

BEFORE THE OHIO DEPARTMENT OF COMMERCE  
DIVISION OF SECURITIES

IN THE MATTER OF:	)	CRD NO. 2437888
	)	CASE NO. 14-028
TIMOTHY K. FIFE,	)	
	)	HEARING EXAMINER
RESPONDENT.	)	ROBERT J. WALTER

**REPORT AND RECOMMENDATION**

**INTRODUCTION**

{¶ 1} This matter came on for hearing<sup>1</sup> at the request of Respondent Timothy K. Fife (“Fife” or “Respondent”) concerning the Amended Notice of Opportunity for Hearing/Amended Notice of Intent to Suspend or Revoke Investment Adviser License No. 2437888 issued December 8, 2014, (“Division Order”)<sup>2</sup> by the Ohio Division of Securities (“Division”).

{¶ 2} The Division was represented by Assistant Attorneys General Rachel O. Huston, Federico G. Barrera III, and Keith O’Korn. The Division representative at the hearing was Mark J. Ballenger. Respondent was present throughout the hearing and represented by Karl E. May.

{¶ 3} At the outset of the hearing, the parties stipulated that paragraphs 23(b) and (d) of the Division Order were dismissed.<sup>3</sup>

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<sup>1</sup> The hearing covered all or part of the following eleven days in 2015: May 19, 20; August 4, 5; September 8, 9, 10; and October 26, 27, 28, 29.

<sup>2</sup> The initial Division Order was issued on June 19, 2014, and amended on December 8, 2014. The Division Order of December 8, 2014, is the subject of this hearing and identified as Ex. A.

<sup>3</sup> Tr. Vol. I pp. 22-25.

## THE DIVISION ORDER

{¶ 4} The Division Order proposes to suspend or revoke the Ohio investment adviser representative license of Fife which he has held since April 1, 2010 through Ron Camirand & Associates, LLC (“RCA”), an investment adviser licensed in Ohio.<sup>4</sup>

{¶ 5} The Division Order charges Fife with the following alleged violations of the Ohio Securities Act and certain regulations which occurred in 2009 and 2010:

1. Providing investment advice and initiating the purchase and sale of securities to Dr. Robert McDonald, Thomas Medvec, Donna Medvec, Carol Medvec, James Michel, and Judith Svoboda while not licensed by the Division;
2. Making unsuitable investments for, not following the investment wishes of, and making various misrepresentations to the same individuals;
3. Failing to maintain accurate disclosures of his licensing record through the CRD system of certain complaints and settlements identified in the Division Order;
4. Leading some of those individuals to believe he worked for Charles Schwab when he did not;
5. Failing to inform those individuals that he was not licensed by the Division between September 16, 2009, and April 1, 2010; and
6. Not being of good business repute due to the above alleged violations and because he was subject to complaints alleging violation of federal or state securities laws, and violated other provisions of the Ohio Securities Act and rules.

## JURISDICTION AND BURDEN OF PROOF

{¶ 6} This is an administrative hearing conducted in accordance with the requirements of Chapter 119 of the Ohio Revised Code, Ohio’s Administrative Procedure Act. The Division complied with the requirements of Chapter 119 and has jurisdiction over this matter.<sup>5</sup>

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<sup>4</sup> Ex. QQ is a Certification from the Commissioner of Securities that Ron Camirand & Associates, LLC, CRD# 142532 “has been licensed as an investment adviser pursuant to Revised Code sections 1707.14 and 1707.151 from 1/20/2010...[and] There is no record of investment adviser licensure prior to 1/20/2010. Further, Ron Camirand & Associates, LLC has not been licensed as a securities dealer pursuant to Revised Code 1707.14 and 1707.15.”

<sup>5</sup> See stipulation as to notice and jurisdiction. Tr. Vol. I pp. 7, 8.

{¶ 7} One of the fundamental concepts of administrative law and procedure is that “the party asserting the affirmative of an issue bears the burden of proof.” *Kenneth C. Beare v. City of Eaton*, 12 Dist. Preble Case No. CA83-09-018, 1984 Ohio App. LEXIS 10499, \*10 (July 23, 1984); *citing, Chiero v. Bureau of Motor Vehicles*, 55 Ohio Misc. 22, 381 N.E.2d 219 (Franklin Co. Ct. Common Pleas 1977).

{¶ 8} The Division has the burden to prove by a preponderance of the evidence the charges against Respondent. VFW Post 8586 v. Ohio Liquor Control Commission (1998), 83 Ohio St.3d 79, 81; Trotter’s Inc. v. Ohio Liquor Control Commission (2006), 2006-Ohio-2448, ¶ 38.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 9} This case involves investment advice that was given to the following Ohio investors: Dr. Robert McDonald (“Dr. McDonald”), an 85-year-old retired dentist; Thomas Medvec, a 47-year-old recruiter for the machining industry, and his wife Donna Medvec (“the Medvecs”); Carol Medvec, a 75-year-old retired florist designer (“Carol Medvec”) and the mother of Thomas Medvec; James Michel (“Michel”), a 65-year-old retired Goodyear employee; and Judith Svoboda, a 68-year-old retired ATT manager for technical support and sister-in-law of Michel (“Svoboda”).<sup>6</sup> These individuals are sometimes collectively referred to as “complainants.”

{¶ 10} At the center of this dispute is the recommendation to place all of these complainants into investments known as leveraged and inverse exchange traded funds (“leveraged and inverse ETFs”) and whether Fife was the person responsible for placing the complainants into these investments.

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<sup>6</sup> The ages listed are at the time of this hearing; depending upon when the alleged incident took place with respect to a particular individual, time will need to be subtracted to calculate the age of the person at the time of the alleged incident.

{¶ 11} Leveraged ETFs aim to provide a multiple of returns on a given index. Inverse ETFs try to go up when the market drops and down when the market goes up. Leveraged ETFs often have multipliers like 2x or 3x which means the ETF aims to deliver two or three times the return on its stated index. Leveraged and inverse ETFs are complex products that typically are designed to achieve their stated performance objectives on a daily basis. The performance of leveraged and inverse ETFs over a period longer than one day can differ significantly from their stated daily performance objectives.<sup>7</sup>

{¶ 12} All of the complainants lost a significant portion of their investment.

{¶ 13} Among other things, the Division Order maintains that (i) the investments were not suitable for any of these complainants; (ii) Fife was responsible for causing the losses for each of the complainants; and (iii) Fife's license should be revoked.

{¶ 14} Fife is a 48-year-old Ohio-licensed investment adviser representative who, during some of the time period at issue, maintained a principal business address was 2001 Crocker Road, 460 Gemini Towers II, Westlake, Ohio 44145.<sup>8</sup>

{¶ 15} Fife was licensed as a securities salesperson from September 10, 1994, to September 19, 2000, with Salomon Smith Barney Inc. (n/k/a Citigroup Global Markets Inc.) and as an investment adviser representative from September 8, 2000, to September 16, 2009, with Wells Fargo Advisors, LLC.<sup>9</sup>

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<sup>7</sup> Ex. LL; Tr. Vol. VII pp. 29, 30.

<sup>8</sup> See footnote 6; Tr. Vol. VIII p. 6; Ex. FF.

<sup>9</sup> The Division Certificate (Ex. JJ) mentions only Wells Fargo, but that time also includes the period Fife worked for Wachovia.

{¶ 16} Since April 1, 2010, Fife has held his investment adviser representative license through RCA.<sup>10</sup> At times, RCA marketed itself in Ohio as Camirand, Moge and Fife (“CMF”). CMF is a d/b/a of RCA.<sup>11</sup>

{¶ 17} Before joining RCA, Fife, as noted, was employed by and licensed as an investment adviser representative with Wachovia which in 2008 was acquired by Wells Fargo. For purposes of this matter, Fife’s time of employment with Wachovia and Wells Fargo will be referred to as his being with the “Bank.” Fife was licensed as an investment advisor representative with the Bank until September 16, 2009.<sup>12</sup>

{¶ 18} Between September 16, 2009, and April 1, 2010, Fife was not licensed as an investment adviser representative or a securities salesperson in the state of Ohio.<sup>13</sup>

{¶ 19} Fife claims that he hired a lawyer to make certain that he was licensed, but the attorney failed to get that licensing done.<sup>14</sup> Fife said he did not know that he was not licensed for the period between September 16, 2009, and April 1, 2010. Fife did not tell any of the complainants that he did not have a license between September 16, 2009, and April 1, 2010.

{¶ 20} Fife cannot blame his failure to be licensed between September 16, 2009, and April 1, 2010, on a lawyer or anyone other than himself. Fife needed to have a license from the Division when he performed many of the services for the complainants. He did not have a license between September 16, 2009, and April 1, 2010, and he should have. Fife is ultimately responsible to make sure that he is properly licensed. The failure to have a license at a time he was doing things for which a license is required is grounds for discipline.

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<sup>10</sup> Ex. GG and Ex. JJ.

<sup>11</sup> Tr. Vol. I p. 217.

<sup>12</sup> Ex. JJ; Tr. Vol. VIII p. 10.

<sup>13</sup> Tr. Vol. X p. 91.

<sup>14</sup> Tr. Vol. VIII pp.146, 147.

{¶ 21} The Division Order alleges that Fife failed to disclose to the complainants that he was unlicensed for a period of time and that he should have disclosed that fact to them. There is no dispute that Fife did not tell the complainants that he was unlicensed for the period between September 16, 2009, and April 1, 2010. While Fife should have been licensed between September 16, 2009, and April 1, 2010, and his failure to have a license during that period is grounds for discipline, Fife's failure to inform any of the complainants that he was not licensed during that period is not grounds for discipline.

{¶ 22} The Division proved that (i) Fife was not licensed as an investment adviser representative or a securities salesperson in Ohio between September 16, 2009, and April 1, 2010, and (ii) Fife performed services for the complainants between September 16, 2009, and April 1, 2010, that required a license from the Division. Those are grounds for discipline.

{¶ 23} Fife has been in the investment business in one capacity or another since approximately 1994. Over time, Fife's investment philosophy changed from what Fife termed "buy and hold"<sup>15</sup> and "fundamental investing"<sup>16</sup> in part because the "analysts didn't know what they were doing."<sup>17</sup> Fife started using such things as Dorsey-Wright technical analysis point-and-figure charting and leveraged mutual funds<sup>18</sup>

{¶ 24} At times, Fife was hand-charting the market himself.<sup>19</sup> He then began learning systems developed by Ian Notley and Richard Moge; Fife felt these systems would give him a higher probability of success than buy and hold.<sup>20</sup> Fife began showing his clients the Notley

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<sup>15</sup> Tr. Vol. VIII p. 12.

<sup>16</sup> Tr. Vol. VIII p. 16.

<sup>17</sup> Tr. Vol. VIII p. 19.

