promised distribution plus fund expenses, failing which the sustainability of the fund will be jeopardized…Maintaining a high rate of return in a low interest environment is very difficult, as many investors discovered in many periods including 1998, 2000, 2001, 2002 and 2008.".

140. In Professor Kirzner's view, a leveraging strategy might be suitable for someone with a very high level of investment knowledge, a high risk tolerance, a very aggressive investment objective, substantial back up capital and a sufficient horizon to withstand adverse conditions.

141. In cross-examination, Professor Kirzner acknowledged that the use of ROC Funds increased as an investment tool as investors had difficulty finding decent returns elsewhere; they found the high "cash-on-cash yield[6]" appealing although he noted that "whether those investors understood what they were getting is a different story." He also acknowledged the ongoing effort to find better ways to gauge an investor's risk tolerance and the uneven ways in which mutual fund prospectuses explain their features. He conceded that while advisors must meet certain professional standards, they cannot be expected to exhibit the skills of a psychiatrist or psychologist.

[6] The "cash-on-cash yield" was defined by Professor Kirzner as the one-year expected cash distribution, divided by the purchase price of an investment.

The Evidence of Richard Woodall and Anita Radu

142. We earlier summarized, among other things, evidence of the arrangement between the Respondent, Woodall and MD, how the relationship between the Respondent and Woodall soured, and the strict or close supervision imposed on the Respondent as a result of the lawsuit commenced in July 2007.

143. Mr. Woodall also testified that when he took over as branch manager in 2004, there were adjustments that had to take place because client investments did not match their KYC forms. We understood from his evidence that these adjustments were not confined to the Respondent's clients. However, Woodall testified that the CCDF, at one point, made up 90-95% of the Respondent's book of business. Although, as reflected in its prospectus, it was a medium risk fund, clients with lower risk profiles were invested in it nonetheless. Woodall testified that the adjustment process meant that the advisor either had to recommend changes to the portfolio to ensure compliance or update the client's KYC so that it conformed to the investment portfolio.

144. Mr. Woodall described his concerns about the Respondent's portfolio. He felt that the Respondent had not sufficiently diversified his clients' portfolios by placing so much of their money into the CCDF. He raised this issue with a compliance officer in January 2006 who said that Woodall should discuss the lack of diversification with the advisor and provide training. This scrutiny of the Respondent's book of business resulted in significant adjustments to his clients' portfolios to reduce their investments in the CCDF. Woodall said that the Respondent went along reluctantly. Woodall was also concerned, most particularly commencing in 2007, that the Respondent was misdescribing the ROC investments to his clients, as if they were receiving regular income payments or dividends representing profits when, in reality, their capital might be "cannibalized" to enable their regular payments to be made. Woodall testified that he arranged for the CCDF's accountant and wholesaler to educate the Respondent and others about how the Dividend Fund worked.

145. Mr. Woodall was shown (and described) the Member's policies and procedures manuals at various points in time. The Performa manual was approved in April 2003 and revised in

March 2005. It reflected that, among other things, the client must be given the appropriate leveraging disclosure document. Woodall testified that the document came with the initial account opening kit, and was to be provided to the client at that point whether or not leveraging was then proposed. In his view, it was to be reviewed if a leveraging strategy was later introduced. The manual required that the prospectus be given to the client. It provided detailed instructions on the advisor's obligations respecting KYC information. In relation to leveraging, it reflected that Performa did not recommend the use of leveraging by its clients. However, if the client insisted on using leveraging, it represented prudent practice to ensure that the client understands the risks of the investment. It said that the advisor has the duty to the client to ensure that the leveraged investment is suitable. This involves consideration not only of the information found in the account opening form, but an assessment of the client's liquid net worth, excess monthly cash flow and the client's ability to meet the loan payments. It said that a statement of disclosure explaining in detail the risk of borrowing to invest must be provided to each client **prior** to processing a leveraged transaction. The client had to be asked to disclose any transaction made with borrowed money.

146. A Performa document specifically addressing leveraged transactions was issued or updated in December 2005. It set out a list of documents required by Performa if a leveraging recommendation was to be made. Woodall testified that all advisors were made aware of this expectation. Leveraged transactions also required supervisory approval by the branch manager or alternative branch manager (for loan amounts less than $50,000) and otherwise by the regional compliance officer. Approval guidelines and criteria stated, among other things, that a leveraged program must be re-evaluated if a client is over the age of 60. Woodall testified that no one, including the Respondent, ever sought approval of a leveraged strategy. He felt that no one over 60 years of age with limited income would have been approved: "there's just too much risk for the minimal benefit if things go the right way."

147. The Optifund[7] policies and procedures manual dated October 2005 reflected that due to the risks involved in investing with borrowed money, it is a requirement that such transactions be

[7] Optifund was Desjardins' mutual fund dealership at the time. Shortly thereafter, the name "Optifund" was no longer used.

reviewed by the branch manager with extreme caution and care. Where the advisor is not newly licensed, the transaction must be reviewed no longer than one day after the trade is placed. If the branch manager is not satisfied as to suitability, then he should consult with the advisor and/or the client and if still not satisfied, the trade should be cancelled.

