

Re Sammy

IN THE MATTER OF:

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

and

Krishna Sammy

2016 IIROC 04

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

Heard: November 23, 24, 25 and 26, 2015 at Toronto, Ontario
Decision: January 18, 2016

Hearing Panel:

Patrick T. Galligan, Q.C., Chair, Debbie Archer and Neil Murphy

Appearances:

Robert Del Frate, Senior Enforcement Counsel

Edward Chan, Agent for the Respondent

REASONS FOR DECISION

¶ 1 This Hearing Panel was convened to hear three charges of contraventions against the Respondent. The charges are set out in the Amended Notice of Hearing dated March 3, 2015. The charges are as follows:

- (i) On multiple occasions between January 2009 and December 2011, the Respondent purchased or recommended the purchase of securities in client accounts on the same day he either had sold or intended to sell the securities of these same issuers from his personal account, thereby placing him in a conflict of interest with those clients which he failed to address appropriately, contrary to Dealer Member Rules 29.1 and National Instrument 31-103.
- (ii) On multiple occasions between January 2009 and December 2011, the Respondent purchased securities in managed client accounts on the same day he either had sold or intended to sell the securities of these same issuers from his personal account:
 - a. without the written consent of his clients, contrary to Dealer Member Rule 1300.19; and
 - b. in reliance upon information as to trades made or to be made in managed accounts, contrary to Dealer Member Rule 1300.18.
- (iii) Between January 2009 and December 2011, the Respondent recommended the purchase of securities to several clients without using due diligence to ensure that:
 - a. The recommendations were suitable for the clients based on their financial situation, investment knowledge, investment objectives and risk tolerance contrary to Dealer Member Rule 1300.1(q); and/or
 - b. The recommendations were in accordance with the risk tolerance stated on clients' New

Account Application Forms and within the bounds of good business practice, contrary to Dealer Member Rules 1300.1(o) and/or (q).

REGISTRATION HISTORY

¶ 2 The following is the Respondent's registration history.

¶ 3 From August 1999 until December 2011, the Respondent was registered as a Registered Representative and Supervisor with a Brampton, Ontario branch of DWM Securities Inc. (previously Dundee Securities Corporation), an IIROC Dealer Member.

¶ 4 From December 2011 until November 2012, the Respondent was registered as a Registered Representative and Supervisor with a Brampton, Ontario branch of Canaccord Genuity Corp., an IIROC Dealer Member. The Respondent has not been registered in the securities industry since November 2012. The Respondent had previously been registered in the securities industry in various capacities dating back to 1989.

PRELIMINARY MATTERS

¶ 5 On April 7, 2015, on consent, the hearing was fixed to proceed during the full week commencing November 23, 2015.

¶ 6 On November 18, 2015, by way of a telephone conference call, counsel for the Respondent, Robyrt Regan, moved for leave, pursuant to Rule 3.3(2), to withdraw as counsel for the Respondent. Because the material supporting the motion had not been provided to the Hearing Panel, the motion was adjourned to the opening of the hearing on November 23, 2015. The Hearing Panel heard the motion on November 23, 2015 and, after deliberation, we granted Mr. Regan leave to withdraw.

¶ 7 Enforcement counsel advised the Hearing Panel that late in the afternoon of the previous Friday, November 20, 2015, he received an email from the Respondent advising that Mr. Edward Chan would appear on his behalf. Mr. Chan is not a lawyer. In accordance with Rule 3.1 the Hearing Panel permitted Mr. Chan to appear and represent the Respondent as his agent.

¶ 8 The Response required by Rule 7.1(2) was not served upon enforcement counsel until November 21, 2015 at 6:27 p.m. The Response does not comply with Rule 7.3(1)(b) because it does not contain the grounds for his general denial.

¶ 9 Enforcement counsel stated that IIROC was ready to proceed and wished to do so. Mr. Chan asked that the hearing be adjourned. Enforcement counsel opposed the request. The Hearing Panel heard submissions then its members deliberated. We concluded that the Respondent had had a reasonable opportunity to prepare for the hearing and appear at it, but that he failed to take advantage of that opportunity. Indeed the whole of the circumstances led us to conclude that the Respondent was attempting to avoid or to stall the hearing. We directed that the case proceed.

¶ 10 Enforcement counsel made an opening statement. He called *viva voce* evidence and tendered several volumes of documentary evidence. Mr. Chan cross-examined the witnesses who testified. At midday on November 25, 2015 enforcement counsel closed IIROC's case.

¶ 11 The Hearing Panel then called upon Mr. Chan to present the Respondent's case. He advised that he wished to call the Respondent as a witness but that he was in Guyana and would not appear in person. Mr. Chan asked that the Respondent be permitted to testify by Skype. The Hearing Panel decided that should be permitted. It ruled that it was the Respondent's responsibility to make the necessary arrangements and be able to proceed at 10:00 a.m. the following day, November 26, 2015. The hearing was adjourned accordingly.

¶ 12 On November 26, 2015, the Respondent testified by Skype. Upon the completion of his testimony, enforcement counsel elected not to call reply evidence. It was then agreed that the parties would make their closing submissions in writing. Those submissions have been provided to the Hearing Panel.

OVERVIEW

¶ 13 Broadly speaking the contraventions alleged against the Respondent fall into two distinct categories. The first category is made up of the charges set out in Counts (i) and (ii) of the Notice of Hearing. They arise out of allegations that the Respondent sold shares which he owned on the same days that he purchased shares of the same issuer for his clients. We propose to examine the evidence and the law with respect to those sales and purchases under the rubric of conflict of interest.