<sup>18</sup> Tr. Vol. VIII pp. 22-39.

<sup>19</sup> Tr. Vol. VIII pp. 40,41; Tr. Vol. IX, pp. 147, 148; Ex. R-56.

<sup>20</sup> Tr. Vol. VIII pp. 47-51. Fife said Ron Camirand was Ian Notley's "right-hand man" and "protege." – Tr. Vol VIII pp. 49, 104. Camirand had been using the Notley system since 1974. Tr. Vol. III p. 105.

system which he thought “was probably better than Dorsey-Wright.”<sup>21</sup> Fife wanted his clients to know “this was a change in the way I did business.”<sup>22</sup> The Notley system is a form of technical analysis, sometimes referred to as charting analysis, which examines past behavior to determine a buy or sell signal.<sup>23</sup>

{¶ 25} When Fife initially started proposing his new philosophy to clients he proposed that the client’s use the system for only a portion of their assets. Fife used leveraged mutual funds and shorted the market to achieve his goal.<sup>24</sup> Speaking of clients generally, Fife said:

And they were looking for solutions. They had to retire. They had to get income off of their accounts, and it just wasn't happening. So that's why -- the people who participated, they were happy because, you know, we would take, like, a third of the money and we would do this. And so the other stuff I put in, like, income-producing vehicles or whatever, and it got them exposure. If I used a double -- if I used a leveraged mutual fund, I'd get a guy, if he had, like, you know, \$500,000, I'd take \$200,000, I'm almost getting him \$500,000 in market exposure, and we still got \$300,000 in cash. So, you know, that's pretty cool.<sup>25</sup>

{¶ 26} To attempt to grow his business, Fife met with accountants to get referrals; one of those accountants was David Pintenich.<sup>26</sup>

{¶ 27} In November 2008, Fife began using exchange traded funds rather than mutual funds because they were cheaper and, unlike mutual funds, could be traded like a stock during the day when the market was open.<sup>27</sup>

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<sup>21</sup> Tr. Vol. VIII p. 56.

<sup>22</sup> Tr. Vol VIII p. 57.

<sup>23</sup> Tr. Vol. VII pp. 56, 58, 111.

<sup>24</sup> Tr. Vol. VIII pp. 60, 61, 70.

<sup>25</sup> Tr. Vol VIII pp. 60-61.

<sup>26</sup> Tr. Vol. VIII p. 61.

<sup>27</sup> Tr. Vol. VIII pp. 76, 78 79, 111.

{¶ 28} Even though the prospectus for the funds Fife was using state they are designed to be held for a day, Fife is not in agreement with that statement. Fife believes they can be held for longer periods in the system that he used.<sup>28</sup>

{¶ 29} Fife claimed that he made his clients a lot of money in 2008 using this system. He claimed that his business increased and more people wanted to meet with him:

even more people wanted to meet with me, imagine that. You know, the kid who saw the '08-'09 crash and the government didn't see it, nobody saw it. There was probably 20 people around the world that saw everything that Ian saw who I wish would have lived to see it. We were right.<sup>29</sup>

{¶ 30} Fife's clients were charged a management fee of 2% of the account for his services while at the Bank.<sup>30</sup>

{¶ 31} The Division alleges that Fife told some complainants that he would use a stop loss in their account. Fife said that a stop loss could not effectively be used with the technical analysis system using the exchange traded funds that he was using; Fife said that he never told a client that a stop loss would be used with that system.<sup>31</sup> Fife claimed that with the system that he was using he was looking for a trend and that once the trend ended he would get out.<sup>32</sup>

{¶ 32} Fife said that after Ian Notley died, he (Fife) introduced Ron Camirand and Richard Moge to each other with the hopes of putting "together a team of my own" when he left the Bank and because "the reports were not that good with Dorsey-Wright – or, with the Notley system I thought. So I thought I'm going to put these guys together and build a stronger system."<sup>33</sup>

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<sup>28</sup> Tr. Vol. VIII pp. 86-88.

<sup>29</sup> Tr. Vol. VIII p. 75.

<sup>30</sup> Tr. Vol. VIII p. 77.

<sup>31</sup> Tr. Vol. VIII pp. 97, 98, 232.

<sup>32</sup> Tr. Vol. VIII p. 99.

<sup>33</sup> Tr. Vol. VIII pp. 107, 108, 150, 151, 152. Fife was in the last year of a forgivable loan from the Bank. See also Tr. Vol. VIII pp. 123, 124.

{¶ 33} Because he was doing something “out of the ordinary” Fife was placed on “heightened supervision” by the Bank; a Bank representative would call his clients monthly, he had to meet quarterly with his branch manager and he had to fill out reports.<sup>34</sup> Fife said Ron Camirand presented the Notley system to others at the Bank, but those other representatives did not use the system because it was “too much work” and they were “too lazy.”<sup>35</sup>

{¶ 34} In 2009 Financial Industry Regulatory Authority (“FINRA”) issued a compliance alert cautioning that leveraged exchange traded funds should only be used with sophisticated investors. Although his clients were not sophisticated investors, Fife said “I was” the sophisticated investor because he was the one making the recommendation to his clients to buy or sell into the Notley system and “I had a sophisticated system because I needed one.”<sup>36</sup>

{¶ 35} Fife estimated that he had approximately \$70 million of assets under management and that he utilized the Notley system for approximately \$10 million of those assets (i.e., 15 to 20% of the assets under management) in August of 2009. He estimated that he had 35 clients for whom he used the Notley system.<sup>37</sup>

{¶ 36} The accounts Fife managed at the Bank were nondiscretionary; he had to contact clients and receive approval before he could make a trade.<sup>38</sup> Using the technical analysis system without the advisor having discretion creates problems according to Fife because he has to track the client down to obtain approval before he can make a trade.<sup>39</sup>

{¶ 37} Fife said that in August 2009, without warning, he was informed by his Bank branch manager that the Bank had a concern with Fife’s use of the Notley system and that he could

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<sup>34</sup> Tr. Vol. VIII p. 109.

<sup>35</sup> Tr. Vol. VIII pp. 110, 111.

<sup>36</sup> Tr. Vol. VIII pp. 112, 113.

<sup>37</sup> Tr. Vol. VIII pp. 120, 121.

<sup>38</sup> Tr. Vol. VIII p. 32, 38, 42, 76.

<sup>39</sup> Tr. Vol. VIII p. 122.

no longer use that system at the Bank. Fife said the Bank had a problem only with the ETF portion of his business and that if he wanted to give up the ETF portion of his business he could have continued with the Bank. Fife believed in the ETF system and said that he would try to “grow this thing and see where it goes. So I said all right” which meant “[e]verything else I would have to leave” with the Bank.<sup>40</sup> The Bank gave Fife 30 days to move his business.<sup>41</sup>

{¶ 38} Fife and Ron Camirand agreed that Fife would join RCA. Fife said he contacted his clients and told them that there had been a change in policy at the Bank with the ETFs in terms of what the Bank would and would not support and Fife was going “to join my mentor, Ron Camirand.”<sup>42</sup>

{¶ 39} Ron Camirand had been advising a Pennsylvania billionaire and other high net worth individuals.<sup>43</sup> None of the complainants involved in this matter were billionaires or high net worth individuals.

{¶ 40} RCA used Charles Schwab (“Schwab”) as its custodian for the assets that it managed.<sup>44</sup> RCA’s paperwork gave RCA discretion to make trades in the accounts being transferred to it.<sup>45</sup> The RCA Investment Advisor Services Agreement provided that the following were among the services provided by RCA:

- RCA agrees to provide advice to Client in Client’s investment; such advice may include, but is not necessarily limited, security investments, hedge fund investments, mutual fund investments and other forms of investment techniques which Client may be interested and from which Client may benefit.
- RCA shall, with due diligence, regularly review Client’s portfolio and ongoing investments in order to provide the most accurate and helpful

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<sup>40</sup> Tr. Vol. VIII pp. 114, 124-126.

<sup>41</sup> Tr. Vol VIII p. 126.

<sup>42</sup> Tr. Vol. VIII p. 132.

<sup>43</sup> Tr. Vol. VIII p. 108.

<sup>44</sup> Tr. Vol. VIII pp. 132, 136.

<sup>45</sup> Tr. Vol. VIII p. 136.

advice possible. Reviews shall be made at a minimum on a quarterly basis, but may be made on a more frequent basis depending on each individual Client's needs and expectations.

- Decisions regarding RCA's level of discretion regarding Client's investments shall be made on a case-by-case basis so that each and every Client shall receive the precise and specific manner of investment advice that Client is seeking.
- Generally, unless Client requests otherwise ..., RCA shall have discretion over which securities will be purchased, the amount of the security purchased and which broker shall be used in the purchasing process.<sup>46</sup>

{¶ 41} Fife met with his clients to have them sign paperwork to transfer their accounts from the Bank to RCA and Schwab. Fife said he never told any of his clients that he was actually working for Schwab<sup>47</sup> Some of the complainants said that Fife led them to believe he worked for Charles Schwab.

{¶ 42} The allegation in the Division Order that Fife led some to believe he worked for Charles Schwab was not proven by the Division. Fife neither told the complainants that he was working for Charles Schwab nor do anything to suggest that he was actually working for Charles Schwab. If a complainant somehow thought Fife worked for Charles Schwab, he or she reached that conclusion on his/her own and was mistaken. The allegation that Fife led some to believe he worked for Charles Schwab was not proven by the Division and is not grounds for discipline of Fife.

{¶ 43} Fife resigned from the Bank on September 15, 2009.<sup>48</sup>

{¶ 44} Fife said the non-ETF portion of his business he "left it there [at the Bank]"<sup>49</sup> Fife said he did not contact those other clients to come with him because he "didn't have money

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<sup>46</sup> Ex. C Tab 9.

<sup>47</sup> Tr. Vol. VIII p. 135, 136

<sup>48</sup> Tr. Vol. VIII p.140.

<sup>49</sup> Tr. Vol. VIII p. 127.

management to offer them and I didn't believe in it."<sup>50</sup> According to Fife, RCA only "did leveraged ETF stuff."<sup>51</sup>

{¶ 45} RCA charged a management fee of 2% of the assets under management.<sup>52</sup> Fife said at the beginning of his relationship with RCA there was no compensation arrangement and that he was paid on an as-needed basis for about a year and then he was paid 50/50 of what was taken in by RCA.<sup>53</sup>

{¶ 46} Among the clients of Fife's at the Bank who moved with him to RCA were Dr. McDonald, Michel, the Medvecs, Carol Medvec, and Svoboda. Ron Camirand spoke by telephone with some or all of these individuals to welcome them to RCA. Fife participated in some or all of those calls.<sup>54</sup>

{¶ 47} All of the complainants experienced significant losses to their assets. Depending on the individual, tens or hundreds of thousands of dollars were lost. The actual amount of losses may be in dispute, but it is clear the complainants lost large amounts of money. Because this is not a civil action by the complainants requesting a monetary judgment, exact precision in determining the amount of losses is not required. The fact that the complainants lost money in these investments is sufficient to establish the point that a loss was experienced by each of them.