148. The Desjardins manual dated October 2007 reflected that an advisor must provide information to each client on borrowing money to purchase mutual funds whether or not the client intends to do so. Should the client actually borrow money, the complete stand-alone leveraging document must be signed by the client and advisor regardless of when the account was opened and when the leveraging information was given. That manual also stated that in determining whether it is appropriate to borrow, the advisor must be convinced of that client's ability to service the loan in the worst case scenario. The advisor must ensure that he reviews his advice with the branch manager. A separate section of the manual commanded a branch manager to question any account where the client has a disproportionately concentrated portfolio, and to be wary of the advisor who recommends only a very small select group of funds, type of fund or makes blanket recommendations; this could be an indicator of the advisor's lack of mutual fund knowledge. In February 2008, the Respondent acknowledged in writing that he had read this manual.

149. Anita Radu began to work for the Respondent as his office administrator in November 1998. She later served as the administrator of the amalgamated office. In October 2004, Radu became a licensed assistant and in June 2005, she became registered as an alternate branch manager. She oversaw the distribution of commissions and the implementation of payments to be made pursuant to the agreement between RW, MD and the Respondent. She described the disagreement between two strongly opinionated men, the Respondent and Mr. Woodall, over the characteristics of the CCDF. She was the one who modified the account opening forms to require clients to initial the entries about borrowing. This was done to protect the advisors. She described the time period in which KYC information would be inputted by her into a computerized system. If the client's KYC profile did not match the risk measurement of the proposed purchase, the trade would be rejected unless changes were made.

150. The Respondent denied that he was a one-fund advisor. He relied, in part, on a summary that Ms. Radu prepared that showed that roughly 30% of his top clients' money was going into the CCDF in 2005 and somewhat less in 2007. However, these clients did not include any of the complainants.

151. The Respondent, of course, had the continuing obligation to familiarize himself with the existing practices, procedures and directives issued by his employer, and to comply with them. In fairness, the evidence was not entirely clear as to precisely what policies and procedures concerning leveraged transactions were actually being implemented at various points in time, and there were some differences in the various manuals. All that being said, at least four things were consistently clear throughout the period in question and known to the Respondent: (1) leveraged transactions were to be approached with extreme caution given the significant risks associated with them; (2) they were to be clearly identified; (3) the clients had to be fully informed of the risks associated with them and provided the relevant documentation in that regard; and (4) the transactions were to be brought to the attention of a supervisor for consideration of their suitability.

The Applicable MFDA Rules, Policies and Procedures

152. It is undisputed that the Respondent was, at the material times, bound by the MFDA Rules then in existence, as a mutual fund salesperson in Ontario who was an Approved Person of a Member of the MFDA.

153. The allegations relate to the period 2004 to 2009. Central to those allegations are the existing KYC and suitability obligations on advisors. These distinct but closely related obligations require some elaboration.

154. The KYC obligation requires that the advisor learn about his or her clients, their personal financial circumstances, age, level of financial sophistication and past investment experience, as well as their current and ongoing investment objectives and risk tolerance. The "suitability" obligation requires that the advisor determine whether an investment is appropriate for his or her

client. Of course, suitability can only be properly ascertained if the advisor "understands the investment product and knows enough about the client to assess whether the product and client are a match" *Lamoureux (Re)*, [2001] A.S.C.D. No. 613.

155. The KYC and suitability obligations are captured in MFDA Rule 2.2.1: [8]

> 2.2.1 **"Know-Your-Client".** Each Member and Approved Person shall use due diligence:
>
> (a) to learn the essential facts relative to each client and to each order or account accepted;
> (b) to ensure that the acceptance of any order for any account is within the bounds of good business practice;
> (c) to ensure that each order accepted or recommendation made for any account of a client is suitable for the client and in keeping with the client's investment objectives; and
> (d) to ensure that, notwithstanding the provisions of paragraph (c), where a transaction proposed by a client is not suitable for the client and in keeping with the client's investment objectives, the Member has so advised the client before execution thereof.

156. It follows that a discrepancy between the KYC information and an investment will generally mean that the investment is unsuitable or that the KYC information is no longer accurate and must be updated: MFDA Suitability Guidelines, MSN-0069 at p. 15. It also follows that KYC information is required for each account that is opened, and not merely for each client. To state the obvious, clients' investment objectives and risk tolerance may well be different depending upon whether they are dealing with, for example, RRSP or RESP contributions, or their portfolio more generally.

157. MFDA Rule 2.2.4 requires Members and Approved Persons to update KYC information in the event that material changes or inaccuracies come to their attention and to make inquiries of clients at least once a year to find out whether the KYC information has changed.