¶ 14 The second category is comprised of the charge set out in Count (iii). It arises out of allegations that the Respondent put his clients into securities which were unsuitable for them and which were not in accordance with their risk tolerance. We propose to examine the evidence and the law with respect to them under the rubric of suitability of investments.

¶ 15 The two categories can be conveniently discussed separately.

ASSESSMENT OF CREDIBILITY

¶ 16 At the hearing, enforcement counsel called five witnesses. The first witness was Yu Chen, a senior investigator with IROC. The other witnesses were four of the Respondent's former clients. They were J.P., N.A., C.M. and W.B. All of these witnesses were cross-examined by Mr. Chan on behalf of the Respondent. Some of the cross-examinations were vigorous. The Respondent testified by Skype and was cross-examined by enforcement counsel.

¶ 17 After a consideration of the manner in which these witnesses testified and the inherent probability or improbability of the facts to which they testified we find that the witnesses who testified on behalf of IROC were credible. We accept their testimony without reservation.

¶ 18 The Respondent's evidence was peppered with generalities, vagaries and assumptions. His testimony was not impressive. Where any conflict exists between testimony given by the five IROC witnesses and that given by the Respondent we accept that of the former and reject that of the latter.

CONFLICT OF INTEREST

¶ 19 The evidence discloses that during the time particularized in the Notice of Hearing, in the years 2009, 2010 and 2011 the Respondent had significant personal holdings in two stocks. They were Mahdia Gold Corp. ("Mahdia") and Northcore Technologies Inc. ("Northcore").

¶ 20 During those three years, on 16 specific days, the Respondent purchased shares of those stocks for certain of his clients and on the same days sold personal shares of his own.

¶ 21 Mr. Yu Chen has examined the trade tickets for each of the 16 days. We accept his evidence and find that the following chart shows the Respondent's trading in Mahdia and in Northcore between January 5, 2009 and December 7, 2011.

MAHDIA GOLD

	Shares Bought for Clients	Personal Shares Sold
1. Nov. 22/10	230,000	140,000
2. Nov. 25/10	130,000	100,000
3. June 6/11	101,000	30,000
4. Aug. 2/11	30,000	70,000
5. Aug. 3/11	35,000	200,000
6. Nov. 14/11	105,000	150,000
7. Dec. 7/11	<u>117,000</u>	<u>100,000</u>
	748,000	790,000

NORTHCORE TECH

	Shares Bought for Clients	Personal Shares Sold
1. Jan. 5/09	27,000	100,000
2. May 29/09	24,000	54,000
3. June 5/09	21,000	71,000
4. Oct. 1/09	146,000	100,000
5. Dec. 21/09	155,000	130,000
6. Dec. 29/09	47,000	136,000
7. Jan. 7/10	3,000	50,000
8. June 16/10	42,000	50,000
9. July 12/10	<u>500</u>	<u>75,000</u>
	465,500	766,000

¶ 22 The Respondent told some of his clients that he held positions in those two stocks. That information provided some comfort to them and tended to give them confidence in their investments. However there is no evidence, even from the Respondent himself, that he ever told them that on days when he was buying for them he was selling some of his own holdings in those stocks.

¶ 23 Each of J.P., N.A., C.M. and W.B. testified that the Respondent never told them that he was selling some of his personal shares on the same day that he was purchasing shares of the same issuer for them. Each testified, in his or her own way, that if they had been told, they would have been concerned. The common concern was “why is he buying for me at the same time that he is selling his own shares?” That is a fair question.

¶ 24 In his opening statement, enforcement counsel said that he could not prove any direct crosses between a purchase for a client and a personal sale. The position of the Respondent is that he sold personal holdings from time to time for his personal or business needs.

¶ 25 There are technical differences between counts (i) and (ii) which are, to some extent at least, based upon the difference between ordinary accounts and managed accounts. We think that it is not necessary to examine the difference between the charges based upon whether an account was a managed one or not, because the overriding issue is conflict of interest.

¶ 26 We think that what we must first decide is whether the sale of one’s own shares while buying for a client is conduct which observes high standards of ethics and conduct or whether it is conduct which is unbecoming or detrimental to the public interest. This question must be looked at in the light of the requirement that persons working in the financial industry must be held to a very high standard of financial probity.

¶ 27 The Hearing Panel in *Little (Re)*, [2007] I.D.A.C.D. No. 24 at para. 42 said:

... The public interest demands that Members of the industry, and their employees, be held to a very high standard of financial probity. They must be trusted because they handle other people’s money. They must be seen to be trustworthy. If conduct could even appear to cast doubt upon that probity, then it could be detrimental to the public interest and constitute conduct unbecoming.

¶ 28 It is probably not an exaggeration to say that there is always a conflict between the interest of a seller and that of a buyer. It is in the buyer’s interest to pay as low a price as possible. It is in the seller’s interest to obtain as high a price as possible. The conflict is clear. While there is no evidence that any of the Respondent’s clients actually bought some of his shares the situation was such that there had to be at the very least the

appearance of a conflict in their respective interests on each of the 16 days. In *Phillips (Re)*, 2013 IIROC 52, the Hearing Panel observed that no rule is required to find that an approved person is in a conflict of interest. “Common sense is sufficient.” (para. 62)

¶ 29 It is our opinion that common sense dictates that there is an obvious conflict of interest between an advisor who sells his own stock virtually contemporaneously with his purchase of stock from the same issuer on behalf of a client. At the very least it would appear to be a conflict of interest. Because the clients were not told of the sales at the time purchases were being made for them, it is irrelevant to enquire, or even to speculate, what might have been their answer if they had been told.

¶ 30 The gravamen of the offence is the failure to disclose. It is not the task of this Hearing Panel to attempt to prescribe rules about how disclosure should be made and how it should be documented because, in this case, disclosure was neither made nor attempted.