{¶ 48} Although they have experienced losses, there has been some restitution to the complainants through settlements. For example:

- Dr. McDonald entered into a Settlement Agreement with Fife and RCA to settle the lawsuit referred to in paragraph 21 of the Division Order. Dr. McDonald was paid \$47,000.00.<sup>55</sup>

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<sup>50</sup> Tr. Vol. VIII p. 133.

<sup>51</sup> Tr. Vol. VIII p. 134.

<sup>52</sup> Tr. Vol. VIII p.141.

<sup>53</sup> Tr. Vol. VIII pp.142, 143.

<sup>54</sup> Tr. Vol. VIII p.143, 144.

<sup>55</sup> Tr. Vol. I pp. 98, 99; Ex. I; Ex. GG.

- Michel received \$85,000.00 in settlement of an arbitration and his sister-in-law Svoboda received less (Michel did not state an exact amount that Svoboda received).<sup>56</sup>
- the Medvecs settled their arbitration (the amount was not disclosed).<sup>57</sup>

{¶ 49} All of the complainants said they wanted conservative investments. Leveraged and inverse ETFs are not conservative investments.

{¶ 50} Fife is charged in the Division Order with initiating improper purchases. He denied that allegation. Fife claimed that he did not make any trades. He said that all trades were made by Ron Camirand.<sup>58</sup> Fife's claims are not correct; the evidence does not support Fife's claims.

{¶ 51} Ron Camirand was not licensed in Ohio.<sup>59</sup> Fife claimed that he was simply the "marketing guy."<sup>60</sup> Fife said "I'm kind of a glorified secretary for two pretty good market boys."<sup>61</sup> However, Fife was not simply providing marketing or secretarial services. He was providing investment advice and services to all of the complainants.

{¶ 52} Fife tries to minimize the role he played when he initially went to RCA. That claimed minimization is particularly important in Fife's argument since he was unlicensed between September 16, 2009, and April 1, 2010. Fife continued to have direct contact with his clients that he brought over to RCA from the Bank.<sup>62</sup> Fife said he showed clients marketing material that had been developed which demonstrated the kind of data being used at RCA.<sup>63</sup>

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<sup>56</sup> Tr. Vol. II pp. 414-416; Ex. GG.

<sup>57</sup> Tr. Vol. III p. 73.

<sup>58</sup> Tr. Vol. VIII p. 236.

<sup>59</sup> Ex. RR is a Certification from the Commissioner of Securities that Ronald R. Camirand, CRD# 1058181 "has not been licensed as an investment adviser, investment adviser representative, securities salesperson, or securities dealer pursuant to Revised Code §§ 1707.15.1, 1707.16.1, 1707.16, or 1707.15.

<sup>60</sup> Tr. Vol. VIII p.148.

<sup>61</sup> Tr. Vol. VIII p. 160.

<sup>62</sup> Tr. Vol. VIII p.149.

<sup>63</sup> Tr. Vol. VIII pp.163, 169; Ex. R-46 (this document is from 2011 or later, but Fife claimed a version of the document was used in 2009 and 2010).

{¶ 53} Fife used this material, for example, to “explain to my clients that, look, asset classes are kind of like aging, it’s kind of like being a person; and so youthful, advanced, declining, terminating. So I wanted to be able to tell or show them something that they could relate to.”<sup>64</sup>

{¶ 54} Fife did initiate the improper purchases. Ron Camirand (or some administrative person at RCA) may have been the one to physically perform the trades, but Fife was involved in the process and advised his clients. To “initiate” is “to cause or facilitate the beginning of.”<sup>65</sup> Fife initiated the improper purchase of leveraged and inverse ETFs for the accounts of the complainants during the times at issue in the Division Order, including the period that Fife was unlicensed (between September 16, 2009, and April 1, 2010).

{¶ 55} Ron Camirand did not testify in person during this hearing. By agreement, Ron Camirand’s affidavit, deposition in a civil case, and his R.C. 1707.23 testimony were submitted.<sup>66</sup> In his affidavit, Ron Camirand said that he made all investment decisions for clients of RCA, but that claim conflicted with his testimony elsewhere. For example, Ron Camirand confirmed that:

- From the day Dr. McDonald opened an account at RCA, he was being served by Fife as an investment advisor representative for RCA;<sup>67</sup>
- the person at RCA whose responsibility it was to advise Dr. McDonald about his investments was Fife;<sup>68</sup>
- Fife had several other clients at RCA for whom he was performing investment advisory services;<sup>69</sup>
- Fife was on the phone the first time Ron Camirand spoke to Dr. McDonald;<sup>70</sup>
- Fife and Ron Camirand co-managed Dr. McDonald’s account;<sup>71</sup>

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<sup>64</sup> Tr. Vol. VIII p.168.

<sup>65</sup> Merriam-Webster online Dictionary.

<sup>66</sup> Ex. R-61. Ex. OO; Ex. PP.

<sup>67</sup> Ex. PP p. 29.

<sup>68</sup> Ex. PP p. 35.

<sup>69</sup> Ex. PP p. 36.

<sup>70</sup> Ex. PP p. 48.

<sup>71</sup> Ex. OO p. 94.

- Ron Camirand discussed the investments for the clients with Fife.<sup>72</sup>

{¶ 56} Fife confirmed that he (Fife) was involved in advising Dr. McDonald while at RCA.<sup>73</sup>

{¶ 57} In October of 2009, Fife put together a luncheon meeting for the clients who moved with him from the Bank to RCA to meet Ron Camirand and Richard Mogey and ask questions. Fife could not recall all who attended, but of those who have filed complaints against him he said Tom Medvec was there.<sup>74</sup>

{¶ 58} In 2009 and 2010 Fife assisted at RCA in the development of a Performance Only product trading leveraged ETFs available only to qualified investors. This was previously the SSO/SDS product. SDS and SSO are leveraged ETFs. Instead of a management fee, those in this product were charged a fee of 20% of the profit. If the market was going down SDS would be traded. If the market was going up SSO would be traded.<sup>75</sup>

{¶ 59} Fife was involved in investment decisions, advice and services involving the complainants. Fife performed investment advisor representative services for his clients at a time that he was not licensed (between September 16, 2009, and April 1, 2010). The clients considered Fife to be their investment advisor representative.

{¶ 60} The Division proved the allegations in the Division Order that Fife initiated purchases of leveraged and inverse ETFs for the complainants, including at a time that Fife did not have a license with the Division (between September 16, 2009, and April 1, 2010).

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<sup>72</sup> Ex. PP p. 56.

<sup>73</sup> Ex. C p. 53.

<sup>74</sup> Tr. Vol. VIII pp.152-155.

<sup>75</sup> Tr. Vol. VIII pp.155-157.

Dr. Robert McDonald

{¶ 61} Fife met Dr. McDonald in December 2008, as the result of a referral to him by accountant David Pintenich.<sup>76</sup> Fife said Dr. McDonald had lost money with his previous adviser, led an exotic lifestyle, and was looking for a way to increase his return. Fife claimed Dr. McDonald needed to generate income for living expenses. Fife said that he explained the Notley system to Dr. McDonald and his wife. Fife said Dr. McDonald started to open an account with Fife at the Bank around February of 2009, then decided not to go forward because there had been some errors on the paperwork as it was input. Dr. McDonald later decided to open the account in July 2009.<sup>77</sup>

{¶ 62} According to the notes that Fife took of the July 2009 meeting that Fife had with Dr. McDonald and his wife, the McDonalds had less than a million dollars.<sup>78</sup> There was a discrepancy on the account profile forms Fife had McDonald sign. Net worth for Dr. McDonald was listed as one million on one form and three million on the other.<sup>79</sup> Fife said Dr. McDonald told him the net worth was three million. Dr. McDonald testified that his net worth when he met Fife was “about a million dollars” (not the three million Fife stated).<sup>80</sup>

{¶ 63} Fife checked off the boxes identifying investment objectives.<sup>81</sup> The form indicated the time frame for investing the money was more than ten years, but Fife said that Dr. McDonald had an immediate need for the funds to meet his living expenses.<sup>82</sup> Dr. McDonald had lost about

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<sup>76</sup> Tr. Vol. VIII p 188.

<sup>77</sup> Tr. Vol. VIII pp.188-215.

<sup>78</sup> Tr. Vol. VIII p. 218; Ex. 1 of Ex. CC.

<sup>79</sup> Ex. C Tab 4; Ex. CC plaintiff's Ex. 4 and 5; Ex. D.

<sup>80</sup> Tr. Vol. I p. 45, 61.

<sup>81</sup> Ex. CC p. 65.

<sup>82</sup> Tr. Vol. VIII, p. 220; Ex. 4 of Ex. CC.; Tr. Vol. pp. 188-220.

\$127,000.00 in the 2008 market downturn.<sup>83</sup> When the market started going back up in 2009, Dr. McDonald wanted to get the money invested to get a better return than he had been getting.<sup>84</sup> Dr. McDonald switched to Fife as his investment advisor because his then investment advisor had him “in a cash fund, and it made about enough to pay...his fee.”<sup>85</sup>

{¶ 64} Fife had Dr. McDonald sign a Bank Account Application in August of 2009.<sup>86</sup> The Bank Account Application listed Dr. McDonald’s investment objective as Long Term Growth & Income. There is a section within the application which defines terms used in Investment Objectives and Risk Tolerance.

{¶ 65} For the Investment Objective that is Growth & Income, the Bank Account Application states:

Growth and Income Investors seek current income but also seek income and capital growth over time. These investors are willing to forgo a portion of current income in order seek potential future growth

For the Risk Tolerance that is Long Term, the Bank Account Application states:

Long Term Growth and Income Investors seek a significant level of growth and income, are financially able and willing to risk losing a substantial portion of investment capital, and due to their long term horizon or other factors, they pursue high risk, more aggressive strategies that may offer higher potential returns. High yield bonds and equities, generally dividend paying equities, may be the primary assets in the account.

{¶ 66} Dr. McDonald eventually opened an account at the Bank with Fife as his investment advisor and had funds transferred into that account in August 2009.<sup>87</sup> Dr. McDonald transferred

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<sup>83</sup> Tr. Vol. I p. 114.

<sup>84</sup> Tr. Vol. I p. 124; Dr. McDonald’s advisor was dealing with cancer; Dr. McDonald did not feel comfortable questioning the advisor; and Dr. McDonald was looking for a fresh idea (Tr. Vol. I pp. 120, 124, 125).

<sup>85</sup> Tr. Vol. I p. 43.

<sup>86</sup> Ex. D.