[8] This has been the wording of Rule 2.2.1 since December 2005. The pre-existing Rule (when read together with Rule 1.1.2) imposed the same requirements on its Members and Approved Persons.

158. Existing jurisprudence establishes a three-stage process that advisors should follow to meet their suitability obligations. The three-stage process is described by the Alberta Securities Commission in *Lamoureux*, *supra* at p. 18:

> Suitability is to be assessed prior to any investment recommendation by the registrant to a client. The process that culminates in a registrant's investment recommendation to a client has three component phases or stages that must occur in sequence.
>
> 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.
>
> Only after the "due diligence" of the first stage is completed, can the registrant move to the second stage in which they fulfill their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for the client.
>
> Suitability determinations . . . will always be fact specific. A proper assessment of suitability will generally require consideration of such factors as a client's income, net worth, risk tolerance, liquid assets and investment objectives, as well as understanding an understanding of particular investment products. The registrant must apply sound professional judgement to the information elicited from "know your client" inquiries. If, based on the due diligence and professional assessment the registrant reasonably concludes that an investment in a particular security in a particular amount would be suitable for a particular client, it is then appropriate for the registrant to recommend the investment to that client.
>
> By recommending a securities transaction to a client, a registrant enters the third stage of the process… 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.
>
> The disclosure of material negative factors in the third stage of the process is intended to assist the client in making an informed investment decision.

159. There are several features of the suitability analysis that must be emphasized. These do not purport to be exhaustive, but are all relevant to the issues at this hearing.

160. First, an advisor is mandated to know the client, not merely those associated with the client. Information about the experience or sophistication of the client's relative or friend, absent a power of attorney or similar legal authorization, is not a proxy for knowing the client or obtaining instructions from the client. Of course, a client may enlist friends or family to

participate in meeting with an advisor, and in assisting the client in making investment decisions. However, it remains the advisor's personal responsibility to ensure that an investment is suitable for that client, and that the client (not just a friend or family member) makes an informed decision based on an understanding of the potential downside to the investment. We also observe that it undermines supervisory and compliance safeguards to attribute the personal characteristics of friends or family members to the client in a KYC form

161. Second, the completion of a KYC form alone does not insulate advisors from a finding that the first stage of the suitability process has not been performed. The KYC form is merely one tool to facilitate fulfillment of the advisor's obligation. Of course, a KYC form filled out by or with the involvement of the advisor in a perfunctory, incomplete, or inaccurate way undermines the validity of the suitability analysis. Equally important, the mischaracterization by an advisor of the client's experience, investment horizon or objectives in a way that is designed to validate an otherwise unsuitable investment recommendation amounts to a serious breach of an advisor's obligation to act in the client's best interests. Similarly, the completion of inadequately explained forms such as acknowledgements or waivers does not mean that the advisor has met his or her disclosure obligation. Disclosure must be provided in a meaningful way so that the advisor can competently determine that the client both understands the risks and features of the products and strategies that are being recommended and is making an informed decision to proceed.

162. Third, the obligation to assess suitability rests with the advisor, and cannot be assumed only by the client, even where the client is aware of the risks associated with a particular investment or strategy.

163. Fourth, without purporting to describe all of the criteria in determining suitability, it can fairly be stated that an investment product or strategy is not suitable for a client unless, at a minimum, the client has the sophistication necessary to understand the relevant risks, the willingness to accept the risks and the capacity to withstand the potential adverse consequences that might result from those risks materializing.

164. Fifth, an investment product or strategy is not retroactively made unsuitable because it fails due to circumstances that were not reasonably foreseeable. Conversely, an advisor is expected to disclose to the client, at a minimum, reasonably foreseeable adverse conditions or risks that are material to an investment decision. An advisor's belief that such reasonably foreseeable conditions or risks are unlikely to materialize does not relieve the advisor from this disclosure obligation. In this regard, we adopt with approval, the observations of the British Columbia Court of Appeal in *Rhoads v. Prudential-Bache Securities Canada Ltd.*, [1992] B.C.J. No. 153 at p.8:

> It ought to be reasonably foreseeable to any investment advisor that there might, at almost any time, be a market downturn that might prove to be of minor or major proportion and would impact, potentially substantially, the performance of an equity based mutual fund. Even though the precise timing of a downturn may not be predictable, the possibility of a downturn at any time is foreseeable. However, such an event would not necessarily be foreseeable to an investor.

165. Sixth, special considerations apply if a leveraged strategy is contemplated. As Staff accurately reflected at paragraph 69 of its written submissions, an advisor who is evaluating the suitability of a leveraged strategy must consider whether:

(a) the client has sufficient income or unencumbered liquid assets to be able to:

  (i) withstand a market downturn without jeopardizing their financial security (including their ability to maintain their home);
  (ii) meet a margin call (if potentially applicable); and
  (iii) satisfy all loan obligations (both principal and interest) associated with the strategy without relying on anticipated income from the investments; and

(b) there is any reason to expect the client's current sources of income to be reduced in the short term bearing in mind the client's stage of life (age, anticipated retirement date, etc.), employment status and personal circumstances (e.g.; disability, pregnancy, any known risk of imminent anticipated job loss, etc.).