¶ 31 Our finding is that when the Respondent decided to sell his stock at a time when he was buying the same stock for clients he put himself in a clear conflict of interest with his clients. He failed to disclose that conflict before completing the transactions.

¶ 32 As noted earlier, the Respondent contends that his sales were straightforward ones made for legitimate personal or business reasons. Unfortunately for him that is not an answer to the charge. The motivation for his sales is irrelevant. His position, as his clients’ financial adviser, required of him a high standard of financial probity to them. His failure to see the obvious question which a client would ask “why are you buying for me when you are selling your own” indicates a failure to understand the importance of his being seen as completely trustworthy. We hold that the Respondent’s failure to disclose his sales when buying the same stock for his clients does not observe high standards of ethics and business conduct and amounts to conduct which is unbecoming. We found our decision on that part of Member Rule 29.1 which mandates that an employee of a Dealer Member:

- (i) shall observe high standards of ethics and conduct in the transaction of their business,
- (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest ...

¶ 33 We conclude, therefore, that the contravention alleged in Count (i) is established on the reasonable balance of probabilities.

¶ 34 Count number (ii), while it differs in some of its legal aspects, is founded upon exactly the same trading activities as is Count number (i). The Supreme Court of Canada, in *Q. v. Kienapple*, [1975] 1 S.C.R. 729, has ruled against the making of multiple convictions based upon the same facts. Since we have convicted on Count number (i) we cannot convict on Count number (ii) because it is based on the same facts. We direct that Count number (ii) be stayed.

SUITABILITY OF INVESTMENTS

¶ 35 We start by observing that it is fundamental to the relationship between a client and an advisor that the latter knows his or her client and acts on the client’s behalf in accordance with that knowledge. This concept is emphasized in many cases. We make reference to only two of them.

¶ 36 We cite, first, from *Myatovic (Re)* 2012 IIROC 47:

108 The Know-Your-Client Rule is one of the basic tenets that defines the relationship between a registered representative and his or her client. Consequently with the opening of an account, a registered representative has the obligation to make diligent efforts to learn of and to record the financial and personal circumstances of the client. This research obligation includes a full understanding of the prospective client’s entire financial circumstances, both existing and anticipated. It also includes an informed assessment of the prospective client’s knowledge and experience with investing and capital markets. This informed assessment is essential to enable

the registered representative to work with the prospective client to better define his or her investment objectives and risk tolerances. And this research obligation includes a reasonable inquiry into the prospective client’s business and personal relationships to assist the registered representative to properly advise the prospective client with the future trading activity in the account.

...

112 ... the registered representative has the duty to monitor the trading of securities in the account to ensure that the securities traded in the account are suitable for the investment experience, investment objectives, and risk tolerances defined for the account.

(Emphasis added)

¶ 37 *Lamoureux (Re)* 2001 A.S.C.D. No. 613, a decision of the Alberta Securities Commission contains this statement at p. 23:

The suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the risks associated with the investment product with the risk profile of the investor. This comparison is probably the most critical element in the registrant’s suitability obligation.

(Emphasis added)

Additionally, we note that the Conduct and Practices Handbook identifies “Risk Tolerance” as one of the most important factors in assessing a client’s situation.

¶ 38 a) Investments out of line with Clients’ risk tolerances

We have considered both the oral testimony of the Respondent’s former clients and the substantial documentary evidence which is in the record. The documentary evidence includes records of the Respondent which were retrieved from the Member.

¶ 39 We have also weighed the testimony of Yu Chen. Mr. Chen analysed client account statements and determined the conformity of client holdings to the risk tolerances in their NAAFs. We accept his opinion as to the risk categories into which the various holdings fell. We also accept the methodology by which he formed his opinion about the risk concentrations at different times in the client accounts.

¶ 40 He prepared a number of charts titled “Suitability Analysis”. They are all included in Exhibit #2. We intend to incorporate some of those charts into these reasons for our decision. We find as a fact that each of the charts, which we incorporate, accurately shows the risk proportions in the client accounts at the various times shown in them.

¶ 41 Client N.A. testified – On February 2, 2007, he opened a RRSP account with the Respondent. The New Client Application Form (“NAAF”) provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that, during the years 2010 and 2011, the proportion of high risk securities in the portfolio substantially exceeded 40%. The monthly proportions are as follows:

EXHIBIT #2-1, TAB 4

Sum of Market Value	Column Labels			Grand Total
	Low	Medium	High	
Row Labels				
1/31/2010	3.77%	40.28%	55.95%	100.00%
2/28/2010	0.13%	37.48%	62.39%	100.00%

3/31/2010	0.23%	41.48%	58.29%	100.00%
4/30/2010	7.72%	38.71%	53.57%	100.00%
5/31/2010	8.14%	37.85%	54.00%	100.00%
6/30/2010	8.04%	35.59%	56.37%	100.00%
7/31/2010	5.93%	20.35%	73.71%	100.00%
8/31/2010	7.11%	22.57%	70.31%	100.00%
9/30/2010	7.71%	24.90%	67.39%	100.00%
10/31/2010	6.65%	23.14%	70.22%	100.00%
11/30/2010	7.77%	27.12%	65.11%	100.00%
12/31/2010	20.50%	15.97%	63.52%	100.00%
1/31/2011	17.55%	14.68%	67.77%	100.00%
2/28/2011	1.04%	8.50%	90.46%	100.00%
3/31/2011	1.34%	11.86%	86.80%	100.00%
4/30/2011	0.76%	12.35%	86.89%	100.00%
5/31/2011	0.63%	8.27%	91.09%	100.00%
6/30/2011	0.91%	10.95%	88.15%	100.00%
7/31/2011	0.24%	9.95%	89.81%	100.00%
8/31/2011	0.40%	10.07%	89.53%	100.00%
9/30/2011	0.53%	11.56%	87.91%	100.00%
10/31/2011	13.01%	0.00%	86.99%	100.00%
11/30/2011	18.23%	0.00%	81.77%	100.00%
12/31/2011	21.75%	0.00%	78.25%	100.00%
Grand Total	5.86%	20.84%	73.30%	100.00%