<sup>87</sup> Tr. Vol. I pp. 139, 142.

approximately \$409,000 to the account that Fife established for him at the Bank (which was then transferred to the Charles Schwab account when Fife moved to RCA).<sup>88</sup>

{¶ 67} Dr. McDonald said the only other assets he had besides the \$409,000.00 were his residence and an annuity at Reliant Standard in the amount of approximately \$120,000.00.<sup>89</sup> According to Dr. McDonald that was “practically all the money I had, plus my residence. So I didn’t need to lose any more money....The purpose was to protect what I had.”<sup>90</sup>

{¶ 68} Dr. McDonald said he requested “a low-risk, stop-loss type of investment to protect what money I had left.”<sup>91</sup> Dr. McDonald needed to use the retirement funds he was investing to pay living expenses.<sup>92</sup>

{¶ 69} After Dr. McDonald’s funds were transferred to his account at the Bank, Fife said he met with Dr. McDonald on August 20, 2009, and told him he would be leaving the Bank due to a change of policy at the Bank and that he was transferring his business to RCA. Fife had Dr. McDonald sign paperwork transferring Dr. McDonald’s account to RCA<sup>93</sup>

{¶ 70} Dr. McDonald’s funds were transferred to a custodial account in his name at Charles Schwab. The Independent Investment Advisor listed on that account was RCA. Dr. McDonald said when he set the account up he dealt with Fife even though RCA is listed on the account as the advisor.<sup>94</sup>

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<sup>88</sup> Tr. Vol. VIII p. 224; Ex. D.

<sup>89</sup> Tr. Vol. I p. 77.

<sup>90</sup> Tr. Vol. I p. 44.

<sup>91</sup> Tr. Vol. I pp. 44, 63.

<sup>92</sup> Tr. Vol. I p. 44.

<sup>93</sup> Tr. Vol. VIII pp. 222-231.

<sup>94</sup> Ex. D; Tr. Vol. I p. 72.

{¶ 71} Dr. McDonald claimed Fife said he would have a stop-loss feature in place. Fife characterized those allegations as a “lie.” Fife said he never used stop-loss so he would not have promised Dr. McDonald a stop-loss feature.<sup>95</sup>

{¶ 72} As noted, Fife argued throughout this matter that he cannot be held responsible for any of the purchases made through RCA because all purchases were made by Ron Camirand. Dr. McDonald was dealing with Fife and assumed Fife was making the investments on his behalf.<sup>96</sup> As stated elsewhere, Fife is still responsible for the investments made for Dr. McDonald whether or not he placed the actual orders and whether or not the physical act of placing the order was performed by Fife, Ron Camirand, or an administrative assistant.

{¶ 73} Dr. McDonald wanted to earn more money on his investments, but he could not afford to take risks. Despite the fact that Fife and RCA had control of most of Dr. McDonald’s assets which he needed to live on, his conservative funds were sold beginning in September and October 2009, and in their place leveraged and inverse ETFs Proshares UltraShort QQQ, UltraShort S&P 500 and UltraShort Real Estate were purchased.<sup>97</sup> Dr. McDonald claimed that nothing was discussed with him concerning these investments and that he did not receive the prospectus for any of these funds.<sup>98</sup>

{¶ 74} The prospectus which ProShares filed with the U.S. Securities and Exchange Commission states in the Summary Section:

Proshares Ultra QQQ (the “Fund”) seeks investment results for a **single day only**, not for longer periods. This means that the return of the Fund for a period longer than a single trading day will be the result of each day’s returns compounded over the period which will very likely differ from twice (200%) the return of the NASDAQ-100 Index (the “Index”) for that period. In periods of higher market volatility, the volatility of the benchmark may be at least as important to the Fund’s

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<sup>95</sup> Tr. Vol. VIII pp.186,187.

<sup>96</sup> Tr. Vol. I p. 85.

<sup>97</sup> Tr. Vol. VIII p. 238; Ex. D.

<sup>98</sup> Tr. Vol. I pp. 86, 87.

return for the period as the return of the benchmark. **The Fund is different from most exchange-traded funds in that it seeks leveraged returns and only on a daily basis. The Fund is also riskier than similarly benchmarked exchange-traded funds that do not use leverage. Accordingly, the Fund may not be suitable for all investors and should be used only by knowledgeable investors who understand the potential consequences of seeking daily leveraged investment results. Shareholders should actively monitor their investments. (emphasis in original)**<sup>99</sup>

{¶ 75} In the Investment Objective section of the prospectus that ProShares filed with the U.S. Securities and Exchange Commission, it is stated:

The Fund seeks daily investment results, before fees and expenses that correspond to twice (200%) the daily performance of the Index. **The Fund does not seek to achieve its stated investment objective over a period of time greater than one day. (emphasis in original)**<sup>100</sup>

{¶ 76} Similar statements are contained in the Summary Prospectus for ProShares UltraShort Real Estate, ProShares UltraShort S&P 500, and ProShares UltraShort QQQ that are sent to each person or entity for whom these leveraged and inverse ETFs are purchased.<sup>101</sup>

{¶ 77} Dr. McDonald did not recall receiving summary prospectuses for the ProShares leveraged and inverse ETFs, but if he did he said he “probably wouldn’t have read it anyway.”<sup>102</sup>

{¶ 78} Dr. McDonald was concerned when he noticed his account at RCA went down from approximately \$409,000.000 to \$368,000.00 in a month. He said he felt that drop would have exceeded the stop-loss. He admitted that since the position was not closed out that probably meant that there was not a stop-loss in place. When the account dropped to \$339,000.00, Dr. McDonald called Fife to discuss this. Fife recommended that Dr. McDonald not sell the positions because Dr. McDonald had not “lost anything and ... everything was all right.”<sup>103</sup> He said Fife “insisted

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<sup>99</sup> Ex. E; see also Ex. F for a similar statement. The prospectus filed with the SEC is not sent to individual purchasers; it is the summary prospectus that is sent to individual purchasers.

<sup>100</sup> Ex. E; see also Ex. F for a similar statement. The prospectus filed with the SEC is not sent to individual purchasers; it is the summary prospectus that is sent to individual purchasers.

<sup>101</sup> Ex. C Tabs 11, 12, and 13.

<sup>102</sup> Tr. Vol. I pp. 161, 162.

<sup>103</sup> Tr. Vol. I p.92.

that I not” sell.<sup>104</sup> Dr. McDonald called Ron Camirand who also said Dr. McDonald should not sell. Dr. McDonald terminated the relationship with RCA and sold the positions when the account value was around \$286,000.00.<sup>105</sup> Dr. McDonald’s account had gone from \$409,000.00 to \$286,000.00, a loss of \$123,000.00, in a few months.<sup>106</sup>

{¶ 79} The Division proved the allegations against Fife concerning Dr. McDonald except the allegation about a stop-loss feature being in place and that Fife earned all of the 2% fee.

#### Judith Svoboda

{¶ 80} The Division Order alleges that Fife during 2009 and 2010 placed Svoboda in unsuitable investments by placing her in leveraged and inverse ETFs. Svoboda retired from AT&T, Bell Systems in 2009. She was in management and performed computer work providing technical support as a switch operator.<sup>107</sup> She was earning approximately \$80,000 per year at the time of her retirement. After she retired her income consisted of social security of \$26,000 per year and a small pension.<sup>108</sup>

{¶ 81} Svoboda was introduced to Fife by her brother-in-law Jim Michel, another complainant. Fife became her investment advisor in approximately 2006 while he was at the Bank.<sup>109</sup> The investment goal which Svoboda conveyed to Fife was modest - “to conserve the money for my children.”<sup>110</sup> Fife told Svoboda he was “putting [her money] in something totally safe.”<sup>111</sup>

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<sup>104</sup> Tr. Vol. I, p. 165.

<sup>105</sup> Tr. Vol. I p. 164-168; Tr. Vol. VIII p. 248.

<sup>106</sup> Ex. D; Tr. Vol. I p. 94.

<sup>107</sup> Tr. Vol. V p. 9.

<sup>108</sup> Tr. Vol. V p. 21.

<sup>109</sup> Tr. Vol. V p. 13.

<sup>110</sup> Tr. Vol. V p. 33.

<sup>111</sup> Tr. Vol. V p. 35.

{¶ 82} In August of 2009, when Fife advised Svoboda that he was leaving the Bank and joining RCA, Svoboda signed the RCA Investment Advisor Services Agreement.<sup>112</sup> Three custodial accounts for Svoboda were established at Charles Schwab totaling \$451,780.26. RCA was listed at the Independent Investment Advisor for each account.<sup>113</sup> After the transfer, ProShares leveraged and inverse ETFs were purchased in the accounts. By December 2010, the value of the three accounts was 247,240.08, a loss of \$204, 540.18. The accounts had lost 45% of their total value.

{¶ 83} The Division Order alleges that Fife had led Svoboda to believe he worked for Charles Schwab instead of RCA. That allegation was not proven by the Division. If Svoboda was under the impression Fife worked for Charles Schwab that is something she determined on her own.

{¶ 84} The Hearing Examiner agrees with Fife that an alleged misrepresentation by Fife that he worked for Charles Schwab is not material. As stated in Fife's Post-Hearing Memorandum at p. 13:

Nor is it material as defined [by] the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S 224 (1988). Under *Basic*, the determination of materiality requires that the total mix of information available at the time must be analyzed, and for a misrepresentation to be material the alleged misstatement would have had to change the view of the total information by a reasonable investor. Given the total mix of information—the RCA management agreement, the RCA ADV, the Schwab account sign-up documents, and the Schwab statements clearly defining the entity RCA as the adviser, a belief that Mr. Fife was going to be working directly for Charles Schwab would not even be reasonable.

{¶ 85} The Division Order also alleges that Fife failed to inform Svoboda that he was not licensed in Ohio as an investment adviser representative between September 16, 2009, and April 1, 2010. As noted earlier, Fife did not inform any of the complainants, including Svoboda, that

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<sup>112</sup> Ex. V.

<sup>113</sup> Ex. T-F Tab October 2009.

he was not licensed between September 16, 2009, and April 1, 2010, but such failure is not grounds for discipline.

{¶ 86} Fife's claim that he cannot be held responsible for the results of the investments for Svoboda because they were placed by Ron Camirand fails for the same reasons that argument failed for the investments during 2009 and 2010 for Dr. McDonald and the other complainants.

{¶ 87} Fife was Svoboda's investment advisor during this time period and involved in the decision to place her in the investments. He should be held accountable for placing her in unsuitable investments which resulted in the losses in Svoboda's accounts.

{¶ 88} The Division proved the allegations against Fife concerning Svoboda except the allegation that Fife led Svoboda to believe he worked for Charles Schwab.

#### James Michel

{¶ 89} The allegations in the Division Order involving Michel are similar to the allegations involving his sister-in-law Svoboda.