Stage three of the suitability analysis is of particular importance when a leveraged strategy is being recommended. The advisor must properly explain and ensure that the client understands how the investment product, including leveraging, works and the material risks associated with the implementation of the proposed strategy. This is simply a reflection of an advisor's obligation to disclose to a client in relation to any investment product or strategy, the benefits and potential risks in a balanced, realistic and objective way. An advisor's assessment of risk cannot be skewed by the advisor's optimism in the strategy or by self-interest.

166. Seventh, the duty on an advisor to take positive steps to ensure that the recommendation is suitable and that adequate disclosure of the risks has been made is of particular importance where the client has limited investment experience or lacks financial sophistication.

167. Finally, an advisor is not entitled to make an unsuitable recommendation even if he or she discloses material negative factors about the product or strategy and regardless of whether the client claims to understand and accept the risks involved in the investment. It is unnecessary for us to address the situation in which an advisor is asked to implement a strategy against his or her recommendations since the Respondent does not allege that this scenario ever arose here.

The "Fair Dealing" Rule

168. In addition to the MFDA Rule governing unsuitability, MFDA Rule 2.1.1 (sometimes described as the "fair dealing" rule) is relevant to the allegations contained in the Amended Notice of Hearing. It articulates the standard of conduct imposed upon all Members and Approved Persons. It requires, among other things, that Members and Approved Persons:

(a) deal fairly, honestly and in good faith with clients;
(b) observe high standards of ethics and conduct in the transaction of business;
(c) refrain from engaging in business conduct or practice which is unbecoming or detrimental to the public interest; and
(d) be of such character and business repute and have such experience and training as is consistent with the standards of the industry.

Analysis

169. Despite differences between the Respondent's account of events and the various accounts provided by the witnesses called by Staff, a number of our findings are derived from the undisputed evidence.

Suitability of Investments Respecting the Leveraged Clients: SM, WC and PC and MH

170. On the Respondent's recommendation, SM, WC and PC and MH all invested significant sums of money in the same ROC Fund, the CCDF. Indeed, they all mortgaged their own homes to enable them to invest in the Dividend Fund. In SM's case, she first obtained mortgages on two rental properties to invest in the Dividend Fund before obtaining another mortgage on her home.

171. In relation to SM's investments, the Respondent claimed that he was only aware that SM mortgaged her home to invest. That was why, according to him, the documents he prepared for her earlier investments denied that SM had borrowed monies to invest. We reject his explanation as untrue. SM was an unsophisticated investor who placed heavy reliance upon the advice given to her by the Respondent. She would never have engaged in a leveraged strategy without assurances from the Respondent that the mortgage payments would be covered by the monthly distributions from the Dividend Fund. Moreover, the Respondent testified that he would have asked SM whether she was borrowing monies to invest before completing the forms. It is untenable to suggest that SM misled her own advisor. Although we reject the Respondent's evidence on this point, we note that the alternative scenario, namely that the Respondent simply checked "no" in response to the leveraging questions on the documents without having discussed the issue with SM, would also amount to misconduct on his part.

172. Leaving aside the inadequacy of the Respondent's disclosure to each of his clients for a moment, the leveraging strategy was wholly unsuitable for each of these clients. SM invested a total of $300,000 in the same fund, all leveraged by mortgages on her rental properties and then her own home. What this leveraging strategy meant, when combined with undiversified

investments in the CCDF, was that a downturn in the fortunes of a single fund would pose a serious risk to SM's ability to finance her indebtedness. Moreover, the issue was not merely whether the targeted distributions by the fund were sufficient to cover SM's mortgage payments. It was completely foreseeable that, in whole or in part, the mortgage payments would be covered by the return of SM's own capital, thereby diminishing the value of her holdings and ultimately further endangering her financial situation.

173. MH had no real savings or assets other than her home. Her ability to make the mortgage payments on her home was entirely dependent on the distributions from the Dividend Fund. The Respondent conceded that he would have been "dead against" the leveraging strategy for MH if her son had not been involved. We reject the Respondent's position that the involvement of Mr. H altered the unsuitability of this investment strategy. Mr. H was not an account holder. He held no power of attorney. Although more knowledgeable than his mother, Mr. H was not a sophisticated investor. This leveraging strategy was patently unsuitable for MH.

174. WC and PC had some savings. However, like the others, they could ill afford to place their home at risk. They too were heavily dependent on the distributions from the Dividend Fund to make their mortgage payments. They sought assurances from the Respondent that their home would not be at risk. The Respondent provided those assurances. The objective facts told a different story. This was a strategy that potentially placed their home at risk. Again, this leveraging strategy was wholly unsuitable for these clients.