¶ 42 On February 2, 2007, N.A. also opened a RESP account with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that during the years 2010 and 2011 the proportion of high risk securities in the portfolio on most months exceeded 40%. The monthly proportions are as follows:

EXHIBIT #2-1, TAB 6

Row Labels	Sum of Market Value			Grand Total
	Low	Medium	High	
1/31/2010	3.53%	43.89%	52.57%	100.00%
2/28/2010	1.95%	41.02%	57.02%	100.00%
3/31/2010	2.36%	44.16%	53.48%	100.00%
4/30/2010	11.85%	42.24%	45.91%	100.00%

5/31/2010	10.38%	42.28%	47.34%	100.00%
6/30/2010	7.22%	39.92%	52.86%	100.00%
7/31/2010	11.62%	32.00%	56.38%	100.00%
8/31/2010	5.53%	35.23%	59.24%	100.00%
9/30/2010	4.43%	38.04%	57.53%	100.00%
10/31/2010	3.64%	36.32%	60.04%	100.00%
11/30/2010	4.12%	40.46%	55.41%	100.00%
12/31/2010	1.95%	46.62%	51.43%	100.00%
1/31/2011	1.19%	41.51%	57.29%	100.00%
2/28/2011	5.39%	37.29%	57.32%	100.00%
3/31/2011	6.20%	42.05%	51.75%	100.00%
4/30/2011	6.36%	46.87%	46.77%	100.00%
5/31/2011	5.98%	42.12%	51.91%	100.00%
6/30/2011	7.17%	46.89%	45.94%	100.00%
7/31/2011	6.51%	44.66%	48.83%	100.00%
8/31/2011	7.18%	46.37%	46.45%	100.00%
9/30/2011	8.91%	51.17%	39.92%	100.00%
10/31/2011	8.66%	56.46%	34.88%	100.00%
11/30/2011	10.21%	63.91%	25.88%	100.00%
12/31/2011	11.04%	68.84%	20.11%	100.00%
Grand Total	6.20%	43.20%	50.60%	100.00%

¶ 43 On February 2, 2007, N.A. also opened a Canadian Margin account with the Respondent. The NAAF provided for a risk tolerance of 50% medium and 50% high. The evidence shows that, in 18 months during the years 2010 and 2011, the proportion of high risk securities in the portfolio exceeded 50%, sometimes dramatically so. The monthly proportions are as follows:

EXHIBIT #2-1, TAB 2

Sum of Market Value	Column Labels			Grand Total
	Low	Medium	High	
Row Labels				
1/31/2010	19.72%	20.34%	59.94%	100.00%
2/28/2010	8.24%	18.64%	73.12%	100.00%
3/31/2010	9.15%	20.68%	70.17%	100.00%
4/30/2010	20.04%	19.37%	60.59%	100.00%
6/30/2010	19.10%	17.74%	63.16%	100.00%
7/31/2010	8.95%	12.91%	78.15%	100.00%

9/30/2010	11.04%	17.17%	71.79%	100.00%
10/31/2010	9.68%	15.18%	75.14%	100.00%
12/31/2010	33.21%	0.00%	66.79%	100.00%
1/31/2011	28.99%	0.00%	71.01%	100.00%
2/28/2011	5.63%	0.00%	94.37%	100.00%
3/31/2011	6.89%	0.00%	93.11%	100.00%
4/30/2011	7.79%	0.00%	92.21%	100.00%
6/30/2011	8.24%	0.00%	91.76%	100.00%
7/31/2011	7.15%	0.00%	92.85%	100.00%
9/30/2011	10.93%	0.00%	89.07%	100.00%
10/31/2011	11.91%	0.00%	88.09%	100.00%
12/31/2011	22.19%	0.00%	77.81%	100.00%
Grand Total	13.15%	8.65%	78.20%	100.00%

¶ 44 NA had one other account with the Respondent. We do not think it is necessary to analyze that other account to see whether it too was beyond N.A.'s risk tolerance.

¶ 45 Client W.B. testified – On December 29, 2005, he opened an RRSP account with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that during the years 2010 and 2011 the proportion of high risk securities grossly exceeded 40%. The monthly proportions for the months for which there is evidence are as follows:

EXHIBIT #2-2, TAB 13

Sum of Market Value	Column Labels				Grand Total
	Row Labels	N/A	Low	Medium	
1/31/2010	0.00%	7.86%	28.96%	63.19%	100.00%
2/28/2010	0.00%	3.92%	28.18%	67.90%	100.00%
3/31/2010	0.00%	13.81%	30.63%	55.56%	100.00%
4/30/2010	0.00%	7.82%	28.82%	63.36%	100.00%
5/31/2010	0.00%	10.77%	29.82%	59.41%	100.00%
6/30/2010	0.00%	10.24%	27.10%	62.66%	100.00%
7/31/2010	0.00%	4.36%	15.92%	79.72%	100.00%
8/31/2010	0.01%	1.52%	0.00%	98.47%	100.00%
9/30/2010	0.02%	0.99%	0.00%	98.99%	100.00%
10/31/2010	0.00%	2.07%	0.00%	97.93%	100.00%
11/30/2010	0.00%	4.92%	0.00%	95.08%	100.00%
12/31/2010	0.00%	5.82%	1.66%	92.52%	100.00%