{¶ 90} In 2006, Michel retired at age 57 from Goodyear after 39 years of work, 30 of which were spent inside a laboratory testing tires. When he retired, Michel was making about \$55,000.00 annually.<sup>114</sup>

{¶ 91} Michel had about \$340,000.00 of retirement funds and \$100,000.00 of debt. In 2006, Fife hired Fife as his investment advisor to invest the retirement funds for him.<sup>115</sup> Michel needed his retirement investments "to see me through to the rest of my life."<sup>116</sup> Michel said Fife "knew that was all the money that I had in the world, and I had to live on it."<sup>117</sup>

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<sup>114</sup> Tr. Vol. II pp. 256, 257, 289.

<sup>115</sup> Tr. Vol. II pp. 257, 259, 262.

<sup>116</sup> Tr. Vol. II p. 291.

<sup>117</sup> Tr. Vol. II p. 267.

{¶ 92} Fife told Michel that he used the Notley system and showed Michel a chart of the S&P. As part of his job with Goodyear, Michel did a lot of charts and he understood graphs and charts and was good using Excel.<sup>118</sup>

{¶ 93} Since his retirement Michel held part-time jobs “[b]ecause I still had to make money.” He also took monthly withdrawals from his retirement account to meet living expenses (initially \$2,500.00 month).<sup>119</sup>

{¶ 94} As part of his investment plan for Michel at the Bank, Fife used leveraged mutual funds and leveraged and inverse ETFs.<sup>120</sup> Although Michel said he could not remember, Michel must have approved those purchases because the accounts at the Bank were nondiscretionary.<sup>121</sup> Michel could not recall discussing some of the investments, or receiving confirmations or prospectuses for some of the purchases.<sup>122</sup>

{¶ 95} Michel charted the performance of the investments and his monthly withdrawals. His withdrawals totaled \$109,910.00.<sup>123</sup> Through his tracking and the receipt of his monthly statements, Michel saw the account value was fluctuating up and down. Michel understood that while he may have had a gain or loss in the account, he did not realize that gain or loss until he liquidated the position. Michel said he did not understand that Fife used leveraged funds which magnified the increase or decrease in value.<sup>124</sup>

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<sup>118</sup> Tr. Vol. II pp. 261, 262.

<sup>119</sup> Tr. Vol. II p. 290, 369.

<sup>120</sup> Tr. Vol. VIII p. 91; Ex. N; Ex. R-1; Ex. R-2; Ex. R-3.

<sup>121</sup> Tr. Vol. VIII p. 32, 38, 42, 76.

<sup>122</sup> Tr. Vol. II pp. 359-362, 371, 374, 377.

<sup>123</sup> Ex. P; Ex. S.

<sup>124</sup> Tr. Vol. II p. 385.

{¶ 96} When Michel called Fife questioning the drops in account value, Fife “assured me that was expected and that it would fluctuate” and “everything was fine, everything was going good.”<sup>125</sup> At one point, the account exceeded \$450,000.00 (taking into account withdrawals).<sup>126</sup>

{¶ 97} In 2008, the value of the account went from \$284,492.01 at the end of July to \$279,410.71 at the end of August. At the end of September, the account value increased to \$320,927.83. At the end of October, the account value increased to \$437,642.11. The account value dropped to \$432,170.45 at the end of November and \$430,430.23 at the end of December. The values included the \$2,500.00 monthly withdrawal for living expenses and what appeared to be a \$3,000.00 distribution to Michel on November 28, 2008.<sup>127</sup>

{¶ 98} In 2009, the account experienced more volatility: \$474,608.21 at the end of January to \$362,847.82 at the end of February; up to \$477,916.04 at the end of March; and down to \$346,807.19 at the end of April.<sup>128</sup>

{¶ 99} In April of 2009, Michel received a call from a representative of the Bank who advised him of the risky nature of the investments that Fife had him in. Michel said the Bank representative “wanted to make sure that ... I knew that some of the investments that Mr. Fife had me into were not the safest or not the most conservative.” Michel said the Bank representative “asked me if I wanted to reconsider or something, and I said no...”<sup>129</sup> Despite the caution from the Bank representative, Michel for the moment was happy with Fife and chose not to make any changes.

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<sup>125</sup> Tr. Vol II pp. 268, 375.

<sup>126</sup> Tr. Vol. II p. 269; Ex. P; Ex. S.

<sup>127</sup> Tr. Vol. II pp. 391-399; R-2.

<sup>128</sup> Tr. Vol. II pp. 401, 402; R-3

<sup>129</sup> Tr. Vol. II p. 404; R-4.

{¶ 100} When, in August of 2009, Fife advised Michel that he was leaving the Bank and joining RCA, Michel signed the RCA Investment Advisor Services Agreement.<sup>130</sup>

{¶ 101} Michel's happiness with Fife changed and he joined his sister-in-law Svoboda in an arbitration against the Bank. They reached a settlement with the Bank in the arbitration.<sup>131</sup>

{¶ 102} Michel said that Fife told him that with the right investments Michel could be a millionaire.<sup>132</sup> The purported statement, allegedly made in 2006, about Michael possibly being a millionaire is outside of the time frame covering the charges against Fife (2009 and 2010) and should not be considered as a basis for a finding against Fife.

{¶ 103} The investments that Fife placed Michel in were not suitable for Michel. He should have never been placed in those investments. Fife initially failed to follow Michel's investment wishes.

{¶ 104} Although initially Michel did not fully appreciate the potential pitfalls of the investments that Fife had placed him in, Michel became well aware of the volatility of the investments and their risky nature. Michel was aware of the value fluctuations; he was charting them. Michel ignored the warnings given to him by the Bank representative. Michel chose to stay with the investments that were not suitable for him knowing the consequences.

{¶ 105} Under the circumstances, Michel should bear some responsibility for the situation in which he eventually found himself. Michel could have avoided his losses.

{¶ 106} The Division proved the allegations against Fife concerning Michel, however, those allegations against Fife involving Michel should not be used as grounds for revocation of Fife's license because of Michel's own actions which accepted the risks after Michel was made

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<sup>130</sup> Tr. Vol. II p.304; Ex. O.

<sup>131</sup> Tr. Vol. II p. 414.

<sup>132</sup> Tr. Vol. II p. 260.

aware of them. If the Michel allegations were the only complaint against Fife, the recommendation would be for a suspension rather than revocation of Fife's license because of Michel's actions.

Thomas and Donna Medvec

{¶ 107} The Division Order alleges that throughout 2009 and 2010, Fife (i) placed Thomas and Donna Medvec in unsuitable investments – mainly ETFs; (ii) failed to follow their investment wishes; (iii) failed to disclose that he was unlicensed as an Ohio investment adviser representative; (iv) led them to believe a stop-loss feature would be in place; and (v) causing them to lose thousands of their investment dollars. The “Medvecs” sometimes are referred to as “Medvec” because Thomas Medvec was the only one of the two who testified during this proceeding.

{¶ 108} Medvec, a high school graduate who also took courses for one semester at a community college, was self-employed as a recruiter in the machinery industry. His wife Donna assisted in the business.<sup>133</sup> The Medvecs made a nice living, lived conservatively, drove modest vehicles, and paid off the mortgage on their home. Donna Medvec's father had retired at 50 from Ford. Medvec had set a goal to retire early in 2011-2012 if possible.<sup>134</sup>

{¶ 109} The Medvecs met Fife in 2008 through a referral from their accountant. They had been unhappy with their previous investment advisor. In their opinion they were not getting any returns in their accounts. They told Fife of their conservative nature and desire for early retirement. Fife told them that buy and hold did not work and that he had a different philosophy using the Notley system.<sup>135</sup>

{¶ 110} According to Medvec Fife said that he had tools in his system to avoid risk and that there were safeguards such as “stop losses” which would be triggered “if it goes down by a

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<sup>133</sup> Tr. Vol. I pp. 179-183.

<sup>134</sup> Tr. Vol. I pp. 187,188, 201.

<sup>135</sup> Tr. Vol. I pp. 188-194.

certain amount ... it will automatically either be sold or come out of the trade.” Fife told the Medvecs that his system had “no risk” and was “foolproof.”<sup>136</sup>

{¶ 111} It does not appear that there was a stop-loss in place and, given the approach Fife was following, unlikely that Fife said a stop-loss would be in place. Fife had confidence in his system and implied that he and those who followed that system knew better than others in the business concerning an approach to investing. Although statements of no risk and an approach is foolproof as they relate to investing should not be made, the Hearing Examiner believes that Fife made those statements to the Medvecs.

{¶ 112} The Medvecs opened accounts at the Bank with Fife as their advisor in 2008. The Medvecs understood that investments go up and down. They were looking for a better return and told Fife they could accept “some risk.” The Bank Account Application listed their investment objective as Long Term Growth. Medvec did not recall signing the Bank Account Application, but acknowledged that “obviously I did.”<sup>137</sup>

{¶ 113} Although the Medvecs may not have read it when they signed the Bank Account Application, there is a section within the application which defines terms used in Investment Objectives and Risk Tolerance.

For the Investment Objective that is Growth, the Bank Account Application states:

Growth Investors do not seek account income and their primary objective is capital appreciation.

For the Risk Tolerance that is Long Term, the Bank Account Application states:

Long Term Growth investors seek a significant level of growth, are financially able and willing to risk losing a substantial portion of investment capital, and due to their long term horizon or other factors, they employ higher risk, more aggressive strategies that may offer higher potential returns. Higher risk investments such as equities may be as much as 100% of the account.

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<sup>136</sup> Tr. Vol I pp. 209, 210.

<sup>137</sup> Tr. Vol. I pp. 200, 219, 226, 227; Ex. K; Ex. L; there were two accounts-a joint IRA and an individual IRA.

{¶ 114} The information on the Bank Account Application was compiled by Fife. Based on the Medvecs' conservative approach and plan to retire in the next few years, Fife should not have listed Long Term Growth as the Investment Objective. That was not an accurate description of the Medvecs' Investment Objective.

{¶ 115} When Fife left the Bank and joined RCA, the Medvecs signed the RCA Investment Advisor Services Agreement in August of 2009.<sup>138</sup> Medvec said that Fife was their investment adviser representative after they signed on with RCA.<sup>139</sup>

{¶ 116} Medvec said Fife never brought up ETFs in any discussion with them and never provided information to them concerning ETFs. Medvec said Fife always referred to what he was doing as the "trade."<sup>140</sup> Medvec did not recall ever receiving a summary of ETFs or the Summary Prospectus for ProShares UltraShort Real Estate, ProShares UltraShort S&P 500, and ProShares UltraShort QQQ.<sup>141</sup> Medvec may not recall having received the Summary Prospectuses, but he did receive them. If received, he may not have read them, but a Summary Prospectus is sent to the investor at least at the initial time of purchase.