175. All of these clients were over 60 years old. They had a limited time horizon in which they could recover from investment losses associated with this leveraging strategy. All but SM were retired and receiving very little income. Their limited net worth deprived them of any ready means to repay their mortgages (without compromising savings needed to pay their living expenses) if the value of their investments in the CCDF significantly decreased. SM's business was, at this point, struggling and she had other indebtedness.

176. The leveraging strategy employed by the Respondent might arguably have been suitable if his clients were sophisticated, with high risk tolerance, aggressive investment objectives, a

long investment horizon and significant net worth such that they could withstand foreseeable downturns in the value of their investments. We accept Professor Kirzner's expert opinion evidence in this regard. However, none of these clients could be so described. Indeed, in many ways, they fall at the other end of the spectrum. Frankly, our finding need not depend on Professor Kirzner's opinion. The leveraging strategy was patently unsuitable for these particular clients, having regard to their financial means, age, level of investment knowledge, and objectives. The Respondent was obligated to so advise them. Instead, he recommended this unsuitable strategy to each of them.

Disclosure to the Leveraged Clients SM, WC and PC and MH

177. We earlier articulated the three stage process involved in ensuring suitability of an investment. The third stage includes disclosure of the risks associated with the proposed investment strategy and ensuring that those risks are understood by the clients.

178. The Respondent failed abysmally in fulfilling his disclosure obligations in relation to SM, WC and PC and MH. This is particularly so when the leveraging strategy was combined with investments, almost exclusively, in ROC Funds.

179. A key selling point for ROC Funds is that they pay consistent monthly distributions at seemingly attractive rates. They seem attractive investments, on the surface, if the anticipated distributions exceed the monthly borrowing costs incurred to finance those investments. Without adequate explanation, the strategy is too readily perceived as successful as long as the distributions continue to exceed the borrowing costs.

180. However, as already described, ROC Funds are often unable to earn a true profit or return equal to or greater than the anticipated distribution payout. This means, among other things, that:

(a) The distributions may be funded, in whole or in part, by the return of the investor's own capital. Without adequate explanation, the investor may assume that the

distributions represent true profits. Put another way, the investor may not understand that the investment has declined in value, or the extent of that decline;

(b) The value of the investment may decline to a point at which the investor would no longer be able to fully repay the loan even with the sale of the complete investment; and

(c) As the unit value of the ROC Fund declines, the fund company may be compelled to reduce the monthly distributions, undermining the investor's ability to continue to meet his or her loan obligations or, at the very least, reducing or undermining the rationale for the leveraging strategy in the first place.

181. The first point requires elaboration. As Professor Kirzner explained, the nature of the distributions paid by a ROC Fund may easily be misunderstood by investors who fail to appreciate the difference between a true profit or return on their investment and the current cash-on-cash yield, that is, the rate at which payments from the fund are made to unit holders as a proportion of the purchase price that investors paid. If the current yield exceeds the true rate of return, then the investment's unit price will likely decline since the fund will have to pay out more to investors to meet the current yield commitment than the profits that the underlying investments (less expenses) actually generated. In these circumstances, it is of particular importance that the risks be clearly explained to a prospective investor.

182. The Respondent claimed that he explained how the Dividend Fund works, and the implications of the leveraging strategy, to each client. Of course, our finding that the leveraging strategy was wholly unsuitable for SM, WC, PC and MH supports the additional finding that the Respondent failed in his disclosure obligations. He was obligated to advise them that their virtually exclusive investments in the CCDF, coupled with a leveraging strategy, was unsuitable.

183. That being said, the Respondent's failing was far more pronounced. We are satisfied that the Respondent not only failed to convey the risks associated with this investment strategy, but provided a seriously flawed misdescription of those risks. Had these clients been given an accurate description of those risks, they would not have adopted this investment strategy.

184. As indicated earlier in these reasons, we accept that SM, WC, MH and Mr. H have imperfect recollections of their exchanges with the Respondent. We also accept that their current recollections, although honest, may be affected by the passage of time and subsequent events. However, key components of their testimony are supported by common sense inferences, the existence or absence of documents and concessions made by the Respondent. Indeed, the Respondent's testimony, in certain respects, undermined his own position that he adequately explained the investment strategy to his clients.

185. WC testified that in January 2005, he and his wife obtained a line of credit of $142,500 which was approximately 75% of the value of their home. This entire amount was invested in CCDF shares. WC and PC had already purchased $31,000 in CCDF shares. We accept WC's testimony that the Respondent advised him and his wife that other clients had been increasing the income they received from their Dividend Fund holdings by accessing the equity in their home and estimated that such a strategy could potentially increase their income by almost $17,000 a year. This testimony is consistent with the Respondent's enthusiasm for the Dividend Fund coupled with a leveraging strategy.