2/28/2011	0.00%	4.22%	1.09%	94.69%	100.00%
5/31/2011	0.00%	15.59%	1.00%	83.41%	100.00%
8/31/2011	0.00%	21.76%	1.38%	76.86%	100.00%
11/30/2011	0.00%	32.09%	2.09%	65.82%	100.00%
Grand Total	0.00%	8.81%	11.67%	79.52%	100.00%

¶ 46 Client J.P. testified – On September 24, 2002, she opened an RRSP account with the Respondent. The NAAF provided for a risk tolerance of 80% medium and 20% high. The evidence discloses that during the years 2010 and 2011 the proportion of high risk securities in the portfolio greatly exceeded 20%. The monthly proportions are as follows:

EXHIBIT #2-5, TAB 34

Sum of Market Value	Column Labels				Grand Total
Row Labels	N/A	Low	Medium	High	Grand Total
1/31/2010	0.00%	0.36%	46.05%	53.60%	100.00%
2/28/2010	0.00%	5.76%	42.31%	51.94%	100.00%
3/31/2010	0.02%	2.16%	44.00%	53.83%	100.00%
4/30/2010	0.02%	0.27%	43.28%	56.43%	100.00%
5/31/2010	0.02%	0.01%	42.74%	57.23%	100.00%
6/30/2010	0.02%	0.01%	42.39%	57.58%	100.00%
7/31/2010	0.02%	0.16%	39.94%	59.89%	100.00%
8/31/2010	0.01%	2.65%	35.95%	61.39%	100.00%
9/30/2010	0.01%	0.18%	37.48%	62.33%	100.00%
10/31/2010	0.02%	0.29%	36.89%	62.81%	100.00%
11/30/2010	0.00%	0.69%	44.76%	54.55%	100.00%
12/31/2010	0.00%	0.70%	47.60%	51.70%	100.00%
1/31/2011	0.00%	0.77%	44.87%	54.36%	100.00%
2/28/2011	0.00%	12.65%	35.76%	51.59%	100.00%
3/31/2011	0.00%	15.18%	38.39%	46.43%	100.00%
4/30/2011	0.00%	15.02%	36.37%	48.61%	100.00%
5/31/2011	0.00%	11.79%	28.00%	60.21%	100.00%
6/30/2011	0.00%	14.59%	33.65%	51.76%	100.00%
7/31/2011	0.00%	15.50%	35.52%	48.98%	100.00%
8/31/2011	0.00%	15.87%	34.54%	49.59%	100.00%
9/30/2011	0.00%	17.78%	35.19%	47.03%	100.00%
10/31/2011	0.00%	17.65%	36.54%	45.81%	100.00%

11/30/2011	0.00%	19.49%	39.73%	40.78%	100.00%
12/31/2011	0.00%	20.32%	41.00%	38.68%	100.00%
Grand Total	0.00%	8.51%	38.76%	52.73%	100.00%

¶ 47 On May 25, 2006, JP opened a Canadian Margin account with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that during the years 2010 and 2011 the proportion of high risk securities in the portfolio greatly exceeded 40%. The monthly proportions are as follows:

EXHIBIT 2-5, TAB 36

Sum of Market Value	Column Labels				Grand Total
	Row Labels	N/A	Low	Medium	
1/31/2010	#####	13.29%	29.93%	56.79%	100.00%
2/28/2010	#####	10.85%	29.99%	59.17%	100.00%
3/31/2010	#####	4.59%	36.05%	59.36%	100.00%
4/30/2010	#####	2.86%	34.76%	62.37%	100.00%
5/31/2010	#####	6.86%	35.77%	57.37%	100.00%
6/30/2010	#####	4.28%	32.19%	63.53%	100.00%
7/31/2010	#####	1.01%	25.91%	73.09%	100.00%
8/31/2010	#####	0.00%	20.13%	79.87%	100.00%
9/30/2010	#####	0.00%	19.19%	80.81%	100.00%
10/31/2010	#####	0.00%	19.03%	80.97%	100.00%
11/30/2010	#####	0.00%	20.67%	79.33%	100.00%
12/31/2010	#####	0.00%	21.18%	78.82%	100.00%
1/31/2011	#####	0.00%	19.37%	80.63%	100.00%
2/28/2011	#####	0.00%	16.77%	83.23%	100.00%
3/31/2011	#####	0.00%	19.57%	80.43%	100.00%
4/30/2011	#####	0.00%	19.92%	80.08%	100.00%
5/31/2011	#####	0.00%	18.14%	81.86%	100.00%
6/30/2011	#####	0.00%	22.32%	77.68%	100.00%
7/31/2011	#####	0.00%	22.15%	77.85%	100.00%
8/31/2011	#####	0.00%	23.82%	76.18%	100.00%
9/30/2011	#####	0.00%	31.56%	68.44%	100.00%
10/31/2011	#####	6.15%	25.22%	68.63%	100.00%
11/30/2011	#####	7.43%	30.69%	61.88%	100.00%

12/31/2011	####	8.45%	34.55%	57.00%	100.00%
Grand Total	####	2.25%	24.45%	73.30%	100.00%

¶ 48 Client C.M. testified – On February 8, 2006, C.M. updated a LIRA account which she had with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that during the years 2010 and 2011 the proportion of high risk securities in the portfolio greatly exceeded 40%. The monthly proportions are as follows:

EXHIBIT #2-6, TAB 43

Sum of Market Value	Column Labels				Grand Total
Row Labels	N/A	Low	Medium	High	Grand Total
1/31/2010	0.00%	30.72%	0.00%	69.28%	100.00%
2/28/2010	0.00%	23.94%	0.00%	76.06%	100.00%
3/31/2010	0.00%	25.76%	0.00%	74.24%	100.00%
4/30/2010	0.00%	35.09%	0.00%	64.91%	100.00%
5/31/2010	0.00%	36.73%	0.00%	63.27%	100.00%
6/30/2010	0.00%	36.20%	0.00%	63.80%	100.00%
7/31/2010	0.00%	20.04%	7.91%	72.05%	100.00%
8/31/2010	0.00%	17.78%	8.56%	73.66%	100.00%
9/30/2010	0.00%	18.99%	9.49%	71.52%	100.00%
10/31/2010	0.00%	13.75%	9.54%	76.72%	100.00%
11/30/2010	0.00%	15.09%	10.26%	74.64%	100.00%
12/31/2010	0.00%	16.66%	11.43%	71.91%	100.00%
1/31/2011	0.00%	14.18%	10.22%	75.60%	100.00%
2/28/2011	0.00%	17.30%	8.77%	73.92%	100.00%
3/31/2011	0.00%	20.02%	9.80%	70.18%	100.00%
4/30/2011	0.00%	13.62%	11.22%	75.16%	100.00%
5/31/2011	0.00%	10.67%	8.88%	80.45%	100.00%
6/30/2011	0.00%	13.76%	10.74%	75.50%	100.00%
7/31/2011	0.00%	13.81%	10.52%	75.67%	100.00%
8/31/2011	0.00%	14.78%	11.28%	73.93%	100.00%
9/30/2011	0.00%	18.58%	13.56%	67.86%	100.00%
10/31/2011	0.00%	19.88%	15.07%	65.05%	100.00%
11/30/2011	0.00%	25.75%	17.56%	56.70%	100.00%
12/31/2011	0.00%	29.12%	19.86%	51.02%	100.00%
Grand Total	0.00%	20.26%	8.09%	71.66%	100.00%

¶ 49 On February 8, 2006, C.M. also updated a RRSP account which she had with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that during the years 2010 and 2011 the proportion of high risk securities in the portfolio substantially exceeded 40%. The monthly proportions are as follows:

EXHIBIT #2-6, TAB 44

Sum of Market Value	Column Labels				Grand Total
Row Labels	N/A	Low	Medium	High	Grand Total
1/31/2010	0.00%	28.63%	19.93%	51.44%	100.00%
2/28/2010	0.00%	20.85%	19.00%	60.14%	100.00%
3/31/2010	0.00%	22.09%	20.47%	57.44%	100.00%
4/30/2010	0.00%	31.01%	19.51%	49.48%	100.00%
5/31/2010	0.00%	32.16%	19.75%	48.09%	100.00%
6/30/2010	0.00%	31.49%	18.66%	49.85%	100.00%
7/31/2010	0.00%	16.03%	23.33%	60.64%	100.00%
8/31/2010	0.00%	12.45%	25.51%	62.04%	100.00%
9/30/2010	0.00%	13.05%	27.56%	59.38%	100.00%
10/31/2010	0.00%	14.03%	26.78%	59.19%	100.00%
11/30/2010	0.00%	13.35%	28.67%	57.98%	100.00%
12/31/2010	0.00%	14.80%	31.11%	54.09%	100.00%
1/31/2011	0.00%	12.98%	28.02%	59.01%	100.00%
2/28/2011	0.00%	17.05%	24.86%	58.09%	100.00%
3/31/2011	0.00%	19.11%	27.80%	53.09%	100.00%
4/30/2011	0.00%	13.69%	30.35%	55.96%	100.00%
5/31/2011	0.00%	11.44%	25.20%	63.36%	100.00%
6/30/2011	0.00%	14.06%	29.82%	56.13%	100.00%
7/31/2011	0.00%	14.21%	29.53%	56.26%	100.00%
8/31/2011	0.00%	15.06%	30.54%	54.40%	100.00%
9/30/2011	0.00%	7.10%	35.62%	57.27%	100.00%
10/31/2011	0.00%	7.44%	39.28%	53.27%	100.00%
11/30/2011	0.00%	8.89%	44.20%	46.90%	100.00%
12/31/2011	0.00%	10.12%	49.48%	40.41%	100.00%
Grand Total	0.00%	16.96%	27.20%	55.84%	100.00%

¶ 50 Client J.C. – Client J.C. did not testify. We examined records of the Respondent retrieved from the Member which form part of Exhibit #2-3. On July 19, 2007 J.C. opened a Spousal RRIF with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that during the

years 2010 and 2011, with the exception of two months, the proportion of high risk securities in the portfolio exceeded 40%. The monthly proportions are as follows:

EXHIBIT #2-3, TAB 19

Sum of Market Value	Column Labels				Grand Total
Row Labels	N/A	Low	Medium	High	
1/31/2010	0.00%	24.52%	23.43%	52.05%	100.00%
2/28/2010	0.00%	15.75%	23.20%	61.05%	100.00%
3/31/2010	0.00%	19.21%	33.41%	47.38%	100.00%
4/30/2010	0.00%	11.86%	31.76%	56.37%	100.00%
5/31/2010	0.00%	9.82%	33.37%	56.81%	100.00%
6/30/2010	0.00%	8.97%	32.46%	58.56%	100.00%
7/31/2010	0.00%	8.80%	25.22%	65.99%	100.00%
8/31/2010	0.00%	6.81%	27.28%	65.91%	100.00%
9/30/2010	0.00%	4.97%	30.36%	64.67%	100.00%
10/31/2010	0.00%	3.46%	30.05%	66.49%	100.00%
11/30/2010	0.00%	2.88%	33.86%	63.26%	100.00%
12/31/2010	0.00%	2.42%	36.48%	61.10%	100.00%
1/31/2011	0.00%	0.90%	34.52%	64.58%	100.00%
2/28/2011	0.00%	2.44%	30.45%	67.11%	100.00%
3/31/2011	0.00%	1.88%	34.67%	63.46%	100.00%
4/30/2011	0.00%	0.59%	39.82%	59.59%	100.00%
5/31/2011	0.00%	0.99%	32.41%	66.60%	100.00%
6/30/2011	0.00%	0.52%	38.88%	60.61%	100.00%
7/31/2011	0.00%	4.90%	34.30%	60.80%	100.00%
8/31/2011	0.00%	4.23%	35.83%	59.94%	100.00%
9/30/2011	0.00%	3.93%	41.57%	54.51%	100.00%
10/31/2011	0.00%	2.04%	47.59%	50.37%	100.00%
11/30/2011	0.00%	0.62%	60.68%	38.70%	100.00%
12/31/2011	0.00%	10.41%	55.16%	34.43%	100.00%
Grand Total	0.00%	6.31%	33.90%	59.79%	100.00%

¶ 51 Client R.C. – Client R.C. did not testify. We examined records of the Respondent which were retrieved from the Member and form part of Exhibit #2-3. On July 19, 2007, R.C. opened a RRIF account with the Respondent. The NAAF provided for a risk tolerance of 60% medium and 40% high. The evidence discloses that, with the exception of two months, the proportion of high risk securities exceeded 40%, sometimes substantially. The monthly proportions are as follows:

EXHIBIT #2-3, TAB 21

Sum of Market Value	Column Labels				
Row Labels	N/A	Low	Medium	High	Grand Total
1/31/2010	0.00%	12.71%	38.04%	49.25%	100.00%
2/28/2010	0.00%	5.48%	37.25%	57.26%	100.00%
3/31/2010	0.00%	9.98%	42.93%	47.09%	100.00%
4/30/2010	0.00%	7.98%	42.04%	49.98%	100.00%
5/31/2010	0.00%	5.03%	44.31%	50.66%	100.00%
6/30/2010	0.00%	4.29%	43.49%	52.22%	100.00%
7/31/2010	0.00%	4.96%	36.47%	58.57%	100.00%
8/31/2010	0.00%	2.88%	39.60%	57.51%	100.00%
9/30/2010	0.00%	1.56%	42.83%	55.61%	100.00%
10/31/2010	0.00%	0.19%	42.94%	56.87%	100.00%
11/30/2010	0.00%	1.28%	46.34%	52.39%	100.00%
12/31/2010	0.00%	1.80%	45.86%	52.34%	100.00%
1/31/2011	0.00%	0.34%	42.44%	57.21%	100.00%
2/28/2011	0.00%	2.26%	36.32%	61.42%	100.00%
3/31/2011	0.00%	1.65%	39.89%	58.45%	100.00%
4/30/2011	0.00%	0.37%	38.39%	61.24%	100.00%
5/31/2011	0.00%	0.69%	35.65%	63.66%	100.00%
6/30/2011	0.00%	5.32%	38.36%	56.32%	100.00%
7/31/2011	0.00%	8.83%	40.80%	50.37%	100.00%
8/31/2011	0.00%	6.23%	42.37%	51.41%	100.00%
9/30/2011	0.00%	6.17%	47.15%	46.67%	100.00%
10/31/2011	0.00%	4.78%	52.03%	43.19%	100.00%
11/30/2011	0.00%	2.26%	61.63%	36.11%	100.00%
12/31/2011	0.00%	8.73%	59.35%	31.92%	100.00%
Grand Total	0.00%	4.21%	42.31%	53.48%	100.00%

¶ 52 Client S.M. – Client S.M. did not testify. We examined records of the Respondent which were retrieved from the Member and which form part of Exhibit #2-4. On November 28, 2005, S.M. opened a RRIF account with the Respondent. The NAAF provided for a risk tolerance of 70% medium and 30% high. The evidence discloses that, in eight months during the years 2010 and 2011, the proportion of high risk securities in the portfolio exceeded 30%. The relevant monthly proportions are as follows:

EXHIBIT #2-4, TAB 26

Sum of Market	Column
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Value	Labels				Grand Total
Row Labels	N/A	Low	Medium	High	Grand Total
2/28/2010	0.00%	2.57%	59.17%	38.26%	100.00%
5/31/2010	0.00%	1.46%	61.83%	36.70%	100.00%
8/31/2010	0.01%	2.38%	38.57%	59.05%	100.00%
11/30/2010	0.00%	7.16%	33.87%	58.97%	100.00%
2/28/2011	0.00%	10.78%	27.45%	61.77%	100.00%
5/31/2011	0.00%	15.61%	27.69%	56.71%	100.00%
8/31/2011	0.00%	12.00%	38.18%	49.82%	100.00%
11/30/2011	0.00%	18.09%	45.51%	36.40%	100.00%
Grand Total	0.00%	9.09%	39.98%	50.93%	100.00%

¶ 53 Client R.M. – R.M. did not testify. We examined records of the Respondent which were retrieved from the Member and which form part of Exhibit #2-4. On December 19, 2006, R.M. opened a RRIF account with the Respondent. The NAAF provided for a risk tolerance of 70% medium and 30% high. The evidence discloses that, in eight months during the years 2010 and 2011, the proportion of high risk securities in the portfolio exceeded 30%, sometimes substantially. The relevant monthly proportions are as follows:

EXHIBIT #2-4, TAB 28

Sum of Market Value	Column Labels				Grand Total
Row Labels	N/A	Low	Medium	High	Grand Total
2/28/2010	0.00%	2.16%	49.92%	47.92%	100.00%
5/31/2010	0.00%	4.93%	52.66%	42.41%	100.00%
8/31/2010	0.01%	1.02%	35.78%	63.19%	100.00%
11/30/2010	0.00%	6.57%	35.53%	57.90%	100.00%
2/28/2011	0.00%	5.25%	32.81%	61.95%	100.00%
5/30/2011	0.00%	4.28%	35.93%	59.79%	100.00%
8/31/2011	0.00%	5.53%	44.61%	49.86%	100.00%
11/30/2011	0.00%	5.35%	61.17%	33.48%	100.00%
Grand Total	0.00%	4.34%	42.30%	53.35%	100.00%

¶ 54 The whole of the evidence has convinced us that, on many occasions, eight client accounts held significantly more risk than those clients stated, in their NAAFs, that they were prepared to authorize. There can, therefore, be no doubt that the Respondent frequently failed to use due diligence to ensure that investments which he made for clients were in accordance with their risk tolerance.

¶ 55 b) Loss suffered by clients

Six of the clients contended that they suffered financial losses as a result of the Respondent investing their funds in high risk stocks beyond their tolerance for risk as set out in their NAAFs. In the record there is some

evidence which tends to corroborate the fact that four clients did suffer loss and which tends to give some very rough guidance as to the possible amount of those losses.

¶ 56 Clients N.A., W.B., J.P., C.M., S.M. and R.M. all made claims against the Member. The Member analyzed the claims, and in four of them, without prejudice, assessed those losses and offered settlements. This is not an action to recover damages for any losses which may have been sustained. Thus it is no part of our task to attempt to calculate with any precision what amount of loss was suffered by any of the clients. However, to see whether the case is beyond *de minimis* we have looked at the assessments made by the Member, someone who is knowledgeable in the financial industry. We observe that the four clients testified that the assessments by the Member were less than the amounts at which they calculated their losses. Even so the assessments by the Member show support for fact that losses did occur and gives an idea of what the low limit of those losses might be.

¶ 57 The Member was of the opinion that clients S.M. and R.M. did not suffer financial loss as a result of the Respondent investing offside of their risk tolerances. We are unable, on the evidence before us, to say whether or not they did suffer loss. There certainly was some offside investing, but we are unable to say what, if any, loss resulted from it.

¶ 58 The assessments made by the Member of clients' losses were as follows:

N.A.	\$120,000	(rounded)
W.B.	\$ 40,000	(rounded)
J.P.	\$ 69,000	(rounded)
C.M.	<u>\$ 50,000</u>	(rounded)
	\$279,000	

¶ 59 Dealer Member Rule 1300.1(q) imposes a duty on an adviser to use due diligence to ensure that a purchase is suitable for a client based upon, among other things, the client's risk tolerance. The evidence referred to above shows many occasions of investments being made on clients' behalf which was not in line with the risk tolerance shown in their NAAFs. In our view that evidence demonstrates, beyond reasonable controversy, a lack of the due diligence required by Rule 1300.1(q).

¶ 60 The basic defence is that these clients were experienced, sophisticated and knowledgeable investors and that they approved either explicitly, or by necessary implication, all of the high risk trades that he made on their behalf. We will deal with those contentions shortly. First, the clients denied that they agreed to the trades and we have accepted their credibility. Second, the adviser cannot shift the responsibility to determine suitability to the client. See *Lamoureux, supra*, at p. 23:

... The OSC, in deciding that the obligation to determine suitability rests with the registrant and cannot be transferred to the client, stated [at p. 4735]:

We reject this attempt to rely on these procedures as an effort to transfer to the customers the burden of determining whether the high risk investments being recommended to them by Marchmont salespersons were suitable for purchase by them. The obligation to determine suitability clearly rests with the registrant.

¶ 61 We think it is appropriate to make some comment about the importance of the risk tolerance set out in a client's NAAF. It sets out the parameters of the adviser's authority to invest a client's money. A felicitous expression is found in one of the Members' letter to a client. It described an adviser, who invested outside the client's risk tolerance, as shown in a NAAF, as being "offside". The use of a term commonly used in sporting activities is helpfully descriptive. It tells the adviser where he or she may go and where he or she may not go.

¶ 62 A client's risk tolerance, set out in the NAAF, revolves disputes between a client and an adviser about who said what, to whom and when. It would seem to us that if an adviser maintains that a client authorized a

change to the risk tolerance in a NAAF, the adviser should have well documented proof of that authorization.

¶ 63 Count number (iii) alleges a lack of due diligence on an alternative basis. Paragraph a. alleges lack of suitability based upon a number of factors which include risk tolerance. Paragraph b. is focused upon risk tolerance. We have decided that this case falls squarely within risk tolerance. The evidence compels us to find that the Respondent was offside risk tolerance on many occasions. Since that finding constitutes the establishment of the contravention under one of the alternatives it is unnecessary to consider the other.

¶ 64 We have concluded that the contravention alleged in Count (iii) b. is established on the reasonable balance of probabilities.

DECISION

¶ 65 For the reasons set out above we hold:

1. That the Respondent is guilty of the contravention alleged in Count (i) of the Notice of Hearing.
2. That the Respondent is guilty of the contravention alleged in Count (iii) b. of the Notice of Hearing.
3. That the allegation contained in Count (ii) of the Notice of Hearing is stayed.
4. That the hearing is adjourned to a date to be fixed by the National Hearing Officer to determine penalty.

DATED at Toronto, this 18th day of January 2016.

The Hon. Patrick T. Galligan

Chair

Debbie Archer

Industry Representative

Neil Murphy

Industry Representative

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