{¶ 117} Early in the relationship the Medvecs were pleased with Fife. In April 2009, they sent Fife a letter thanking him for his efforts and service on their accounts.<sup>142</sup> Over time the relationship deteriorated as the Medvecs lost money<sup>143</sup>

{¶ 118} While the Medvecs' accounts were at the Bank, Fife purchased for them leveraged and inverse ETFs –e.g., Direxion Emerging Markets Bull 3X, Direxion Emerging Markets Bear

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<sup>138</sup> Tr. Vol. I pp. 215, 226, 227; Ex. K; Ex. L.

<sup>139</sup> Tr. Vol. I p. 218.

<sup>140</sup> Tr. Vol. I pp. 220, 221.

<sup>141</sup> Tr. Vol. I p. 222; Ex. C, Tabs 11, 12, and 13.

<sup>142</sup> Tr. Vol. III pp. 41-42; Ex. Q.

<sup>143</sup> Tr. Vol. III pp. 43,

3X, Direxion Developing Markets Bull 3X, Direxion Financial Bull 3X. While the Medvecs' accounts were at RCA, leveraged and inverse ETFs were also purchased for them- e.g., ProShares UltraShort S&P 500.<sup>144</sup>

{¶ 119} Fife argues that he cannot be held responsible for trades that occurred through RCA. As previously discussed above, Fife's argument fails. Fife was the financial adviser for the Medvecs and he was responsible for making sure investments in which they were placed were suitable for them. The leveraged and inverse ETFs were not suitable for the Medvecs.

{¶ 120} The combined Medvec accounts totaled approximately \$950,000.00 in late 2008 (joint IRA approximately \$630,000.00 and individual IRA approximately \$317,000.00). By the end of March 2014, the loss in the Medvecs accounts was approximately \$860,000.00. The accounts had lost approximately 90% of their value.<sup>145</sup>

{¶ 121} The Division proved all of the allegations against Fife concerning the Medvecs except the one concerning the stop-loss feature. Those remaining allegations are grounds for discipline.

#### Carol Medvec

{¶ 122} The Division Order alleges that in December 2009, Fife (i) placed Carol Medvec into unsuitable investments, (ii) failed to follow their investment wishes by, among other things, placing her in ETFs, (iii) failed to disclose that he was unlicensed as an Ohio investment adviser representative, and (iv) caused her to lose thousands of her investment dollars.

{¶ 123} Carol Medvec is Thomas Medvec's mother. She is a 75-year old retired florist designer (she stopped working full time in the mid-1990s to raise her children and then worked part-time). Carol Medvec is a widow living on social security (approximately \$1,480.00 per

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<sup>144</sup> Ex. M; Ex. M-1.

<sup>145</sup> Ex. M p. 2; Ex. M-1.

month) and investment income.<sup>146</sup> She had a trust that had been funded by a life insurance policy that she received when her husband passed away.<sup>147</sup>

{¶ 124} Carol Medvec met Fife at the suggestion of her son Tom.<sup>148</sup> She told Fife that she wanted her funds placed “in a low risk account, because I was counting on it...” and that he was to communicate with her son Tom because “I really don’t know about stocks or finances.”<sup>149</sup>

{¶ 125} Fife had Carol Medvec sign a Bank Account Application in July of 2009.<sup>150</sup> The Investment Objective listed on that application was Conservative Growth and Income. According to the Bank Account Application the risk tolerance for Conservative Growth and Income Investors is:

Conservative Growth and Income Investors seek the maximum growth and income consistent with a relative modest degree of risk. They are willing to accept lower potential returns in exchange for lower risk. Equities, generally dividend paying equities, may be some percentage of the account.

{¶ 126} Fife kept Carol Medvec’s \$159,000.00 in cash while at the Bank.<sup>151</sup>

{¶ 127} When, in August of 2009, Fife advised Carol Medvec that he was leaving the Bank and joining RCA, Carol Medvec signed the RCA Investment Advisor Services Agreement.<sup>152</sup>

{¶ 128} While Carol Medvec’s account was at RCA, leveraged and inverse ETFs were also purchased for her- e.g., ProShares UltraShort Real Estate, ProShares UltraShort S&P 500, and ProShares UltraShort QQQ.

{¶ 129} As of March 2014, Carol Medvec’s account had declined to approximately \$30,000.00, a loss of \$129,000.00, nearly 82% of the account value.<sup>153</sup>

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<sup>146</sup> Ex. W pp. 5-10.

<sup>147</sup> Ex. W p. 16.

<sup>148</sup> Ex. W p. 11.

<sup>149</sup> Ex. W p. 12; Ex. Y p. 3.

<sup>150</sup> Ex. X.

<sup>151</sup> Ex. Y.

<sup>152</sup> Ex. Z.

<sup>153</sup> Ex. AA.

{¶ 130} Fife argues that he cannot be held responsible for trades that occurred through RCA. As previously discussed above, Fife's argument fails. Fife was the financial adviser for Carol Medvec and he was responsible for making sure investments in which she was placed were suitable for her. The leveraged and inverse ETFs were not suitable for Carol Medvec.

{¶ 131} Leveraged and inverse ETFs may be suitable for high net worth individuals and entities. They are not suitable for Carol Medvec. Leveraged and inverse ETFs should not have been purchased for this elderly widow Carol Medvec, particularly after she had explained to Fife that she wanted low risk conservative investments in her account.

{¶ 132} The Division proved the allegations against Fife concerning Carol Medvec. Those allegations are grounds for discipline.

#### Blaming Others

{¶ 133} Fife tried to blame others for his problems. For example:

- When Mrs. McDonald became upset because information that Fife had taken from them was wrong on the account forms that he sent them, Fife said he was not responsible for inputting the data.<sup>154</sup> Fife blamed his assistant for the discrepancy between the 1 million and 3 million in net worth listed for Dr. McDonald on the Bank forms.<sup>155</sup>
- Fife claimed everyone was lying about him.<sup>156</sup>
- When others at the Bank were shown the Notley system they did not want to use the system because they were too lazy.<sup>157</sup>
- For the period that he did not have a license, Fife blamed the failure to get the license on RCA's attorney.<sup>158</sup> It was Fife's responsibility to make certain that the information about the clients was correct and that he was properly licensed.
- Fife claimed Ron Camirand made the purchases, not him.

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<sup>154</sup> Tr. Vol. VIII p.201.

<sup>155</sup> Tr. Vol. VIII pp. 219, 220.

<sup>156</sup> Tr. Vol. VIII pp. 186, 189; Tr. Vol. IX pp. 132,178.

<sup>157</sup> Tr. Vol. VIII pp. 110, 111.

<sup>158</sup> Tr. Vol VIII pp. 146, 147; Tr. Vol. IX, p. 236; Ex. PP, p. 43.

{¶ 134} Fife should not blame others for his failures. Fife, not others, is responsible for Fife's actions.

#### These Were Not Suitable Investments

{¶ 135} Leveraged and inverse ETFs were not suitable for the complainants. These type of investments may have a place in the portfolios of high net worth individuals or institutions who are willing to take these risks. These investments were not appropriate for the complainants.

{¶ 136} There was a great deal of discussion by the Division's expert, Dr. Craig McCann, and Fife's expert, Howard Rubin, about whether leveraged and inverse ETFs can or should be held for more than one day.

{¶ 137} Dr. McCann opined that:

leveraged and inverse ETFs are complex, risky investments and are unsuitable for unsophisticated investors, whether the funds are being traded by investors directly or by investment advisors on their behalf. In particular, they're unsuitable if they're held for more than a few days or weeks....<sup>159</sup>

{¶ 138} Dr. McCann testified that Fife's trading in the leveraged and inverse ETFs did not demonstrate an understanding of these investments; was reckless and grossly inconsistent with the investment profile Fife developed for his clients; was contrary to the conservative investments requested by his clients; and violated the professional standard of care for investment advisors.<sup>160</sup>

{¶ 139} FINRA issued Regulatory Notice 09-31 in June 2009, entitled "Non-Traditional ETFs," which noted that leveraged and inverse ETFs:

are highly complex financial instruments that are typically designed to achieve their stated objectives on a daily basis. Due to the effects of compounding, their performance over longer periods of time can differ significantly from their stated daily objective. Therefore, inverse and leveraged ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.<sup>161</sup>

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<sup>159</sup> Tr. Vol. VII p. 26.

<sup>160</sup> Tr. Vol. VII pp. 26, 27.

<sup>161</sup> Ex. II.

{¶ 140} After that Regulatory Notice was issued, a distributor of non-traditional ETFs asked FINRA for additional guidance so as to clarify that broker-dealers were not precluded from selling those ETFs to investors who would hold them for longer than one day. FINRA, on July 13, 2009, posted a podcast which included the statement:

Leveraged and inverse ETFs can be appropriate if recommended as part of a sophisticated trading strategy that will be closely monitored by a financial professional. At times, this trading strategy might require a leveraged or inverse ETF to be held longer than one day.<sup>162</sup>

{¶ 141} Approximately one month later in August 2009, the SEC staff and FINRA jointly issued an Investor Alert discussing leveraged and inverse ETFs which provided:

The SEC staff and FINRA are issuing this Alert because we believe individual investors may be confused about the performance objectives of leveraged and inverse exchange-traded funds (ETFs). Leveraged and inverse ETFs are typically designed to achieve their stated performance objectives on a daily basis. Some investors might invest in these ETFs with the expectation that the ETFs may meet their stated daily performance objectives over the long term as well. Investors should be aware that performance of these ETFs over a period of longer than one day can differ significantly from their stated daily performance objectives.<sup>163</sup>

{¶ 142} Dr. McCann said leveraged and inverse ETFs are suitable for “day traders.”<sup>164</sup> Otherwise, he said, there needs to be a daily rebalancing to achieve the stated objective. The investment is not made suitable for other individuals just because it is managed by an investment advisor. Dr. McCann said:

It's like saying that the simple arithmetic of these returns, of the daily rebalancing, doesn't apply to all investors. It's simple arithmetic. And to say that that arithmetic doesn't apply, if an advisor is advising the account that these are bought and held in, is just silly.<sup>165</sup>

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<sup>162</sup> Ex. R-44.

<sup>163</sup> Ex. LL; Tr. Vol. VII p. 32; Ex. KK Tab 3. At the end of the August Investor Alert there was reference to related items which related items included FINRA Regulatory Notice 09-31 and the July 13, 2009, FINRA podcast.

<sup>164</sup> Tr. Vol. VII pp. 35, 182.

<sup>165</sup> Tr. Vol. VII pp. 37, 38, 54.