186. WC testified that there was no discussion of risk. Instead, the Respondent described it as essentially a risk free opportunity to obtain a return on the equity in their home. We are satisfied that the Respondent, at the very least, minimized any risk associated with this leveraging strategy. The Respondent's testimony as to how he explained the risks of leveraging to his clients was superficial, at best, and strongly reinforced our view that the risks were not accurately or adequately explained. WC testified that the Respondent did not advise them to consider borrowing a smaller amount, did not warn them about the risk of a change in interest rates, the risk of a distribution cut by the fund company, the risk of a drop in the value of their portfolio compared with the value of their outstanding loans or other possible risks associated with the strategy. There is no credible evidence that the Respondent brought the very specific risks associated with this investment strategy to WC's attention. The fact that WC and PC were far from high risk investors, but nonetheless treated the distributions from the fund as earned profits and the fact that they invested 75% of the value of their home in the Dividend Fund powerfully

supports WC's testimony, which we accept, that the true risks associated with this strategy remained unexplained to them.

187. The Respondent noted that WC's own comparative analysis of mutual funds caused him to retain the family's holdings in the CCDF. With respect, WC's analysis fails to appreciate the difference between the cash yield and the internal rates of return associated with each fund, reinforcing his lack of understanding of the Dividend Fund, despite some business-related education. It is hardly surprising that WC was flabbergasted when he learned from Mr. Woodall that the distributions did not represent interest, dividends and capital gains, but the return of capital payments.

188. There is no evidence that the Respondent had WC and PC sign a leveraging disclosure statement prior to participating in the leveraged transaction. This, too, reinforces the absence of adequate disclosure.

189. As already noted, the Respondent's description of how he explained both the Dividend Fund and leveraging to clients was, on its face, superficial at best. At worst however, it was misleading. On the Respondent's own testimony, he told clients that the Dividend Fund was a safe investment "because we're dealing with banks and if we think that our bank system is going under, talk to your bank manager and see what they (sic) have to say." There would have been nothing wrong with describing, as the Respondent did, the "blue-chip" nature of the underlying assets held by the Dividend Fund. However, it was seriously misleading to tie the safety of the investment strategy to whether the bank system was likely to "go under."

190. The Respondent testified that he would explain leveraging by looking at whether the distribution generated enough to pay the interest on the loan and help pay down the mortgage. Of course, the more important issue, left unexplained by the Respondent, was what the distribution was likely composed of, and the risks associated with a distribution fueled, in whole or in part, by the return of capital.

191. SM invested $300,000 in the CCDF. All of these funds were leveraged. SM acknowledged that she understood that her CCDF investments were tied to the stock market, and that she had little recollection of the specifics of what the Respondent told her. However, it was obvious from her testimony that she had virtually no understanding of her own portfolio. She was unable to explain the most rudimentary characteristics of her investments. (This is not the slightest reflection on her of course since she acknowledged her lack of investment knowledge and her dependence on the Respondent.)

192. Given SM's lack of basic investment knowledge, it was particularly incumbent on the Respondent to ensure that she understood what she was getting into. We are satisfied that he failed to do so. He claimed that he (together with the accountant) explained the Dividend Fund and the leveraging strategy to SM. There was no independent support for this claim which was described in superficial terms. Not only did the documents assert in two instances that SM was not borrowing when she was, but there is no credible evidence that the Respondent provided SM with a leveraging risk disclosure document for any of the subject transactions. Nor did he seek the approval of his supervisor or the compliance department before or even immediately after closing any of these leveraged transactions. We are satisfied that SM would not have participated in leveraging her own home to invest in the Dividend Fund, had the risks associated with this strategy been accurately and adequately disclosed to her.

193. The Respondent acknowledged that he would have been "dead against" the use of a leveraging strategy for MH, had Mr. H not been involved. Of course, he never disclosed his concerns to MH. He was obligated to do so, even if he felt that Mr. H's involvement somehow enabled him to proceed.

194. MH and Mr. H acknowledged limitations in their recollection of relevant events. Those have been described earlier. However, MH mortgaged her own home to invest in the Dividend Fund. She had no significant savings and no disposable income. It is self-evident that she would not have engaged in this leveraging strategy if its risks were accurately and adequately explained to her. We reject the Respondent's testimony that he was uncomfortable that MH was taking the entire distribution, rather than re-investing part of it, and discussed this issue with her. There is

no documentary or other support for this assertion, which we find to be incredible. MH continued to treat the distributions as true profits until December 2008 because she believed that to be the case. Her view was reinforced by the Respondent's reassurances in October 2008. We accept MH's testimony that in October 2008, she consulted with the Respondent after her girlfriend cancelled travel plans due to the market's poor performance. She said that the Respondent comforted her that unlike American banks, Canadian banks were regulated and consequently, in his view, she had nothing to worry about.

195. It is undisputed that no leveraging risk disclosure statement was prepared or signed when MH first invested in the CCDF. In December 2008, MH was asked to initial a document which turned out to be a leveraging risk disclosure statement. Mr. H testified that he and her mother were misled as to the nature of this document. We need not decide whether that testimony is accurate. Regardless of how the document was described, it is crystal clear that the Respondent caused MH to sign the document, together with a Loan Request Analysis Criteria, although it contained patently false representations. The inevitable inference we draw is that the Respondent was prepared to have MH unwittingly sign a false document to justify, after the fact, this leveraging strategy.

Suitability of Investments in ROC Funds: GL and SL

196. The investments made on behalf of GL and SL were not leveraged. However, we find that they were unsuitable as well.

197. In total, SL's financial assets of $480,717.38 and GL's financial assets of $343,686.19 were transferred to Desjardins. So this combined portfolio totaled $824,403.27. On the Respondent's recommendation, all but a small amount of that combined portfolio was invested in the Dividend Fund.

198. Based on a query from her bank manager, DM asked the Respondent whether the investments being made (at that point, on her uncle's behalf) were safe. She felt that she could not lose any of her uncle's money. The Respondent reassured her that DM had nothing to worry

about unless she thought the banks were going under. The Respondent confirmed that at his suggestion, DM spoke to her bank manager and asked whether he could see his bank going under.

199. We are satisfied that DM always contemplated that her uncle's and father's funds would predominantly be invested only in low-risk virtually guaranteed products. This is reinforced by her reaction to the information obtained from Mr. Woodall in April 2008. Even though she understood that the family portfolio had realized a small gain to that point in time, she remained both surprised and alarmed to learn that the investments were not in low risk guaranteed products. She believed that it was her responsibility to ensure that the money was preserved to address the health care and financial needs of SL and GL in the short term, and that it was also her responsibility to share the assets among the family members to whom she would have to account after her father and uncle passed away. This caused her to adopt a cautious investment approach.

200. DM's evidence in this regard was not seriously challenged. We accept it as accurate. We note that she expressed concern about the composition of the combined portfolio **before** she had any complaint about its downturn in value. She also refused to sign an acknowledgement accepting that a large percentage of the portfolio was invested in a single equity fund that was not guaranteed and was subject to market risk. She also prepared her own acknowledgement that captured her intended investment approach. This involved a diversified portfolio, with the majority of the funds in low risk, guaranteed investments. The evidence was clear that some diversification took place subsequently, but not in a timely way and not to the extent contemplated by DM. Given DM's true investment objectives on behalf of her father and uncle, the placement of almost all of the $824,403.27 in the CCDF was unsuitable.

201. We are also satisfied that the Respondent failed to adequately or accurately explain the risks associated with the CCDF. There was a disconnect between these investments and the investment objectives of DM. DM regarded these investments as low risk with a virtually guaranteed rate of return because of the way in which they were presented to her by the

Respondent. As already indicated, it was misleading to tie the safety of the banks to the safety of these investments.

Due Diligence or Accurate Recording Respecting the Essential Facts

202. Staff also alleges that the Respondent failed to use due diligence to learn the essential facts relative to SM, MH, WC and PC, GL and SL and accurately record those essential facts on the clients' NAAFs, contrary to MFDA Rules 2.2.1(a) and 2.1.1. In relation to this allegation, it is unnecessary to deal separately with the Respondent's leveraged and non-leveraged clients.

203. To briefly recap an earlier discussion, Rule 2.2.1(a) invites consideration of whether the Respondent used due diligence to learn the essential facts relative to each client and to each order or account accepted. Rule 2.1.1 invites consideration of whether the Respondent dealt fairly, honestly and in good faith with his clients in recording their essential facts in the NAAFs. Staff's reliance on both provisions in the Amended Notice of Hearing makes it clear that the Respondent may potentially be found to have engaged in professional misconduct by failing to take the appropriate steps to learn about his clients or by misstating the essential facts about his clients in the NAAFs.

204. The evidence established that the Respondent, at times, failed to make sufficient inquiries to learn the essential facts in relation to clients. At other times, his inquiries or dialogue with his clients were sufficient to inform him of the essential facts, but those facts were misstated nonetheless in the KYCs either deliberately so as to better conform to or justify the investment decisions or because the Respondent misapprehended how these forms were to be filled out.

205. Some examples illustrate the Respondent's misconduct.

206. The Respondent reflected that MH's risk tolerance was medium, her investment knowledge was fair, and her investment horizon was 10+ years. The Respondent testified that the investment horizon was based on the length of the mortgage and the risk tolerance was based on the fund itself. The length of the mortgage did not predetermine MH's investment horizon: indeed, MH's age and personal circumstances supported a shorter investment horizon. More

important, only circular and self-serving thinking would base MH's risk tolerance on the fund itself. Equally important, although MH was, according to the Respondent, "less than a novice" in terms of investment knowledge, Mr. H's involvement caused the Respondent to attribute a higher level of knowledge to MH. This attribution was misleading. Mr. H was not an account holder, held no power of attorney or similar authority. It was important that the KYC reflect MH's knowledge, not that of her son.