{¶ 143} The daily rebalancing is critical in order to start the beginning of each trading day with the stated leverage of the fund.<sup>166</sup> Dr. McCann said if leveraged and inverse ETFs are held “on a volatile underlying index for weeks and months or a year, you're going to lose most of the value due to this rebalancing.”<sup>167</sup>

{¶ 144} Dr. McCann said using leveraged and inverse ETFs is “an efficient way to make a very short-term bet. It's an extraordinarily inefficient way to make a longer-term bet, but it does work if you ... hold them for a few days or even a couple of weeks.”<sup>168</sup>

{¶ 145} Dr. McCann said:

The literature is a little bit, and our own simulations are a little bit vague on how long is too long, whether it's a few days or a few weeks. A few months is clearly too long. It really depends on how volatile the underlying index is, but they only return a multiple of the underlying index on a day-to-day basis. Beyond one day, they're going to deviate from that multiple of the index return, with certainty they're going to. And the longer you hold them and the more volatile the underlying index, the more negative the bias is in that deviation.<sup>169</sup>

{¶ 146} Mr. Rubin disagreed with Dr. McCann concerning how long to hold leveraged and inverse ETFs. A former portfolio manager for ProShares leveraged and inverse ETFs, Rubin cited to a study authored by some of his colleagues

That leveraged and inverse funds have been and can be used successfully over time. Our study shows that the impact of compounding on these funds over multi-day periods for the most broad indexes was virtually neutral. There is a high probability of getting close to the index return times the fund multiple over time. The shorter the period the lower the index volatility, the higher the probability of getting close to the fund multiple times the index return.<sup>170</sup>

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<sup>166</sup> Tr. Vol. VII p. 42.

<sup>167</sup> Tr. Vol VII pp. 44, 45, 120.

<sup>168</sup> Tr. Vol. VII pp. 36, 37.

<sup>169</sup> Tr. Vol. VII p. 37; see also Tr. Vol VII, p. 127, 128.

<sup>170</sup> Tr. Vol. XI p.38, 39.

{¶ 147} Dr. McCann stated that the account Dr. McDonald had with Fife was 5 to 10 times riskier than what a competent investment advisor would have recommended for him.<sup>171</sup>

{¶ 148} Svoboda was placed into the same ProShares UltraShort leveraged and inverse ETFs as Dr. McDonald. According to Dr. McCann, those October 2009 purchases were not suitable for Svoboda. He said it is “[n]ot even close. It’s not even in a gray area.”<sup>172</sup>

{¶ 149} Dr. McCann said the August 2009 purchases for Michel were not suitable for him.<sup>173</sup>

{¶ 150} Dr. McCann also said the leveraged and inverse ETFs (which included Direxion) purchased around October 2009 were not suitable for the Medvecs even though Medvec had a greater risk tolerance.<sup>174</sup>

{¶ 151} The account for Carol Medvec also had the ProShares UltraShort funds in December 2009; Dr. McCann said those purchases were not suitable for Carol Medvec. Similar to how he described the suitability for Dr. McDonald, Dr. McCann said for Carol Medvec it also was “not even close. Not in a gray area.” Dr. McCann went on to say about Carol Medvec’s account “[t]his is substantially all of the portfolio, and it amounts to her being -- this trust being 200 percent invested in the stock market. I believe it had previously been in a money market fund.”<sup>175</sup>

{¶ 152} Dr. McCann said that it was not appropriate to hold leveraged and inverse ETFs in an account “longer than a few days or weeks” and he observed that Fife:

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<sup>171</sup> Tr. Vol. VII p. 64.

<sup>172</sup> Tr. Vol. VII pp. 77, 81.

<sup>173</sup> Tr. Vol. VII p. 85.

<sup>174</sup> Tr. Vol. VII p. 87.

<sup>175</sup> Tr. Vol. VII p. 90.

held these in the customers' accounts for quarters, maybe even longer than a year, and that would clearly not be appropriate for any investor and, therefore, would not pass a reasonable basis suitability analysis.<sup>176</sup>

{¶ 153} According to Dr. McCann leveraged and inverse ETFs were not appropriate for the accounts of any of the complainants in this case.<sup>177</sup>

{¶ 154} Mr. Rubin was not presented by Fife as an expert on the question of whether leveraged and inverse ETFs were suitable for any of the complainants and he did not express an opinion on that.<sup>178</sup>

{¶ 155} Dr. McCann's viewpoint concerning the holding period for leveraged and inverse ETFs as they relate to the investments in which the complainants in this case were placed is the correct one.

{¶ 156} Leveraged and inverse ETFS are risky and complex; they were not suitable for the complainants involved in this case. There may be investors for whom these investments would be appropriate (whether held for short or long duration), but the individuals involved in this case were not such investors. Fife should not have recommended leveraged and inverse ETFs for the complainants.

{¶ 157} The complainants said that they did not understand Fife's explanation of the Notley system. They claimed they did not realize what the investments were. Some said they did not receive prospectuses of the purchases that were made on their behalf. The Hearing Examiner finds the claim that prospectuses were not received is not credible. Prospectuses were sent to each

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<sup>176</sup> Tr. Vol. VII p. 92

<sup>177</sup> Tr. Vol. VII pp. 93, 105, 142-144; Dr. McCann used suitability, appropriate and prudent in the general sense; he did not base his opinion on the FINRA suitability rule, FINRA Rule 211 I, which does not directly apply to investment advisors.

<sup>178</sup> Tr. Vol. XI, p. 70.

complainant. Perhaps the prospectuses that were received by the complainants were not read or, if read, were not understood, but they were sent to the complainants.

{¶ 158} The fact that the prospectuses were sent or that Fife discussed the Notley system does not mean Fife had fulfilled his responsibilities to his clients. The complainants were relying on Fife as their financial advisor.

{¶ 159} The relationship between a financial advisor and his or her clients is fiduciary in nature. *Mathias v. Rosser*, 2002-Ohio-2772, No. 01AP-768 at ¶ 18 (10th Dist. 2002) *citing* *Byrley v. Nationwide Life Ins. Co.*, 94 Ohio App.3d 1, 18 (1994); *Silverberg v. Thomson, McKinnon Secs., Inc.*, Cuyahoga App. No. 48545 (1985); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1026 (6<sup>th</sup> Cir. 1979).

{¶ 160} Fife had a duty to make sure the investments that he recommended were suitable for these individuals. The investments were not suitable. Fife violated the duty to his clients by placing his clients into leveraged and inverse ETFs.

#### CRD and U-4

{¶ 161} The Central Registration Depository (“CRD”) system is an electronic database that contains information about registered brokers, dealers, and similar investment firms and their individual salespersons, representatives and employees, which is submitted by members and regulatory authorities and is accessible both to regulators and to the investing public.<sup>179</sup>

{¶ 162} The information for each registered individual is collected principally through that individual’s completion of a Uniform Application for Securities Industry Registration or Transfer (“Form U-4”). The Form U-4 contains significant details regarding an applicant’s background,

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<sup>179</sup> Tr. Vol. VI p. 29.

including criminal and disciplinary histories, customer complaints, civil and administrative proceedings, settlements and awards as well as other personal and employment data.<sup>180</sup>

{¶ 163} Responses or other statements on the Form U-4 are personally attested to and substantiated by the applicant and the employing firm advancing the application.<sup>181</sup>

{¶ 164} The CRD and the Form U-4 are the primary tools used by the Division and other state and federal securities regulators as well as the industry's current self-regulating organization FINRA to guide licensing and disciplinary decisions for licensees.<sup>182</sup>

{¶ 165} Paragraph 22 of the Division Order alleges that Fife failed to maintain accurate disclosures on his licensing record, maintained through the CRD regarding several complaints and settlements which are described in paragraphs 20 and 21 of the Division Order. The Division proved those allegations.<sup>183</sup>

{¶ 166} The Division proved that the CRD sets forth the following disclosures:

- In a complaint filed with the NASD by Ohio residents on or about October 12, 2000, in NASD Case Number 01-01446, Respondent was accused of mishandling of accounts, excessive trading, and over concentration regarding speculative unstable stock, negligence, fraud, breach of fiduciary duty, and misrepresentation from November 19, 1998 through September 8, 2000. While Respondent made no individual contribution to resolve the complaint, Respondent's employer, during that period paid \$10,057.53, where complainant had demanded \$310,000.<sup>184</sup>
- In a complaint filed with FINRA by an Ohio resident on or about August 12, 2010, in FINRA Case Number 10-03538, Respondent was accused of placing the complainant in an unsuitable investment, specifically ETFs, on or about December 30, 2004. The complainant alleged that Respondent invested in excessive concentration, namely \$90,000 of an aggregate \$117,000 investment, in ETFs. While Respondent made no individual

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<sup>180</sup> Ex. FF.

<sup>181</sup> Tr. Ex. FF.

<sup>182</sup> Tr. Vol. VI pp. 29, 30, 37.

<sup>183</sup> Tr. Vol. VI pp. 30-46.

<sup>184</sup> Tr. Vol. VI p. 31; Ex. GG p. 21.

contribution to resolve the complaint, Respondent's employer, at the time, paid approximately \$38,500, where complainant had demanded \$76,000.<sup>185</sup>

- In a complaint filed with FINRA by Ohio residents on or about July 26, 2011, in FINRA Case Number 11-02739, Respondent was accused of placing complainants in unsuitable investments, namely ETFs, during 2008 and 2009. The complainants alleged total losses of \$260,000. While Respondent made no individual contribution, Respondent's employer, at that time, paid the \$250,000 pursuant to a settlement in this case,<sup>186</sup>
- In a complaint filed with FINRA by Ohio residents on or about December 6, 2012, Respondent was accused of placing complainants in unsuitable investments, specifically ETFs, during 2008 and 2009. The complainants alleged \$450,000 in damages. Respondent's employer during that period paid approximately \$252,500 to settle this case, with no contribution from Respondent;<sup>187</sup>
- In a complaint filed with FINRA by Ohio residents on January 28, 2014, in FINRA Case Number 14-00099, Respondent was accused of placing complainants in unsuitable investments, specifically ETFs from approximately September 15, 2005 through September 30, 2009. The complainants alleged losses of \$447,000. Respondent's employer at the time of the alleged violations paid \$90,000 plus \$1475 for reimbursement of FINRA filing fees to settle this case, with no contribution by Respondent;<sup>188</sup>
- In a complaint filed with FINRA by Montana residents on or about November 15, 2013, in FINRA Case Number 12-03264, Respondent was accused of placing complainants in unsuitable investments, specifically leveraged ETFs, in or about November 2008. The complainant alleged losses of \$750,000. While Respondent made no individual contribution, Respondent's employer, during that time, paid \$500,000 through settlement in this case.<sup>189</sup>
- A complaint filed in the Court of Common Pleas of Allegheny County, Pennsylvania by Dr. McDonald against Respondent alleging fraud, breach of fiduciary duty, and breach of contract.<sup>190</sup>

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<sup>185</sup> Tr. Vol. VI pp. 43-44; Ex. GG pp. 21, 22.