207. As well, the December 2008 documentation later prepared by the Respondent was misleading in how it described MH's available income to retire her indebtedness and her acceptance of the specific risks associated with her leveraged investment. On his own evidence, the Respondent was aware of MH's financial circumstances, and hence, aware that this documentation was false.

208. In relation to SM, as already discussed, documents prepared by the Respondent inaccurately reflected that she was not borrowing to fund her first two investments in the CCDF. As well, the forms indicated that SM had good investment knowledge. This was a fiction. SM should properly have been described as a novice. The Respondent also classified her investment horizon for all her investments as 10+ years. In our view, this investment horizon misconceives SM's personal circumstances, age and potential need for the $300,000 invested entirely in the CCDF. The Respondent described SM's risk tolerance as medium based on her prior willingness to hold on to stocks. This was a wholly inadequate basis on which to evaluate SM's risk tolerance.

209. There are multiple aspects of the KYCs relating to WC and PC that are problematic. For example, a NAAF for PC indicated that she has fair investment knowledge and tolerates medium risk investments. The Respondent testified that WC was very knowledgeable about investments and his assessment of PC was based on WC. PC was a novice and should have been described as such. There was no basis upon which to conclude that PC was prepared to tolerate medium risk investments unless one employed circular reasoning, based on inadequate disclosure provided to WC and PC.

210. In relation to DM, GL and SL, the Respondent testified that he prepared the KYCs pertaining to the GL and SL accounts on the premise that DM would be making the investment decisions. He described her investment knowledge as good. The investment horizons were described as 10+ years. Risk tolerance was described as medium. The risk tolerance and investment horizons did not conform to DM's wishes. In so concluding, we do not accept that the Respondent was entitled to base the KYCs entirely on DM's perspective, without regard, for example, to her joint account holder, GL.

Additional Findings

211. Although unnecessary to our ultimate conclusions, we also make the following findings:

(a) We reject the evidence of the Respondent, and accept the evidence tendered by Staff that the Respondent orchestrated the non-attendance of Mr. Woodall at one meeting with DM and another meeting with MH and Mr. H. He did so through inaccurate representations made to the clients and/or Woodall. The Respondent was highly motivated to exclude Woodall from such meetings, and then to make representations to his clients as to Woodall's continuing involvement in and approval of what the Respondent was doing;

(b) The Respondent never properly explained his compensation relative to the CCDF investments to any of these clients. The charges associated with these funds require some explanation. The Respondent's description of his purported explanation to clients was, again, superficial and lacked credibility. There is no credible evidence that he explained the differences, for example, between deferred service charges and front-loaded expenses or how deferred service charges are determined. On the contrary, the evidence which we accept supports the conclusion that he either did not explain the fee structure involved at all or advised that his clients don't pay fees. Neither explanation was accurate;

(c) We find that the Respondent took steps, albeit imperfect, to prevent his supervisor from learning in a timely way about his leveraged accounts. We reject the Respondent's testimony that he filled out the forms that were available at the time, and expected Ms. Radu and Mr. Woodall to ascertain which clients were leveraged, and rectify any documentary deficiencies. The Respondent chose not to discuss any of the leveraging investments with Woodall before he made his recommendations, before those recommendations were implemented or even shortly after they were implemented. Contemporaneous leveraging disclosure statements were not filled out. They were not only available, but mandated. The Respondent's report of leveraged transactions, required as a term of his strict or close supervision, left out at least one of his leveraged clients. As already noted, he denied in forms he filled out that SM was leveraged in relation to two transactions, when to his knowledge, she was. We have no doubt that the Respondent hoped that all or most of his leveraged accounts would not be noticed by others at the firm; and

(d) The evidence reflects that the downturn in the economy had a significant effect on the value attributed to shares in the CCDF. We are satisfied that the Respondent failed to keep his clients informed of the status of their investments, and take appropriate measures, through timely and accurate disclosure, to ensure that their portfolios remained consistent with their investment objectives, and risk tolerance (even if we wrongly were to assume, for the moment, that these portfolios were ever consistent with the clients' investment objectives and risk tolerance.) Indeed, as described in another context, the Respondent gave false assurances to MH when this issue arose for her in October 2008.

Conclusion

212. For the above reasons, we are satisfied on a balance of probabilities, on the basis of clear, cogent and convincing evidence, that the Respondent engaged in the misconduct contained in allegations 1, 2 and 3 of the Amended Notice of Hearing. A date will be set for the penalty hearing in this matter.

213. We are grateful to all three counsel for their assistance throughout.

DATED this 14th day of January, 2015.

"Mark J. Sandler"

Mark J. Sandler
Chair

"Guenther Kleberg"

Guenther Kleberg
Industry Representative

"Glenda Towle"

Glenda Towle
Industry Representative

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