<sup>186</sup> Tr. Vol. VI pp. 44, 45; Ex. GG pp. 23-25.

<sup>187</sup> Tr. Vol. VI p. 45; Ex. GG p. 26.

<sup>188</sup> Tr. Vol. VI p. 46; Ex. GG pp. 28-30.

<sup>189</sup> Tr. Vol. VI p. 46; Ex. GG pp. 30-32.

<sup>190</sup> Ex. GG pp. 39, 40; Ex. H; Ex. I; Ex. J; Ex. DD.

{¶ 167} Paragraph 23 alleges five specific inaccuracies in subparagraphs (a) through (e). As previously noted, the parties stipulated that paragraphs 23(b) and (d) of the Division Order were dismissed.<sup>191</sup>

{¶ 168} The Division proved the allegations in paragraphs 20 and 21 and the remaining three alleged inaccuracies described in paragraph 23 that these allegations appeared in the CRD and that Fife improperly responded “no” to following Form U-4 questions:

- 14I(1)(a) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged you were *involved* in one or more *sales practice violations* and which:

(a) is still pending, or;

(d) was settled, on or after 05/18/2009, for an amount of \$15,000 or more?

- 14I(4)(a) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged you were *involved* in one or more *sales practice violations* and which:

(a) was settled for an amount of \$15,000 or more...?<sup>192</sup>

{¶ 169} Fife admits that the Division Order charges concerning the inaccuracies in Fife’s Form U-4 filed March 24, 2010, are correct.<sup>193</sup>

{¶ 170} There was no proof offered or determination made in this case concerning whether the allegations made in the various cases appearing in paragraph 20 of the Division Order are true. The Division does not, for purposes of O.A.C. 1301:6-3-19(D), have to prove the underlying misconduct that gives rise to the incidents reported on the CRD. It is enough that the Division

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<sup>191</sup> Tr. Vol. I pp. 22-25.

<sup>192</sup> Tr. Vol. VI pp. 37-47; Ex. FF.

<sup>193</sup> Fife Post-Hearing Memorandum p. 58.

prove that the allegations were made. See *In the Matter of: Timothy Patrick Lofton*, CRD Number 2385447, *Final Order, Order No. 10-044*.<sup>194</sup> The Division has met that burden of proof.

{¶ 171} Fife argues he should not be held responsible for the failures to make proper filings regarding his license because he had hired an attorney to do it and he thought it was being taken care of. Fife acknowledged that he is ultimately responsible for filing the correct paperwork for his license.<sup>195</sup>

{¶ 172} Fife is the licensee and responsible to make certain all filings concerning him are complete and accurate. Those filings were not complete and accurate. Fife's failures maintain accurate disclosures are grounds for discipline.

#### Client Witnesses Presented by Fife

{¶ 173} During the hearing Fife presented four witnesses who were clients of his at various times (Timothy Nickum, Dr. John DeSarro, Richard Obert and Samuel Dean). They said Fife bought and sold on their behalf leveraged and inverse ETFs. They all spoke highly of Fife and his services.<sup>196</sup>

{¶ 174} Fife was the only investment advisor Nickum has had and Nickum is happy with Fife.<sup>197</sup> Dr. DeSarro said that he understood the risks of the types of investments Fife was putting him in, did not need to rely on the investments to support his life style and was willing to take the risk.<sup>198</sup>

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<sup>194</sup> Ex. HH p. 12, Section B 2.

<sup>195</sup> Tr. Vol. IX p. 236.

<sup>196</sup> Nickum Tr. Vol. IV pp. 57-102; DeSarro Tr. Vol. IV pp. 103-154; Obert Tr. Vol. X pp. 94-126; Dean Tr. Vol. X pp.127-152.

<sup>197</sup> Tr. Vol. IV p. 82.

<sup>198</sup> Tr. Vol. IV p. 145.

{¶ 175} Obert said Fife recommended to him leveraged mutual funds and discussed their risk; they “sounded very attractive to me, and the risk, you know, was within my tolerance range; so I said, ‘Go for it.’”<sup>199</sup>

{¶ 176} Dean said he became a client when he was around 30 and gave Fife \$20,000.00 to \$25,000.00 to invest. He said it was “just for growth” and he wanted to “ride the stock market trusting Tim to do it for me.”<sup>200</sup> He said Fife discussed leveraged mutual funds and ETFs.<sup>201</sup> Dean said Fife:

was clear to me about the risk/reward ratio and what they were doing, and I was okay with that. You know, it's my money, I trust them to manage it properly. And like I've said to other people, I have my big boy pants on. You know, I don't expect every market just to go up, there's a risk in investment.<sup>202</sup>

{¶ 177} Dean said the maximum amount he has had invested with Fife was \$50,000.00 and that he has never felt misled by Fife.<sup>203</sup>

{¶ 178} Unlike the complainants in this case, these four individuals were pleased with Fife, understood the investments and/or were willing to take the risks associated with them. The fact that Fife has clients who want to take high risks does not mean that individuals such as the complainants should be in similar investments.

{¶ 179} R.C. 1707.01 (X)(1) defines investment adviser to mean:

... any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of regular business, issues or promulgates analyses or reports concerning securities.

{¶ 180} R.C. 1707.01 (CC) (1) defines investment adviser representative to mean:

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<sup>199</sup> Tr. Vol. X p. 102.

<sup>200</sup> Tr. Vol X p. 130.

<sup>201</sup> Tr. Vol. X pp. 132, 134.

<sup>202</sup> Tr. Vol. X p. 135.

<sup>203</sup> Tr. Vol. X pp. 135-140.

...a supervised person of an investment adviser, provided that the supervised person has more than five clients who are natural persons other than excepted persons defined in division (EE) of this section, and that more than ten per cent of the supervised person's clients are natural persons other than excepted persons defined in division (EE) of this section.

{¶ 181} R.C. 1707.44 is entitled "Prohibited Acts." R.C. 1707.44 (A) provides in pertinent part:

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(2) No person shall engage in any act or practice that violates division (A) of section 1707.141 or section 1707.161 of the Revised Code.

{¶ 182} R.C. 1707.141 provides in part:

(A) No person shall act as an investment adviser, unless one of the following applies:

(1) The person is licensed as an investment adviser by the division of securities; however, nothing in this section shall be construed to prohibit a person from being licensed by the division as both an investment adviser and a dealer or salesperson.

{¶ 183} R.C. 1707.161 provides in part:

(A) No person shall act as an investment adviser representative, unless one of the following applies:

(1) The person is licensed as an investment adviser representative by the division of securities.

{¶ 184} Fife violated R.C. 1707.44(A)(2) by acting as an investment adviser or investment adviser representative during the time he did not have a securities license (September 16, 2009, to April 1, 2010).

{¶ 185} R.C. 1707.44 provides in part:

(B) No person shall knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:

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(5) Advising for compensation, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities;

{¶ 186} Fife violated R.C. 1707.44(B)(5) by falsely assuring the complainants in this case that their monies would be placed in low-risk investments, suitable to them and their investment wishes.

{¶ 187} The Division also requests that Fife be found to have violated R.C. 1707.44(B)(5) by falsely leading Svoboda and Michel to believe he worked for Charles Schwab when he did not and for falsely leading Dr. McDonald and the Medvecs to believe that a stop-loss feature would be in place when they invested through him. As noted, the Division did not prove those two allegations. Fife did not work for Charles Schwab and made no effort to imply to any of the complainants that he did. Fife did not use a stop-loss with leveraged and inverse ETFs and did not imply to any of the complainants that he did.

{¶ 188} R.C. 1707.44(M) provides in part:

(1) No investment adviser or investment adviser representative shall do any of the following:

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(b) Engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person;

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(d) Engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative. The division of securities may adopt rules reasonably designed to prevent acts, practices, or courses of business that are fraudulent, deceptive, or manipulative.

{¶ 189} Fife violated R.C. 1707.44(M)(1)(b) and (d) by obtaining client funds through misrepresentation of the risk and the terms and nature of the securities that would be and were purchased on their behalf.

{¶ 190} O.A.C. 1301:6-3-16.1 provides in part:

(A) License application contents and procedure. Pursuant to division (D) of section 1707.161 of the Revised Code, investment adviser representative license application and procedure shall be as follows:

(1) The license application specified in division (D) of section 1707.161 of the Revised Code shall consist of:

(a) A properly completed form U-4, "Uniform Application for Securities Industry Registration or Transfer" for each investment adviser for whom the applicant seeks to act as an investment adviser representative;

{¶ 191} O.A.C. 1301:6-3-16.1 also provides in part:

(C) Updating. Updates to the form U-4 shall be promptly filed with the division through the "CRD".

{¶ 192} Fife violated O.A.C. 1301:6-3-16.1(A) and (C) by failing to update his Form U-4 to provide accurate licensure disclosures.

{¶ 193} R.C. 1707.19 describes reasons for which the Division may suspend or revoke a license of an investment adviser representative such as Fife. R.C. 1707.19(A) provides that the Division may suspend or revoke the license of an investment adviser representative if the Division determines that the investment adviser representative:

(1) Is not of good business repute;

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(4) Has knowingly violated any provision of sections 1707.01 to 1707.45 of the Revised Code, or any regulation or order made thereunder;

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(9) Conducts business in violation of such rules and regulations as the division prescribes for the protection of investors, clients, or prospective clients;

{¶ 194} O.A.C. 1301:6-3-19(D) provides that the Division when determining “good business repute” shall consider whether the licensee such as Fife:

(8) Has violated any provision of paragraph (A) or (B) of this rule, any provision of Chapter 1707. of the Revised Code or any rule promulgated thereunder;

(9) Has engaged in any conduct which would reflect on the reputation for honesty, integrity, and competence in business and personal dealings of the applicant, investment adviser, investment adviser representative, dealer, salesperson or state retirement system investment officer or bureau of workers' compensation chief investment officer including, but not limited to, forgery, embezzlement, nondisclosure, incomplete disclosure, misstatement of material facts, and manipulative or deceptive practices;

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(11) Has been the subject of any complaint, arbitration or civil litigation that alleges a violation of state or federal law, or the rules or code of ethics of any association of investment advisers, investment adviser representatives, securities salespersons or dealers, any professional association granted disciplinary or regulatory authority by state or federal law, or by any recognized securities exchange, excluding any complaint that has been denied or any arbitration or civil litigation that resulted in a judgment or an award against the party bringing the action;

{¶ 195} The Division alleges Fife is not of good business repute and requests that Fife’s license be revoked. The Division proved that Fife is not of good business repute.

#### RECOMMENDATION

For all of the reasons discussed in this Report and Recommendation, it is recommended that the investment adviser representative license of Fife be revoked.

Dated: February 2, 2016



Robert J. Walter (0009491)  
Hearing Examiner  
rwalter@lanealton.com  
(614) 233-4749